

VOLUME III OF III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable George M. McFaddin, Circuit Court Judge

VALENTINO M. HAYWARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001530

APPENDIX

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CLOSING ARGUMENT - BY MR. SIMPSON

1 Eight short clips, I ask you, ladies
2 and gentlemen, I've asked so much of you for weeks,
3 the State has, I ask you now, you cannot make a
4 decision in this case until you've heard these
5 eight clips. You should be able to hear them
6 clearly and just fine in the jury room.

7 And there is a huge reason Mr. Mayer
8 did not mention them once. Because he's
9 desperately hoping that it stays, oh, you can't
10 hear them, don't listen to them. You will have a
11 big speaker and you will be able to listen to them
12 fine.

13 Twelve clips -- and, again, I'm going
14 to ask you, if someone can just take notes so they
15 can be used in the jury room so you know which
16 clips are which. The evidence is the recordings.
17 So what you hear on the recordings is the evidence,
18 but I'm going to tell you what you're going to
19 hear. Okay?

20 The day of the arrest 12/12, let's get
21 back to that shirt. Let's get back to that
22 evidence. Black shirt before the crime, change at
23 some point. Gerard, that black shirt still in the
24 yard? I already moved that, Tino. Chill out.
25 Right. Right. Right. Burn that shit. Burn it.

CLOSING ARGUMENT - BY MR. SIMPSON

1 In case you were wondering if it was
2 successful, clip number two. Gerard. Talk to
3 Gerard. Where are you with that? Have you burned
4 it? Yeah. Huh? Yeah. Right. Right. Right.
5 Loose end covered up.

6 Innocent people don't have to take care
7 of loose ends.

8 The next three clips -- you heard a
9 little bit about our tracking down. It's really
10 kind of boring stuff you've heard at trial, but
11 when you hear it you're like, what are they talking
12 about? This is where it gets important. You heard
13 about what happened then. The calls on his PIN
14 number get less frequent and cease.

15 Then the investigation learns where we
16 know he's calling a specific number with someone
17 else's PIN. We tracked that number down and we get
18 the inmate number of Brian Bivens. We then pull
19 all of the calls from inmate number Brian Bivens.

20 You can tell from the subject it's
21 Valentino Hayward and you'll be able to tell from
22 the voice it's Valentino Hayward, but just to make
23 you comfortable that it's Valentino Hayward, the
24 next three clips on the phone are calls where the
25 girl says, hey, Tino; bye, Tino.

CLOSING ARGUMENT - BY MR. SIMPSON

1 And then the third clip, the most
2 important of all where he says, this is Tino. So
3 you have the content of the call, you have the
4 voice, but you have everybody calling him Tino and
5 him saying himself it's Tino.

6 The next clip on the jail tapes should
7 put every bit of evidence you have heard from
8 Mr. Mayer or from their case on the stand in a very
9 specific light because the next clip -- and this is
10 clip number six -- is his call to drag another
11 female into this web of lies.

12 This is the call where he's talking
13 about a girl named Lakeshia. And what he says to
14 the other female is, does Lakeshia still live in
15 SAG? No, she doesn't live there anymore. Well,
16 did she live there back in 2013?

17 He doesn't even know if she lived there
18 back in 2015, but then he goes on, I'll tell you
19 why. Because I need her to come to trial and sit
20 on this stand and tell all of you a bunch of
21 nonsense. I'm going to mail her a letter. I'm
22 going to give her a date and a time, and when she
23 gets that I'm going to call her into trial to tell
24 you -- and this should offend you -- you a bunch of
25 nonsense. And that should put everything into

CLOSING ARGUMENT - BY MR. SIMPSON

1 light that you hear. That's the kind of thing he's
2 doing.

3 Finally, the last two clips, by far the
4 most important, because they give you the clearest
5 picture into the mind of Valentino Hayward, clips 8
6 and 9. The investigator, Thomas Walters,
7 testified. He gave you a bunch of information that
8 probably seemed meaningless at the time.

9 March 2014, he took a statement from a
10 woman named Liz Littman. She lived around the
11 block from Valentino. Because of that, we did not
12 want to disclose this for fears that in a moment
13 are going to prove very well-founded. We told --
14 finally, eventually, because we followed ethics, we
15 told the Court and the defense that we had a
16 statement, we told them who it was from, but we
17 asked for more time before we actually handed over
18 the substance.

19 The Court allowed us to hold it until
20 Tuesday, September 8th. Liz Littman, as you heard,
21 had to move out. She was getting kicked out of her
22 house on September, 2015. All of these facts that
23 you heard from investigator Thomas Walters are to
24 give you the context of the next phone call, a
25 phone call between the real Valentino Hayward, not

CLOSING ARGUMENT - BY MR. SIMPSON

1 the person that Mr. Mayer just talked about, and we
2 now know the real Wallace Bishop. Not the nice
3 charming man on the stand, the real Wallace Bishop.

4 What's going on with that old girl L?
5 Is she a problem -- is she something or something?
6 There are some words that are inaudible. What?
7 What's up with L, is that affecting you or
8 something? Who, L? Yeah, on the block.

9 Liz Littman, L, lives right around the
10 block.

11 Yeah. Like, is she a problem? I don't
12 know. I'm waiting for that boy that says that he's
13 supposed to get that tape Tuesday.

14 Again, go back to Thomas Walters. We
15 had the tape, we were giving it to them the Tuesday
16 following.

17 So what do you want to try to do? Are
18 you trying to work that in or you're just trying to
19 work it the other way? Yeah. We're seeing what
20 September is going to bring and see what she says
21 on that Fing tape. So that's what you're going to
22 wait on or you just want to go ahead and get them
23 out of the way? Oh, her? Just in case you're
24 wondering. Probably not. Yeah. I mean, shit, get
25 them out of the way. I don't give an F. I don't

CLOSING ARGUMENT - BY MR. SIMPSON

1 give an F about that. I talked to your little
2 brother and those boys. They want to see him?
3 Yeah. Yeah. They're read y. They're just waiting
4 for some confirmation. Know what I'm saying? If I
5 go around there, they're read.

6 Valentino: All they need is
7 confirmation? Word. That's all they need. Green
8 light. Green light. Go ahead. Yeah, those boys
9 had a thing going on putting that -- you can't
10 really hear it -- to sleep. Oh, Lord. Cut that
11 boy's cheeks open. That's how that thing needs to
12 go with Bobby. You feel me? Just make him quiet.
13 Word. Just make him quiet. That's all. Do
14 whatever just to make him quiet because she's about
15 to move now.

16 What do we know about Liz Littman in
17 the case at this point? That he's out there
18 talking about the move on the 1st right after this
19 call, but he tells her where she's moving. Just
20 days after that conversation you heard a second
21 statement that was provided.

22 A righteous innocent man uses truth as
23 his weapon. A righteous innocent man comes in here
24 and wants you after all this time to hear the
25 truth. It's his best defense, the truth. To a

CLOSING ARGUMENT - BY MR. SIMPSON

1 guilty man, the truth haunts him. He's haunted by
2 it and he wants to keep it in this setting. He
3 wants to keep it from you.

4 First he wants to hide it; burn
5 evidence, get rid it of, burn that shirt. Let me
6 ask you a hypothetical question. How many times in
7 your lives have you felt the need to just randomly
8 burn a piece of clothing? We know, we heard all
9 about GSR.

10 To a guilty man the truth is something
11 to be manipulated and changed. And we heard that.
12 We heard it from Wallace changing his story three
13 times, and we heard it in his attempt to reach out
14 to another female and come in here and lie to you
15 to help him. And in a moment of desperation, to a
16 guilty man, that truth is malleable by any means
17 necessary.

18 Cheek to cheek, just make him quiet.
19 Make him quiet. These are not the words of an
20 innocent person.

21 Let's take a moment before I sit down
22 to talk about a few things that Aaron talked to you
23 about. I would not be doing my job if I did not
24 explain to you, though, I have a suspicion that you
25 already agree with me on this, that the theory that

CLOSING ARGUMENT - BY MR. SIMPSON

1 Latoya Carson killed Deontre Miles is absolutely
2 absurd. It's meaning to distract you from all that
3 we've already talked about.

4 Latoya Carson sat with her earphones
5 in, in the car doing the chats while he walked back
6 there. She heard what sounded like a gunshot to
7 her. And this is interesting, Aaron brought this
8 up, he wanted to talk about white privilege and how
9 our lives are different.

10 If I hear a gunshot I react to it, but
11 we heard from Latoya that in her neighborhood where
12 you grow up that stuff is happening all the time.
13 It's like a car alarm, nobody gives a shit. You
14 hear it constantly.

15 And you didn't just hear that from
16 Latoya, you heard that from Charles Rodwell who, I
17 agree with Aaron, clearly a stand-up great guy
18 unlike the citizens of Ardmore. 99 percent of the
19 citizens of Ardmore are trying to get by in a tough
20 world and a tough economy, and it's the actions of
21 people like Hayward that drags them into it like he
22 did in this case.

23 You heard from Charles back there.
24 When you heard the gunshot, did you run outside?
25 No, we hear that stuff all the time. Latoya Carson

CLOSING ARGUMENT - BY MR. SIMPSON

1 did not ignore the gunshot. She heard the gunshot,
2 had her earphones in, it sounded like it was back
3 in the distance, and it was like -- oh, she noted
4 it. And then what she said is, two to
5 five minutes, but we know from the chat on the
6 phone it was more closer to two, after two minutes
7 of worrying, she decides to get out where she finds
8 her friend, her friend that she loved, her friend
9 that she was close with that made her laugh, dead
10 on the ground.

11 And having heard that shot, she goes
12 up, she cradles him, she holds his head in both her
13 hands and cradles him. Knows clearly that he is
14 dead and she reacts exactly how you would expect
15 someone in that situation to react, screaming,
16 crying, running house to house.

17 The testimony of Charles Rodwell I
18 think was twisted around in Mr. Mayer's closing a
19 little bit. He said, we hear her screaming, going
20 house to house, we come out, she's very upset. The
21 only thing he said is, did you see tears? And he
22 said, yes. And he kind of qualified it, said a
23 moderate amount of tears. Well, okay. What in his
24 estimation was a moderate amount of tears? She's
25 screaming, she's crying.

CLOSING ARGUMENT - BY MR. SIMPSON

1 I don't want to go down this path
2 because you get to hear it. You get to hear it
3 live on the 911 tape. You get to hear her
4 screaming, Chucky, Chucky. And she gets it
5 together and she tries to tell the 91 operator and
6 then she keeps losing it. And you get to see --
7 you saw the clip of the interview where when asked
8 a simple question she can hardly get it out. And
9 the detective is like, oh, my God, get it together.
10 She is wrecked by this. This is an absurd theory
11 that she did it.

12 But, again, we're lucky because I don't
13 need you to go back there and just accept what
14 Latoya says. You get the benefit of science
15 because what was floated out to you by the defense
16 in opening statement is their best evidence ended
17 up being the evidence that completely destroyed
18 their theory, the GSR.

19 You heard from an expert on GSR,
20 Whitney Berry. And what did she tell you about
21 that? She said a gun fires, it explodes in a cloud
22 out of the top of it, out of the sides of it, and
23 forward. So when someone is shot by a gun, you
24 find GSR. You find it all over. When someone
25 shoots a gun or is standing next to a gun that is

CLOSING ARGUMENT - BY MR. SIMPSON

1 shot, you find GSR all over them. What is found on
2 Latoya Carson?

3 I loved her analogy; if you pluck a
4 hair, the diameter of that hair can fit a hundred
5 particles of GSR. What is found on Latoya Carson?
6 One, one molecule of GSR. And what did Whitney
7 Berry explain to you about that? That that leads
8 an expert, a person with scientific -- not to
9 conclude that she had just been near the firing or
10 just fired the gun, but to conclude that she
11 didn't. That, in fact, scientifically, she didn't.

12 Where did that come from? That is very
13 consistent with her story of having gone and
14 touched the person that had just been shot.
15 Evidence transfer, a single molecule. Would have
16 been way more than a single molecule if she fired
17 the gun. The evidence held out to you in opening
18 that's their best evidence turns out to be ours.

19 A couple of other things that I think
20 weren't quite how I remember them held out to you
21 by the defense. Mr. Mayer said that Detective
22 Osborne told you there were no missed calls from
23 Latoya so that means she's lying. That's not at
24 all what he told you.

25 What Detective Osborne said on scene

CLOSING ARGUMENT - BY MR. SIMPSON

1 that night was Chucky's phone, I wasn't concerned
2 about the missed calls. I'm looking for the call
3 he just made. All of this processing and stuff
4 comes later. Okay. Detective Osborne on scene
5 said I'm not concerned about the missed calls, I
6 didn't even look for missed calls. I'm looking for
7 the call that was just made from Tino.

8 Let's talk about Latoya Carson. And I
9 know it's not as sexy or made for TV as what
10 they're saying, some black widow that comes up with
11 these plans, but it's more true in your common
12 sense you know. What's Latoya Carson's problem? I
13 don't justify her decision, but as the father of
14 two daughters this sort of phenomenon scares me.
15 It knows no race, it knows no time, there is a
16 certain type of female that is attracted to
17 dangerous men, to bad boys. And that's Latoya
18 Carson's problem.

19 And we see the dangers on both sides of
20 the coin in Latoya Carson's life. In this case,
21 someone she loved and cared about, taken away by
22 violence right in front of her eyes. Right?
23 Because she is attracted to dudes involved in this
24 kind of stuff.

25 And then we hear later she does get a

CLOSING ARGUMENT - BY MR. SIMPSON

1 criminal charge, she does. And she did plead the
2 Fifth, but we got out -- we got enough into it that
3 we needed to. Latoya Carson is alleged to have
4 been around a guy who killed somebody. And this is
5 one of my favorites, Chucky's best friend. You
6 heard zero evidence that the person that died in
7 North Charleston is Chucky's best friend. Okay.
8 That just sort of fits the made for TV plot that
9 they want to sell you. Okay.

10 Latoya Carson makes bad choices in men.
11 In this case that you're concerned about, she had a
12 friend whom she cared about taken right from her in
13 the prime of his life. In the other case, she's
14 hanging around with a dude that did some bad stuff.
15 She hangs out with bad dudes. She is not a killer.
16 You don't have to believe her; look at the science
17 which cannot lie.

18 A few words on the law that will be
19 charged to you for being the most serious offense
20 out there, murder is pretty simply defined as the
21 killing of another human being with malice
22 aforethought.

23 You will hear from the Judge that
24 malice aforethought doesn't require -- although we
25 see the setup, it doesn't require premeditation, or

CLOSING ARGUMENT - BY MR. SIMPSON

1 a plan or some complicated -- malice aforethought
2 is just that moment in an instant where a person
3 decides to pull a trigger and ends somebody's life.
4 It's that conscious decision to shoot and kill.

5 You will also hear about reasonable
6 doubt. Mr. Mayer talked about that. It is a high
7 standard. We've met it I believe ten-fold in this
8 case, but it is a high standard. I am not trying
9 to tell you anything different.

10 You will hear a charge directly from
11 the Judge and she will say something to the effect
12 of, few things in this world are provable beyond
13 all doubt, but it's your job to do, just be
14 reasonable. If you have a reasonable doubt, then
15 let that lead you, but the doubt has to be
16 reasonable. We're not at a point where we jut go
17 off on wild speculation in the face of all this
18 evidence, including the defendant's own words.

19 You will also hear another charge that
20 I think is important that I want you to consider.
21 We've seen the evidence here and there's really two
22 individuals, it's Wallace and Tino as they drop off
23 the girls shortly before all the evidence in this
24 case, everything we've talked about points to
25 Valentino Hayward as the person that did this. He

CLOSING ARGUMENT - BY MR. SIMPSON

1 set it up, the cover-up, everything, but, if you're
2 back there saying, well, what if it was actually
3 Wallace that did pull the trigger? I'm telling you
4 now, under the law that you have sworn to uphold,
5 it doesn't matter. You're going to hear a charge
6 about the hand of one, the hand of all, and that's
7 when two people engage in something like this
8 together, they're both equally guilty.

9 All the evidence points to Tino as the
10 shooter. You can't hang up on that because he's
11 guilty under either theory. Ladies and gentlemen,
12 what you have sworn to do -- and, boy, we've taken
13 a lot of your life. What you've sworn to do is go
14 back there, remove emotion -- that's difficult. It
15 is a right to feel sympathy and pain for Deontre's
16 family, it is right to feel sympathy and human
17 emotions for the Hayward family and the Singleton
18 family, it's right and human and fine to feel
19 emotion towards Mr. Hayward for this situation that
20 he's in. That's what makes us human. That's what
21 makes us different.

22 We feel and empathize, that's fine, but
23 what you have sworn to do is take all of that and
24 put it to the side. Take all of that and move it
25 out, put it to the side as much as humanly

CLOSING ARGUMENT - BY MR. SIMPSON

1 possible, take a cold look at the evidence and what
2 it clearly shows in this case. That's what your
3 job is and that's what I ask you to do.

4 This case is not about being mean.
5 What I'm asking you to do is not about vengeance.
6 It's not about punishment. It's certainly not
7 about racism as much as they would like to make it
8 about that. It's about holding someone responsible
9 for the decisions that they clearly made that was
10 proven to you over a week-and-a-half. It's not
11 something that you have to feel great about. It's
12 a burden. It's a burden, but the picture is clear,
13 ladies and gentlemen, and it's inescapable.

14 Because not here in this room all week
15 is another human being, a human being named Deontre
16 Miles. His friends loved him, they called him
17 Chucky. He was a son, he was a nephew, he made
18 people laugh. He wasn't a perfect person. You can
19 imply from this case some of the things he was up
20 to, but he was trying. Look at the tox screen on
21 this case, caffeine. Caffeine only.

22 He wasn't a perfect person, but he
23 didn't deserve to be shot and killed in a dark
24 alley lured there by Valentino Hayward. Valentino
25 Hayward willing to go out, cut cheek to cheek and

CLOSING ARGUMENT - BY MR. SIMPSON

1 get people to show up, shut up. Valentino Hayward
2 did every single thing that a guilty man does, this
3 is power, to make sure this day did not come.

4 It's hard to find somebody guilty, but
5 the evidence -- you can't run away from the
6 evidence in this case, including the very words of
7 the man sitting here that point directly to guilt.
8 The evidence shows you scientifically -- forget
9 common sense, forget listening to all that emotion.
10 Scientifically, Latoya Carson did not do this.

11 Mr. Hayward is guilty in the law of
12 South Carolina of murdering another human being.
13 Thank you so much for your time and attention. I
14 know we put a lot of burden on you. I know that
15 you will do the just, right, and true thing and
16 find him guilty. Thank you.

17 THE COURT: Madame Forelady, ladies
18 and gentlemen, we will take a brief restroom break.
19 During the break, please do not discuss the case
20 and please leave your notepads in your seats.

21 (Jury out, 11:40 a.m.)

22 THE COURT: While we're on restroom
23 break, please make sure all the evidence is on the
24 table. We will be at ease until the jury is done
25 refreshing themselves.

JURY CHARGE

1 (A recess transpired.)

2 THE COURT: You may be seated. Is the
3 State ready to proceed?

4 MR. SIMPSON: Yes, Your Honor.

5 THE COURT: Defense ready?

6 MR. MAYER: Yes, Judge.

7 THE COURT: Do you have all the
8 evidence in place?

9 COURT REPORTER: Yes, ma'am.

10 THE COURT: All right. During
11 instruction there will be no movement in the
12 gallery. So I need you to know, if you leave, you
13 will not be able to return.

14 Please bring in the jury.

15 (Jury in, 12:02 p.m.)

16 THE BAILIFF: Jurors are all present.

17 THE COURT: You may be seated.

18 During this trial, ladies and
19 gentlemen, you and I have certain duties to
20 perform. As the trial judge, it is my
21 responsibility to preside over the trial of this
22 case, and I also have the duty to rule upon or pass
23 upon the admissibility of evidence offered during
24 this trial.

25 You are to consider only the competent

JURY CHARGE

1 evidence that is before you, and you are to
2 disregard and disabuse from your mind any testimony
3 that may have been ordered stricken from the record
4 in this case during the progress of this trial, if
5 there has been any.

6 You are to consider only the testimony
7 which has been presented from the witness stand,
8 together with any exhibits which have been made
9 part of the record in this case, as well as any
10 stipulations between counsel that have been made a
11 part of the record.

12 I instruct you, ladies and gentlemen,
13 that a stipulation is an agreement between the
14 parties and it requires no further proof.

15 I have the additional duty to charge or
16 instruct you on the law applicable to this case.
17 As the presiding judge, I'm the sole judge of the
18 law of this case, and it is your duty as jurors to
19 accept and apply the law as I now state it to you.

20 If you have a preconceived idea as to
21 what the law is or ought to be in a case, or in
22 this case, and it should not agree with what I tell
23 you the law is, you are obligated under your oath
24 to abandon this preconception on your part because
25 you are sworn to accept the law and apply the law

JURY CHARGE

1 must assess the credibility of witnesses who have
2 testified. Credibility is simply a legalistic term
3 which means believability. It becomes your duty as
4 jurors to analyze and to evaluate the evidence and
5 determine that evidence which convinces you of its
6 truth.

7 Some of the things you may consider as
8 you decide whether or not to believe a witness's
9 testimony about a particular matter include, what
10 was the manner and appearance of the witness who
11 testified? Was he or she straightforward or
12 hesitant in answering? Was the testimony of a
13 witness consistent or inconsistent? How did the
14 witness come to know the facts that he or she
15 testified to, or what was his or her ability to
16 know these facts? Is there some reason a witness
17 would want to give testimony that would help or
18 hurt one side or the other; in other words, was the
19 witness biased or prejudiced, and was the testimony
20 of a witness strengthened or weakened by other
21 testimony or evidence?

22 I further instruct you that determining
23 the question of the believability or credibility of
24 witnesses who have testified, you may believe one
25 witness as against several witnesses or several

JURY CHARGE

1 witnesses against one witness. You may believe
2 part of a witness's testimony and reject the
3 remaining part of the testimony of that same
4 witness.

5 If you have good and sound reason, you
6 may believe the testimony of a witness in its
7 entirety or reject the testimony of a witness in
8 its entirety. You may consider the demeanor of a
9 witness, that is the appearance and manner of a
10 witness from the witness stand.

11 Ladies and gentlemen, you can believe
12 as much or as little of each witness's testimony as
13 you think proper. Throughout this process, ladies
14 and gentlemen, you have but one objective, to seek
15 the truth regardless of its source.

16 I further instruct you that a person
17 who has a past criminal record is competent to
18 testify during a trial. A past record does not
19 affect the ability of that witness to testify. The
20 past record may only be considered by you, if at
21 all, in determining the witness's believability.
22 Remember, ladies and gentlemen, you are the sole
23 judges of the facts in the case and of the
24 believability of any and all of the witnesses.

25 I further instruct you that you have

JURY CHARGE

1 heard evidence that the defendant committed a bad
2 act not the subject of a conviction, other than the
3 ones for which the defendant is now on trial. It
4 is for you, ladies and gentlemen, to determine if
5 this is true. You must not consider this alleged
6 bad act, which is not the subject of a conviction,
7 as any evidence of the defendant's guilt of the
8 charges we are trying today.

9 Ladies and gentlemen, the Rules of
10 Evidence ordinarily do not permit witnesses to
11 testify to opinions or conclusions. An exception
12 to this rule exists for witnesses we call expert
13 witnesses. A witness who by their education,
14 training, and experience has become an expert in
15 some art, science, profession, or calling may state
16 an opinion as to relevant and material matters in
17 which the witness claims to be an expert and may
18 also state the reasons for that opinion.

19 You should consider any expert opinion
20 received in evidence in this case like any other
21 evidence. Give it the weight you think it
22 deserves. If you decide that the opinion of an
23 expert witness is not based on sufficient education
24 and experience, or if you conclude that the reason
25 given in support of the opinions are not sound, or

JURY CHARGE

1 that the opinion is outweighed by other evidence,
2 you may disregard the opinion entirely.

3 An expert witness's testimony is to be
4 given no greater weight than that of other
5 witnesses simply because the witness is an expert.
6 Further, you are not required to accept an expert's
7 opinion even though it is not contradicted.

8 Ladies and gentlemen, a statement is
9 alleged to have been made by the defendant which
10 has been admitted into evidence in this case.
11 While the Court has determined that the statement
12 is admissible, I instruct you that you make the
13 ultimate decision of whether or not the defendant
14 made the statement.

15 If the defendant did make the
16 statement, you must determine whether the statement
17 was made by the defendant voluntarily and of his
18 own free will. This means that the statement was
19 not caused by pressure, force, fear, threats,
20 coercion, or intimidation, or by hope or promise of
21 leniency or reward of any kind.

22 In determining whether the statement
23 was voluntary, you should consider both the
24 characteristic of the defendant and the details of
25 the questioning. Some of the factors that you must

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1 consider are the age of the defendant, the
2 defendant's education or lack of education, the
3 defendant's mental ability or capacity, the
4 defendant's IQ or intelligence, the defendant's
5 background and environment, the place and length of
6 detention, the nature of the questioning and the
7 advice or lack thereof to the defendant of his
8 constitutional rights, including but not limited to
9 the right to remain silent, that any statement
10 could be used against him in a court of law, the
11 right to have a lawyer present, and that if he
12 could not afford a lawyer, a lawyer would be
13 appointed to represent him without any cost, and
14 that he could stop making a statement at any time.
15 You must carefully consider all of the surrounding
16 circumstances before you give any weight to an
17 alleged statement.

18 The State has the burden of proving
19 beyond a reasonable doubt that the alleged
20 statement was voluntary. If you determine it was,
21 you may give the statement any further
22 consideration that you deem proper. You must
23 decide what weight, if any, should be given to the
24 alleged statement.

25 If you determine the alleged statement

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1 was not the free and voluntary statement of the
2 defendant, you should not consider the statement at
3 all.

4 Ladies and gentlemen, there are two
5 types of evidence which are generally presented
6 during a trial, direct evidence and circumstantial
7 evidence. Direct evidence is the testimony of a
8 person who asserts or claims to have actual
9 knowledge of a fact such as an eyewitness.
10 Circumstantial evidence is proof of a chain of
11 facts and circumstances indicating the existence of
12 a fact.

13 The law makes no distinction between
14 the weight or value to be given to either direct or
15 circumstantial evidence, nor is a greater degree of
16 certainty required of circumstantial evidence than
17 of direct evidence.

18 As I've instructed, crimes may proven
19 by circumstantial evidence and the law makes no
20 distinction between the weight or value to be given
21 to either direct or circumstantial evidence;
22 however, to the extent the State relies on
23 circumstantial evidence, all of the circumstances
24 must be consistent with each other, and when taken
25 together, point conclusively to the guilt of the

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1 accused beyond a reasonable doubt.

2 If these circumstances merely portray
3 the defendant's behavior as suspicious, the proof
4 has failed. The State has the burden of proving
5 the defendant guilty beyond a reasonable doubt.
6 This burden rests with the State regardless of
7 whether the State relies on direct evidence,
8 circumstantial evidence, or some combination of the
9 two.

10 Ladies and gentlemen, you should weigh
11 all of the evidence in this case. After weighing
12 all the evidence if you are not convinced of the
13 guilt of the defendant beyond a reasonable doubt,
14 you must find the defendant not guilty.

15 Conversely, if you're convinced of the
16 guilt of the defendant beyond a reasonable doubt,
17 then you must find him guilty.

18 I instruct you the fact that the
19 defendant was arrested, charged and indicted is not
20 evidence in this case and cannot be considered by
21 you as evidence of guilt in this case, nor does it
22 create any presumption or inference of guilt.

23 This documentation, ladies and
24 gentlemen, are simply the formal written
25 instruments which contain the charge or charges

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1 made against a defendant. They simply serve as the
2 formal documentation by which this case is
3 processed or brought into the court.

4 The defendant has pled not guilty to
5 the Indictments and that plea casts the burden on
6 the State to prove the defendant guilty because a
7 person charged with committing a criminal offense
8 in South Carolina is never required to prove
9 himself innocent.

10 I instruct you Madame Forelady, ladies
11 and gentlemen, that it is a cardinal and important
12 law of the rule of evidence that the defendant in a
13 criminal trial, no matter what the seriousness of
14 the charge or charges made against him may be, will
15 always be presumed to be innocent of the crime for
16 which he is indicted unless his guilt has been
17 proven by evidence satisfying you of that guilt
18 beyond a reasonable doubt.

19 This presumption of innocence does not
20 cease when you retire to deliberate, but
21 accompanies the defendant from the time of his
22 appearance throughout this trial until you reach a
23 verdict in this case. Our Supreme Court has said
24 the presumption of innocence is like a robe of
25 righteousness placed about the shoulders of the

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1 defendant and remains with him and assigns him to
2 that class, the innocent, until that presumptive
3 robe of righteousness has been stripped from his
4 person by evidence satisfying you of that guilt
5 beyond a reasonable doubt.

6 Madame Forelady, ladies and gentlemen,
7 the presumption of innocence is not mere legal
8 theory. It is not just a legal phrase. It is a
9 substantial right to which every defendant is
10 entitled unless you, the jury, are satisfied from
11 the evidence of his guilt beyond a reasonable
12 doubt.

13 I instruct you and emphasize that the
14 fact that the defendant did not testify is not a
15 factor to be considered by you in any way in your
16 deliberations and in your consideration on the
17 question of the guilt or innocence of the
18 defendant. It must not be considered by you in any
19 manner whatsoever. A defendant has the
20 constitutional right to remain silent and the
21 assertion of this right must not be considered by
22 you in your deliberations in any manner whatsoever.

23 I repeat, under your oath, you are to
24 draw no conclusion whatsoever from the fact that
25 the defendant in this case did not testify. The

JURY CHARGE

1 fact that the defendant did not testify should not
2 be discussed in any manner whatsoever in the jury
3 room during the course of your deliberations.

4 The burden of proof, as I stated to
5 you, is on the State. The defendant is not
6 required to prove his innocence. The burden of
7 proof remains on the State to prove his guilt
8 beyond a reasonable doubt. The State has the
9 burden of proving the defendant guilty beyond a
10 reasonable doubt.

11 Some of you may have served as jurors
12 in civil cases where you were told that it is only
13 necessary to prove that a fact is more likely true
14 than not true, such as by the greater weight or
15 preponderance of the evidence. In criminal cases,
16 the State's proof must be more powerful than that.
17 It must be beyond a reasonable doubt.

18 Proof beyond a reasonable doubt is
19 proof that leaves you firmly convinced of the
20 defendant's guilt. There are very few things in
21 this world that we know with absolute certainty,
22 and in criminal cases the law does not require
23 proof that overcomes every possible doubt.

24 If, based on your consideration of the
25 evidence, you are firmly convinced that the

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1 defendant is guilty of the crime charged, you must
2 find the defendant guilty. If, on the other hand,
3 you think there is a real possibility that the
4 defendant is not guilty, you must give the
5 defendant the benefit of that doubt and find him
6 not guilty.

7 The defendant is charged with murder.
8 The State must prove beyond a reasonable doubt that
9 the defendant killed another person with malice
10 aforethought. Malice is hatred, ill will, or
11 hostility towards another person. It is the
12 intentional doing of a wrongful act without just
13 cause or excuse and with an intent to inflict an
14 injury or under circumstances that the law will
15 infer an evil intent.

16 Malice aforethought does not require
17 that malice exist for any particular time before
18 the act is committed, but malice must exist in the
19 mind of the defendant just before and at the time
20 the act is committed; therefore, there must be a
21 combination of the previous evil intent expressed
22 or inferred.

23 These terms, express and inferred, do
24 not mean different kinds of malice, but the manner
25 in which malice may be shown to exist; that is,

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1 either by direct evidence or by inference from the
2 facts and circumstances which are proven.

3 Express malice is shown when a person
4 speaks words which express hatred or ill will for
5 another, or when a person prepared beforehand to do
6 the act which was later accomplished.

7 For example, lying in wait for a person
8 or any other act of preparation going to show that
9 the deed was within the defendant's mind would be
10 expressed malice.

11 Malice may be inferred from conduct
12 showing a total disregard for human life. Inferred
13 malice may also arise when the deed is done with a
14 deadly weapon.

15 A deadly weapon is any article,
16 instrument, or substance which is likely to cause
17 death or great bodily harm. Whether an instrument
18 has been used as a deadly weapon depends on the
19 facts and circumstances of each case. The
20 following are examples of instruments which may be
21 deadly weapons, a pistol, a shotgun, a rifle, a
22 dirk, a dagger, a knife, a slingshot, metal
23 knuckles, a razer, gasoline, a fire bomb or Molotov
24 cocktail, lighter fluid. A gun may be a deadly
25 weapon even if it is not operating.

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1 Ladies and gentlemen, these are simply
2 evidentiary facts to be taken into consideration by
3 you, along with all the other evidence in the case,
4 and to be given the weight, value, and effect you
5 decide it should receive.

6 The defendant is also charged with
7 possession of a weapon during the commission of or
8 attempt to commit a violent crime. The State must
9 prove beyond a reasonable doubt that the defendant
10 was in possession of a firearm or visibly displayed
11 what appeared to be a firearm during the commission
12 of a violent crime.

13 A firearm means any machine gun,
14 automatic rifle, revolver, pistol, or any weapon
15 which will, is designed to, or may be readily
16 converted to expel a projectile. In order to find
17 the defendant guilty of possession of a weapon
18 during the commission of a violent crime, you must
19 first find the defendant guilty of committing a
20 violent crime or attempting to commit a violent
21 crime.

22 I instruct you that murder is a violent
23 crime as defined by South Carolina Code Annotated,
24 Section 16-1-60.

25 Ladies and gentlemen, if a crime is

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1 committed by two or more people who are acting
2 together in committing a crime, the act of one is
3 the act of all. A person who joins with another to
4 commit an unlawful act is criminally responsible
5 for everything done by the other person, which
6 happens as a probable or natural consequence of the
7 act done in carrying out the common plan and
8 purpose.

9 For example, two people can be guilty
10 of killing another person, but only one of the two
11 had a gun, there was only one bullet, and only one
12 of the two fired the shot that caused the death.
13 If two or more people are acting together -- are
14 together acting together assisting each in
15 committing the offense, the act of one is the act
16 of all. As it is sometimes said, the hand of one
17 is the hand of all.

18 Prior knowledge that a crime is going
19 to be committed without more is not sufficient to
20 make a person guilty of that crime. Mere knowledge
21 that another person is going to commit a crime,
22 even if the defendant is present when the crime is
23 committed, is not sufficient to convict the
24 defendant as a principal.

25 Guilt as a principal is shown by actual

JURY CHARGE

1 or constructive presence at the scene as a result
2 of prior arrangement; therefore, a finding of a
3 prior arranged plan or common scheme is necessary
4 for a finding of guilt as a principal. The State
5 must prove beyond a reasonable doubt by competent
6 evidence the theory of the hand of one is the hand
7 of all.

8 A principal in a crime is one who
9 either actually commits the crime or is present,
10 abiding, abetting, or assisting in the commission
11 of the crime. When a person does an act in the
12 presence or with the assistance of another, the act
13 is done by both. Whether two or more acting with
14 the common plan or intent are present at the
15 commission of a crime, it does not matter who
16 actually commits the crime. All are guilty, the
17 hand of one is the hand of all.

18 Present at the commission of a crime
19 means to be sufficiently near to aid and abet and
20 assist in the commission of a crime; however, mere
21 presence at the scene of the crime is not
22 sufficient to convict one as a principal on the
23 theory of aiding and abetting.

24 Intent is also a necessary element
25 where there must have been a common design or

JURY CHARGE

1 intent to commit the crime, and the crime must have
2 been committed pursuant thereto with the person
3 aiding and abetting by some overt act.

4 Intent means intending the result which
5 actually occurs, not accidentally or involuntarily.
6 Intent may be shown by acts of conduct of the
7 defendant and other circumstances from which you
8 may naturally and reasonably infer intent. The
9 State must prove these elements beyond a reasonable
10 doubt.

11 Ladies and gentlemen, there are two
12 Indictments in this case, each alleging several --
13 each alleges different offences against the
14 defendant. And those are 2014-GS-10-3322, an
15 indictment for murder, and 3323, an indictment for
16 possession of a firearm during the commission of a
17 violent crime.

18 Each indictment charges a separate and
19 distinct offense. You must decide each indictment
20 separately on the evidence and the law applicable
21 to it uninfluenced by your decision as to any other
22 indictment. The defendant may be convicted or
23 acquitted on any or all of the offences charged and
24 you will be asked to write a separate verdict for
25 each indictment.

JURY CHARGE

1 Ladies and gentlemen, there are two
2 possible verdicts for each indictment. There is no
3 significance whatsoever to the order in which I'm
4 going to state the verdicts to you. You don't need
5 to try to write these down. These forms go into
6 the jury room with you. There is no significance
7 to the order in which I state these potential
8 verdicts. And they are as follows: As to
9 Indictment 2014-GS-10-3322; as to the indictment,
10 we, the jury, by unanimous consent find the
11 defendant guilty of murder, or not guilty.

12 And as to Indictment 2014-GS-10-3323,
13 we, the jury, by unanimous consent find the
14 defendant guilty of possession of a firearm during
15 the commission of a violent crime, or not guilty.

16 Again, there is no significance to the
17 order in which I state these potential verdicts.
18 It is simply that one must be stated first.

19 Ladies and gentlemen, your verdict must
20 be a unanimous one, which means that all 12 of you
21 must agree in order to reach a verdict in this
22 case.

23 Madame Forelady, once the jury has
24 reached a verdict, it is your responsibility to
25 fill out the verdict form, to sign and date the

JURY CHARGE

1 form, and knock on the door and advise the bailiffs
2 that the jury has reached a verdict.

3 Also, if the jury has any questions, it
4 is your responsibility to write those questions
5 out, sign and date the note, and follow the same
6 process by knocking on the door and advising the
7 bailiff that the jury has a question.

8 Ladies and gentlemen, if you have any
9 questions during deliberations, please know that
10 there will be a delay in our response and that is
11 because there's a procedure we must follow in
12 answering your question. So note if you have a
13 question, there will be a delay because we are
14 adhering or following that process.

15 Also, Madame Forelady, any notes from
16 the jury should not include any numerical
17 break-down regarding how the jury may be voting or
18 otherwise. The deliberations of the jury are
19 confidential. They should be confined to the jury
20 room and not designated in any notes or otherwise.

21 Ladies and gentlemen, again, as I
22 instructed you at the beginning of the trial, the
23 foreperson is an administrative function. That
24 person does not have any greater vote or voice than
25 you do. It's simply that we must have someone to

JURY CHARGE

1 fill out the verdict forms and write out any notes
2 that you may have during deliberations.

3 Again, ladies and gentlemen, your
4 verdict must be unanimous which means all 12 of you
5 must agree in order to reach a verdict on each
6 indictment in this case.

7 I'm going to ask that you return to
8 your jury room, but do not yet begin your
9 deliberations. I have some brief matters of law
10 that I need to take up with the attorneys that may
11 require further instruction or clarification of an
12 instruction; however, if there is no further
13 instruction necessary, we will send in your
14 notepads, along with -- actually, as you leave,
15 just stack them on the bannister so that the
16 bailiff can bring those to you, and at that time we
17 will bring in the evidence, as well as your
18 notepads.

19 Your lunch has already arrived and is
20 situated in the jury room for your convenience.
21 Let the bailiffs know if you need anything.

22 We have a laptop in your jury room that
23 is a clean laptop. It only has the programs on it
24 that are necessary for you to play any of the
25 evidence. If you encounter any difficulty with

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1 that technology, please let the bailiffs know.
2 Also, so that you're advised, the Internet is
3 blocked on that computer, and we do that so you
4 will not have any evidence outside of the
5 proceedings.

6 Again, do not yet begin your
7 deliberations until I advise you to do so. If you
8 would go with the bailiffs please. Put your
9 notepads on the bannister for me.

10 (Jury out, 12:29 p.m.)

11 THE COURT: You can take your seats.
12 Any exception from the State?

13 MR. SIMPSON: No, Your Honor.

14 THE COURT: From the defense?

15 MR. MAYER: I don't think so, Judge.
16 There was a brief mention about, you've heard
17 testimony of a prior bad act. I couldn't think of
18 what that was.

19 THE COURT: His witness, Mr. Wallace,
20 talked about them buying and smoking weed, and
21 that's a crime and it comes in the nature of
22 character. And I didn't want them to hold it
23 against him as evidence that he's a bad person
24 getting high that night and therefore --

25 MR. MAYER: No exceptions from the

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1 defense.

2 THE COURT: Make sure for me there is
3 no evidence out of place so that that can all be
4 collected and taken into the jury room. Please
5 take their notebooks to them. Get the evidence
6 together, here are the verdict forms, and I need
7 the alternate.

8 (Alternate in, 12:30 p.m.)

9 THE COURT: Ma'am, we want to thank
10 you -- you can take your seats. We want to thank
11 you for your time and your attention to this case.
12 Being an alternate is so very necessary, but can be
13 very thankless in the event that we don't need your
14 services. But you've been a very valuable asset to
15 this trial; I've watched you and you've been timely
16 and attentive.

17 As you know, we've had a sick juror
18 this week and if we'd had another sick juror, we
19 would have needed your service. So we thank you
20 for your time and attention to this case. We know
21 that jury service is a sacrifice.

22 You are welcome to discuss this case if
23 you'd like, but I would ask that you not do that
24 until after the entire jury panel is excused. And
25 if you don't want to talk about it, you don't have

JURY CHARGE

1 to. Sometimes lawyers will contact you and ask you
2 how they can do a better job. If someone should
3 exceed your comfort level, please contact the
4 clerk's office so that we can take the appropriate
5 actions to protect your privacy.

6 You are welcome to hang around with us
7 if you'd like. You're welcome to leave, I don't
8 blame you. You have your lunch and you're welcome
9 to take it with you. You are excused with the
10 court's profound thanks.

11 Do you need a work excuse?

12 ALTERNATE JUROR: Yes, please.

13 THE CLERK: I can do it.

14 THE COURT: He's going to print one
15 for you and we will mail your check to you.

16 ALTERNATE JUROR: Okay.

17 THE COURT: Thank you. Have a good
18 rest of the week.

19 The record should reflect that the jury
20 began its deliberations at 12:30.

21 The jury has their lunch.

22 THE CLERK: Yes, ma'am.

23 THE COURT: You all go ahead and go to
24 lunch. The courtroom will be locked from 12:30 to
25 1:30 and then the deputies will let you back in.

JURY CHARGE

1 If we have any question -- if the jury has any
2 question, we will contact you by your cell prior to
3 that time.

4 (A luncheon recess transpired.)

5 THE COURT: We have several questions
6 from the jury. They were not numbered, they came
7 to me all at the same time. The first note is,
8 Carson's interview recording, question mark. We
9 have the 911 call, but not the recording of her
10 statement/interview.

11 And I'm going to have the bailiff make
12 sure that the foreperson puts the date on the notes
13 because she didn't. Make sure she does that.

14 My response will be, Madame Forelady,
15 ladies and gentlemen of they jury, there are
16 certain determinations that I make as the Judge of
17 the law concerning the admission of documents.
18 Based on the Rules of Evidence and Rules of
19 Procedure, all the documents that you are entitled
20 to are with you in the jury room. You are not to
21 speculate or draw any inferences or conclusions as
22 to why the document has not been sent in with you
23 for purposes of your deliberations.

24 If you desire to have any of the
25 testimony replayed, please advise the bailiff and

JURY CHARGE

1 we will accommodate your request.

2 Is there any exception to that response
3 from the State?

4 MR. SIMPSON: No, Your Honor.

5 THE COURT: From the defense?

6 MR. MAYER: No, Judge.

7 THE COURT: I'll have that marked as a
8 Court's Exhibit.

9 (COURT EXH. 9, Jury note, was marked
10 for identification.)

11 THE COURT: And the next two notes will
12 be responded to in the same way. I'll read both
13 notes.

14 Was prints done at the crime scene,
15 State's Exhibit Number 23, and what drugs, if any,
16 were found at the scene of the crime and on whose
17 person were any substances found?

18 And, likewise, those notes need to be
19 dated and I will have that done.

20 And my response to both notes will be
21 as follows: Madame Forelady, and ladies and
22 gentlemen of the jury, all the evidence in this
23 case has been presented to you. The Court cannot
24 answer factual questions. You must only consider
25 the testimony and evidence that has been submitted

JURY CHARGE

1 into the record for purposes of your deliberations.
2 You cannot conduct your own independent
3 investigation or fact finding outside of the
4 evidence and testimony presented to you during the
5 course of this trial. You are not to speculate or
6 draw any inferences or conclusions from this
7 response to your inquiry during your deliberations.

8 If you desire to have the testimony of
9 any witness replayed or rehear any portions of the
10 law, please advise the bailiff and we will
11 accommodate your request immediately.

12 Any exception from the State?

13 MR. SIMPSON: No, Your Honor.

14 THE COURT: From the defense?

15 MR. MAYER: No, Judge.

16 THE COURT: The jury will be
17 instructed the notes are to be placed with the
18 evidence and not discarded, and I will have the
19 bailiff to instruct the foreperson to date the
20 notes.

21 I need you to have the foreperson put
22 the dates on each note and also instruct her that
23 the notes are not to be discarded.

24 THE BAILIFF: Okay.

25 THE COURT: Okay. Thank you, sir.

VERDICT

1 We will be at ease until we here
2 further instructions from the jury.

3 MR. SIMPSON: Thank you, Judge.

4 (Jury deliberating.)

5 THE COURT: You may be seated. The
6 jury has reached a verdict. Is there anything
7 before we proceed? From the State?

8 MR. SIMPSON: No, Judge.

9 THE COURT: From the defense?

10 MR. MAYER: No, Judge.

11 THE COURT: Please bring in the jury.

12 (Jury in, 4:13 p.m.)

13 THE BAILIFF: All jurors are present.

14 THE COURT: Thank you. You may be
15 seated.

16 Madame Forelady, is it correct that you
17 have reached a verdict?

18 FORELADY: Yes, ma'am.

19 THE COURT: If you would give the
20 verdict forms to the bailiff, please.

21 Sir, if you would stand for publication
22 of the verdicts.

23 THE CLERK: The verdict forms in the
24 matter of State of South Carolina versus Valentino
25 M. Hayward, Defendant. As to Indictment

VERDICT

1 2014-GS-10-3322, we, the jury, by unanimous consent
2 find the defendant guilty of murder. Signed by the
3 foreperson of the jury on November 17, 2015.

4 Ladies and gentlemen of the jury, if
5 this was your verdict please raise your right hand.

6 THE JURY: (Raised hands)

7 THE CLERK: Thank you. Please let the
8 record reflect that all 12 jurors raised their
9 right hands in response to my question.

10 As to Indictment Number
11 2014-GS-10-3323, we, the jury, by unanimous
12 consent, find the defendant not guilty of
13 possession of a firearm during the commission of a
14 violent crime. Signed by the foreperson of the
15 jury, November 17, 2015.

16 Ladies and gentlemen of the jury, if
17 this was your verdict, please raise your right
18 hand.

19 THE JURY: (Raised hands)

20 THE CLERK: Please let the record
21 reflect that all 12 jurors raised their right hands
22 in response to my question.

23 THE COURT: Any request to poll the
24 jury? From the State?

25 MR. SIMPSON: No, Your Honor.

VERDICT

1 THE COURT: From the defendant?

2 MR. MAYER: No, Judge.

3 THE COURT: Madame Forelady, ladies
4 and gentlemen -- you may take your seat -- we thank
5 you for your time and attention to this case. We
6 know that jury service is thankless and in your
7 instance -- well, in all jury instances, but you
8 have gone above and beyond by being with us longer
9 than a week in the trial of this case. I know it
10 has been arduous on both your personal and
11 professional schedules, but we thank you for being
12 here with us.

13 Our system is the only one of its kind
14 where 12 ordinary citizens listen to the facts of a
15 case, determine what the facts are, apply a complex
16 set of laws to those facts and render verdicts.

17 Charleston County -- well, South
18 Carolina has the largest case filing per capita in
19 almost the nation. There is only one State that
20 has a greater caseload than we do at over 5,000
21 filings per judge per capita.

22 We have 49 circuit judges whose job it
23 is to rotate throughout the state and hear cases.
24 We hear both civil and criminal court and we have
25 appellate jurisdiction, which means we hear appeals

VERDICT

1 from the probate court, the magistrate court,
2 municipal court, and zoning. We used to hear
3 workers' comp appeals. We still hear a few of
4 them, but by State law those have been transferred
5 over to the court of appeals.

6 We hold court in Charleston County
7 every week with the exception of holidays. We
8 generally have four trial courts operating, two
9 civil and two criminal, and sometimes we have three
10 criminal courts and three civil courts operating.
11 So you can well imagine, while there are some
12 things that we are able to hear in a non-jury
13 capacity where the Judge acts the trier of the
14 facts, the majority of what we do requires the
15 services of the jury.

16 I hope that you have learned how court
17 truly operates. It is nothing like what you see on
18 television. It's nothing like Judge Judy, Judge
19 Joe Brown the People's Court and all those plethora
20 of shows that are out there. While they are
21 incredibly entertaining, they are not even a
22 semblance of the real process.

23 So I hope it's been educational for you
24 and that in some small way it has reinstalled your
25 faith in the system and that it works really

VERDICT

1 because of your willingness to donate your time to
2 us.

3 You are welcome to discuss the case if
4 you would like. Oftentimes lawyers will contact
5 you to see how they can -- just to get your
6 perspective on the case. If you don't want to talk
7 to anyone, you're not required to do so. And if
8 you feel uncomfortable in any way, please contact
9 the clerk's office so we can take the appropriate
10 action to protect your privacy.

11 If you need a work excuse, you can get
12 them on the first floor at the clerk's office on
13 the civil court side; otherwise, we will mail those
14 to you along with your check.

15 You are also welcome to stay for
16 sentencing if you would like. If you want to do
17 that, please let the bailiffs know and we will
18 bring you back into the courtroom and seat you in
19 the jury box for that purpose.

20 You're excused with the court's
21 profound thanks. I will hear post trial motions in
22 a moment, and I need the sentencing sheet.

23 (Jury out, 4:17 p.m.)

24 THE COURT: Are there any post trial
25 motions, Mr. Mayer?

1 MR. MAYER: Judge, I'm not sure how to
2 phrase it, but I don't fully understand the two
3 verdicts in terms of guilty of murder, but not
4 guilty of possessing the firearm.

5 THE COURT: Conceivably, since he was
6 not found with the firearm in his possession, and
7 the only evidence of him having the firearm would
8 be the actual murder itself or the testimony of the
9 eyewitnesses who say they took the weapon for him
10 and disposed of it. Technically, theoretically
11 they should have found him guilty on that charge if
12 they found him guilty on murder, but they could
13 have compromised their province and decided they
14 just weren't going to pile it on.

15 And in their fact-finding province
16 could have just decided to find him not guilty.
17 It's kind of what I'm -- my thought process is
18 based on --

19 MR. MAYER: Sure.

20 THE COURT: -- the evidence. It's
21 certainly -- it inures to his benefit and it
22 certainly is within their fact-finding province to
23 have found him not guilty.

24 MR. MAYER: Judge, I'm a little bit at
25 a loss as to if I need to make a motion on that

1 basis.

2 THE COURT: You need to make whatever
3 motions you feel are appropriate.

4 MR. MAYER: I mean, on the basis of the
5 rationale I just described, I guess to preserve the
6 record, I will move to ask the Court for judgment
7 not withstanding the verdict on the charge of
8 murder.

9 As -- as we just discussed, it seems to
10 me that being in possession of a firearm when it's
11 death by shooting is a prerequisite to the murder,
12 even if it's just constructive possession of -- if
13 they, for instance, decided that it was Wallace
14 Bishop who actually pulled the trigger.

15 THE COURT: Yeah, but they could have
16 -- they could have found that he was there when
17 someone else did it under hand of one and felt that
18 the other person had the gun and he didn't. That's
19 also a plausible factual posture they could have
20 taken.

21 MR. MAYER: I understand, Judge. I
22 feel -- I feel obliged under the law as I
23 understand it to make my motion.

24 THE COURT: Any further motions from
25 the defense?

1 MR. MAYER: No, Judge.

2 THE COURT: Would the State like to
3 respond? And I'm going to accept Mr. Mayer's
4 motion as a motion for a new trial.

5 MR. SIMPSON: Judge, just briefly, and
6 really just to address what you have already made
7 clear. There of course are theories presented to
8 the jury where a finding of guilt of murder under
9 the hand of one doctrine could have been the basis
10 for their finding of guilt. There is also, as you
11 said, as the fact finders the possibility that
12 merely piling on is something they didn't want to
13 do. That is certainly within their right and
14 province to do that because the evidence supports
15 that verdict. Under several possible theories it
16 should stand. I appreciate Mr. Mayer's position,
17 it's preserved, but we would ask you, Your Honor,
18 to deny it.

19 THE COURT: Anything further,
20 Mr. Mayer?

21 MR. MAYER: No, Judge.

22 THE COURT: You can take your seats.
23 The motion for a new trial is denied. The Court
24 finds there is both direct and substantial
25 circumstantial evidence reasonably tending to prove

1 the defendant's guilt upon which a competent jury's
2 verdict can be sustained. The Court does not
3 substitute judgment for that of the jury. The
4 Court is not the finder of fact and does not waive
5 the credibility and believability of witnesses.

6 The Court finds that there is evidence
7 to support the conviction and that there is
8 competent evidence to sustain this jury's verdict.
9 An inconsistency in a verdict is not a sufficient
10 basis for the Court to vacate a verdict or to grant
11 a new trial. It could have very well been a
12 compromise in some way, but, clearly, it inures to
13 the benefit of the defendant in a finding of not
14 guilty as there was an absence of a weapon produced
15 at trial.

16 There is more than adequate evidence to
17 sustain the jury's verdict on the elements of
18 murder in this case and the motion is denied.

19 Does the defendant have any criminal
20 history?

21 MR. SIMPSON: Yes, Your Honor. There
22 are a couple of minor offenses.

23 THE COURT: Magistrate level?

24 MR. SIMPSON: He's been charged
25 before, but dismissed and they are not to be held

1 against him.

2 THE COURT: So he has no record is
3 what you're telling me?

4 MR. SIMPSON: He has a minimal record,
5 Your Honor.

6 THE COURT: I need to know.

7 MR. SIMPSON: I know, I hate to be
8 unprepared, but I moved all my stuff back. I had
9 it ready to go --

10 THE COURT: Mr. Mayer, do you know
11 what your client's record is?

12 MR. SIMPSON: I will say there are no
13 violent convictions.

14 MR. MAYER: Judge, I can support that
15 assertion.

16 THE COURT: I need to know what it is.
17 I can't just take your word for it. Somebody needs
18 to find me a copy --

19 MR. SIMPSON: Judge, I really
20 apologize. I'm usually prepared to go.

21 THE COURT: While we're waiting, Mr.
22 Mayer, how much pre-detention time has your client
23 served?

24 MR. MAYER: Judge, he was arrested on
25 December 12th of 2013. I can do that math real

1 quick.

2 THE COURT: Could you do it for me?
3 That would be helpful.

4 MR. MAYER: 705 days.

5 THE COURT: Thank you, sir.

6 And how old is he?

7 MR. MAYER: 25 now.

8 MR. SIMPSON: Judge, my apologies. I
9 thought I had it memorized, but I couldn't recall.
10 His record is a possession of cocaine base in 2010,
11 a magistrate charge in 2011, possession of
12 marijuana in 2012. We also would add two
13 narcotics-based charges pending at this time.

14 THE COURT: What do you plan to do
15 with those?

16 Mr. Mayer, what does your client want
17 to do with those pending charges?

18 MR. SIMPSON: I think in light of the
19 verdict, Your Honor --

20 THE COURT: You're going to nolle pros
21 those?

22 MR. SIMPSON: Probably nolle pros
23 those charges.

24 THE COURT: What are those charges?

25 MR. SIMPSON: Distribution charges.

1 Your Honor, just for the record --

2 THE COURT: I'm going to give you an
3 opportunity to speak. I just needed those
4 questions answered.

5 MR. SIMPSON: Thank you.

6 THE COURT: You're welcome.

7 State may proceed.

8 MR. SIMPSON: Typically, at this point
9 in trial when Your Honor has been present for this
10 long, I like to keep things brief. We have here on
11 this side of the courtroom several loved ones and
12 family members of Mr. Miles. They lost someone
13 they cared very dearly about. They have been very
14 patient and supportive of our efforts throughout
15 and the State appreciates their presence here
16 today. No one wishes to address you, Your Honor.
17 They made that decision.

18 THE COURT: Okay.

19 MR. SIMPSON: I think really the facts
20 of the case speak for themselves, Your Honor. I
21 will just point out that, obviously, we had, at
22 least in the State's opinion, fairly competent,
23 strong evidence, not only of the murder, but of
24 destruction of evidence, of the attempts to present
25 false testimony in this court, and probably the

1 most chilling attempts to silence witnesses through
2 threat. I think those are all things that need to
3 go into the sentence, Your Honor. We leave that up
4 to you.

5 We don't think that this is a case
6 where the minimum sentence in light of all those
7 events is appropriate. That's all I would have to
8 say, Your Honor.

9 THE COURT: Thank you, sir. And you
10 have indicated that none of the victim's family
11 wish to be heard, is that correct?

12 MR. SIMPSON: They are -- we do have
13 one --

14 THE COURT: Certainly.

15 MR. SIMPSON: -- member that would
16 like to speak.

17 THE COURT: State your name for the
18 record.

19 MS. JOHNSON: Beyonka Johnson. I'm
20 Deontre Miles' sister.

21 THE COURT: And your last name is
22 Johnson?

23 MS. JOHNSON: Yes, ma'am.

24 THE COURT: And your first name is
25 Bianca?

1 MS. JOHNSON: Beyonka, B-E-Y-O-N-K-A.

2 THE COURT: Yes, ma'am.

3 MS. JOHNSON: Yes, ma'am. I just want
4 to say to Valentino, I've dreaded this day for a
5 long time. I haven't been able to basically get
6 over it, and I want you to know that I forgive you.
7 I can't speak for everybody else in my family, but
8 in order to get over it you have to be able to
9 forgive. I want you to know that was my baby.
10 That was my baby brother. We played ball, he
11 watched my kids. My kids ask for Uncle Chucky, and
12 he ain't coming back. I want you to know that I
13 forgive you.

14 And to your family, I'm sorry you-all
15 have to take the loss that we did too, but at the
16 end of the day, by praying everybody gets through
17 it. That's all.

18 THE COURT: Okay. Thank you, ma'am.

19 Does anyone else wish to be heard?

20 MR. SIMPSON: I don't believe so, Your
21 Honor.

22 THE COURT: Anything else further from
23 the State?

24 MR. SIMPSON: No, Your Honor.

25 THE COURT: Glad to hear from you,

1 Mr. Mayer.

2 MR. MAYER: Thank you, Judge. May it
3 please the Court?

4 THE COURT: Yes, sir.

5 MR. MAYER: And Valentino, as you may
6 have heard through some of the statements and
7 testimony, Judge, dropped out of school in tenth
8 grade. He has a long work history at Azalea
9 Motors, two-and-a-half to three years prior to his
10 arrest, almost two years ago now, which is an
11 uncommonly long work history of full-time work.

12 I would have to respectfully disagree
13 with Mr. Simpson's interpretation of Valentino's
14 calls from the jail about Miss Littman. As the --
15 as the subsequent events of those phone calls bear
16 out what the true meaning was, which was, get it
17 together, get her to talk to my lawyer.

18 You know, marshalling the evidence in a
19 case with this many facts and this many witnesses
20 when you're -- when the client is the main point of
21 contact for -- you know, you have to talk to these
22 people, you have to talk to those people. It's
23 very, very hard to do through the jail.

24 And, you know, these -- these are
25 conversations that are taken out of context. They

1 are conversations that resulted in zero harm to a
2 single person and I believe were not intended at
3 any point to -- to result in harm to a single
4 person. I understand, you know, that -- it's just
5 out of context and I would ask the Court to
6 consider that.

7 Valentino's 25 years old. Already the
8 minimum sentence under the murder statute has him
9 in prison until he's 55 years old. And, Judge, I
10 would plead with the court and submit to the court
11 that those 30 years will be the time in somebody's
12 life when they are apt to be most out -- most
13 outside the law or act up the most or -- and submit
14 to the court that during those 30 years Valentino,
15 as is part of our DNA as human beings, will settle
16 down, and by the time he's 55 years old, he will be
17 in a state -- in a position internally to
18 reintegrate and I would ask the Court for all of
19 these reasons to consider -- to consider the
20 minimum sentence in this case, Judge.

21 THE COURT: Does anybody -- does
22 Mr. Hayward wish to be heard by the Court or are
23 there any members of his family that wish to speak
24 on his behalf.

25 MR. MAYER: I think there is somebody

1 from Mr. Hayward's family.

2 THE COURT: Certainly. Yes, ma'am,
3 tell us your name.

4 MS. JACKSON: My name is Jacquelin
5 Jackson. I'm Valentino's aunt.

6 THE COURT: Yes, ma'am.

7 MS. JACKSON: I can truly say I've
8 known Valentino -- him and my son are the same age
9 and I've known him to be a well mannered young man.
10 You know, I don't -- I've never -- he never
11 displayed respectful in my presence, I've never
12 seen that. I can truly say that he has a child at
13 home that's going to be missing a father, too.

14 THE COURT: How old is that child?

15 MS. JACKSON: She's two years old. So
16 that's a life that child will never get to know.
17 Not taking away from whatever, but that child is
18 missing a father. And we need where fathers can be
19 for the kids now because worst case of it now. I
20 just ask that you would think about that. Because
21 I have a son of my own that, you know, needs that
22 father figure, you know. They have it, but this
23 child may never get to see his father. Thank you,
24 Judge.

25 THE COURT: You're welcome, ma'am.

SENTENCE

1 Anything further, Mr. Mayer?

2 MR. MAYER: No, Judge.

3 THE COURT: Anything further from the
4 State?

5 MR. SIMPSON: No, Your Honor.

6 THE COURT: Court will be at ease for
7 a few moments.

8 (A recess transpired.)

9 THE COURT: Sir, based on what has
10 been presented to the court, you are sentenced to
11 the State Department of Corrections for a period of
12 38 years. You will get credit for any time that
13 you've served to be calculated and applied by the
14 Department of Corrections.

15 Does he need any services with the ATU
16 unit, Mr. Mayer?

17 MR. MAYER: Judge, I'm not familiar
18 with that.

19 THE COURT: That's the alcohol and
20 drug treatment unit.

21 MR. MAYER: I don't believe so, Judge.

22 THE COURT: Thank you so much. Have a
23 great day.

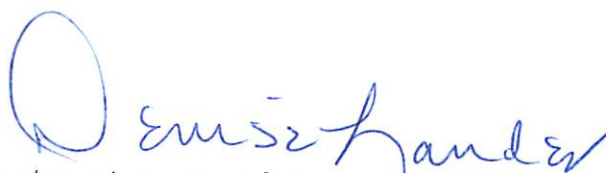
24 (These proceedings were concluded at
25 5:02 p.m.)

1 CERTIFICATE OF REPORTER
2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 11th day of November, 2016 at
13 Charleston, Charleston County, South Carolina.
14

15 
16

17 S/Denise Lauder
18 Carol Denise Lauder
19 Registered Professional
20 Reporter, CP
21 My Commission expires
22 August 2, 2017
23
24
25

FORM 5

STATE OF SOUTH CAROLINA

County of CharlestonValentino M Hayward 366107

Full name and prison number (if any) of Applicant

v.

State of South Carolina

2019-CP-10-2108
IN THE COURT OF COMMON PLEASAPPLICATION FOR
POST-CONVICTION RELIEFBY
JULIE J. ARMSTRONG
CLERK OF COURT
2019 APR 23 PM 2:14

FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence Charleston County
Court house Genral Section
3. Name(s) of co-defendant(s) (if any) Anisha Pearson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014-GS-10-3322
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) November 17, 2015 38 years 705 days credited
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty yes
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. State of South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. March 20, 2019
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Appeal
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Applicant Appealed Challenging objections made during trial
- ii. Anders Brief
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Charleston County Courthouse
- ii. The Court of Appeals
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Challenges Affirmed
- ii. Anders Brief
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. March 20th, 2019
- ii. May 4th, 2017
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. 1.) A photograph of a gun found on Appellants phone
- ii. 2.) an enhancement of that photograph because of probative
- iii. value of the photograph and its enhancement were substantially
- iv. outweighed by the danger of unfair prejudice

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Anders Brief

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. Court of Appeals
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____
 (b) your trial, if any? yes
 (c) your sentencing? _____
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Susan B. Hackett
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
N/A

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Aaron Mager
2000 Sam Rittenberg Blvd, Ste. 2011 Charleston SC. 29407
 ii. Susan B. Hackett
Division of Appellate Defense, P.O. Box 11589, Columbia SC. 29211-1589
 iii. _____

 (b) the proceedings at which each such attorney represented you:
 i. Trial

 ii. Court of Appeals

 iii. _____

19. State clearly the relief you seek in filing this application:

Sentence Vacation

New Trial

Reversal Remand

20. Are you now under sentence from any other court that you have not challenged?

N/A

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, Valentino Hayward, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Valentino Hayward

SWORN to and subscribed before me this 17
day of April, 2019.

Dana Estridge (L.S.)
Notary Public

My Commission Expires: 3/3/2024

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Valentino Hayward, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Valentino Hayward
Applicant

SWORN or affirmed to and subscribed before me this

17 day of April, 2019.

Dellene Eastridge
Notary Public

My Commission Expires: 3/3/2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Valentino Hayward, #366107,	)	Case No.: 2019-CP-10-2108
	)	
Applicant,	)	
	)	RETURN AND MOTION FOR MORE
	)	DEFINITE STATEMENT
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on April 23, 2019, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. In May 2014, the Aiken County Grand Jury indicted Applicant for murder (2014-GS-10-3322). Aaron C. Mayer, Esquire represented Applicant. Assistant Solicitors, Chad Simpson, Esquire and Lauren Mulkey, Esquire prosecuted the case. On November 9, 2015, Applicant proceeded to trial before the Honorable Deadra L. Jefferson. The jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to imprisonment for 38 years for murder.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on March 20, 2019. State v. Hayward, Op. No. 2019-UP-1 12 (S.C. Ct. App. filed March 20, 2019). The remittitur was returned to the circuit court on April 5, 2019.

Attached to this Return and incorporated by reference are the records of the Charleston

FILED
2019 OCT 31 AM 11:19
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the record on appeal and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. “Ineffective Assistance of Counsel”

III.

Respondent submits Applicant’s allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286

S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

V.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts

upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VI.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

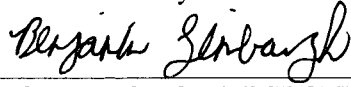
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

BENJAMIN H. LIMBAUGH
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

_____, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

Valentino Hayward, #366107)

Case No.: 2019-CP-10-2108

Applicant,)

v.)

Affidavit of Service by Mail

State of South Carolina)

Respondent,)
_____))

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2019 OCT 31 AM 11:19

FILED

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
Falk Law Firm, LLC
Post Office Box 1058
Charleston, SC 29402

DATED this 28th day of October, 2019.


Jennifer Jennison, Administrative Coordinator
For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE 9TH JUDICIAL CIRCUIT
	)	
Valentino Hayward 366107	)	
Applicant	)	2019-CP-10-2108
Vs.	)	
State of South Carolina	)	AMENDED PCR
Respondent,	)	
_____	)	

2022 MAR -4 AM 11:19
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

PCR Applicant Valentino Hayward, by counsel amends his PCR application filed April 23, 2019, to include the following specific allegation of ineffective assistance of counsel.

1. Trial counsel made the following objections to but failed to preserve the record thereby making appellate review of the Court's decisions impossible.
 - a. Trial counsel submitted proposed voir dire questions that the trial court did not use. The record reflects that trial counsel objected to the court's refusal to ask his proposed voir dire questions, 20, 23, 24, 26, and 28. However, by failing to submit his proposed voir dire as an exhibit, the trial court's decision was not preserved for review. (Record page 34)
 - b. Once the jury was empaneled, there was a bench conference (Record page 51). Other than the notation in the record, there is no record of the issues addressed at the bench conference. Trial counsel should have challenged the State's preemptory strikes pursuant to Batson v Kentucky. If trial counsel raised the Batson issue during the bench conference he provided ineffective assistance of counsel by not ensuring that the record was preserved. If trial counsel did not make a Batson challenge during this bench conference, his failure to do so would amount to ineffective assistance of counsel.
 - c. Counsel failed to preserve his objection to Marian Campbell's testimony. (Record page 287 lines 11-19).
 - d. Counsel failed to preserve his objection to Richard Holmes's testimony. (record page 334 lines 24-25)).
 - e. Counsel abandoned his response to the State's objection to counsel's question to Richard Holmes regarding a polygraph test. (Record page 343 lines 11-25)
2. Trial counsel failed to object to the state's leading questions during its direct examination of Latoya Carson (Record page 206 line 5 through 210 line 5)

3. Trial counsel was ineffective in failing to properly impeach Laytoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (Record p. 214 line 22 - 25; page 215 line 5-11; page 221 lines 18-20).
4. Trial counsel was ineffective in not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (Record page 220 line 2-3).
5. Trial counsel failed to object to prejudicial hearsay testimony from David Osborne. (Record 237 lines 9-15).
6. Trial counsel was ineffective in failing to object to allowing Nada Kerstein testify to the results of a fingerprint analysis performed by Kathleen Butler. (See State v. McCray, 413 S.C. 76; Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d 234 (4th Cir. 2012).
7. Trial counsel was ineffective in failing to object to allowing James W Green testify to the results of a fire arms/ ballistics analysis performed by Ken Whittler. (See State v. McCray, 413 S.C. 76; Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d 234 (4th Cir. 2012).
8. Trial counsel provided ineffective assistance of counsel by failing to move to suppress the results of the "digital dump" of Applicant's cell phone records including the introduction of State's exhibits 32 and 33.

S/ James Falk

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March 1, 2022

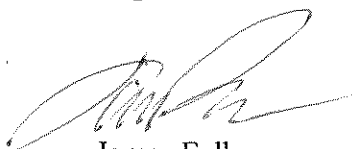
Clerk of Court
Charleston County Circuit Court
100 Broad St
Charleston, SC 29401-2210

Re: Valentino Hayward v State. 2019-CP-2108

Dear Clerk:

Please file the enclosed amendment to Mr Hayward's PCR application. Since this is a PCR case, it is ineligible for electronic filing.

Regards



James Falk

Cc: Samantha Weidauer, Esquire Office of the SC Attorney General.

1 STATE OF SOUTH CAROLINA) IN THE SOUTH CAROLINA CIRCUIT COURT 9
2 COUNTY OF CHARLESTON) COURT C.A NO. 2019-CP-10-02108

3

4 Valentino Hayward,)

5 Plaintiff,)

6 Versus)

7 The State of South Carolina,)

8 Defendant.)

9

10 H E A R I N G

11

12 DATE: February 10, 2023.

13

14 LOCATION: South Carolina Circuit Court 9

15

16 JUDGE: George M. McFaddin

17

18 TRANSCRIBED BY: ERIN REILLY

19

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Certificate of Transcriber 42

EXHIBITS

(None Marked)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH IS
REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

PROCEEDINGS

MR. BARLOW: Russell Barlow, on behalf of the state of South Carolina. This is the post-conviction relief matter of Valentino Hayward versus the State, Case number 2019-CP-10-2108, out of Charleston County. In May of 2014, Charleston County Grand Jury Indicted Applicant for Murder, 2014-GS-10-3322. Aaron C. Meyer, Esquire represented Applicant and assistant solicitors Chad Simpson, Esquire and Lauren Mulkey, Esquire prosecuted the case. On November 9th, 2015, Applicant proceeded to trial before the Honorable Deadra L. Jefferson and the jury found applicant guilty as indicted, Judge Jefferson sentenced applicant to imprisonment for 38 years for murder. Applicant filed a timely notice of appeal and Susan B. Hackett, Esquire of the Office of Appellate Defense, perfected the appeal. The South Carolina Court, excuse me. South Carolina Court of Appeals affirmed Applicant's conviction on March 20th, 2019 in an unpublished opinion State v Hayward Opinion Number 2019 up 12. The Remittitur was returned to the Circuit Court on April 5th, 2019, and his initial application for post-conviction relief applicant alleged he is being held in custody unlawfully based on ineffective assistance of trial Counsel. On March 4th, 2022, Applicant filed an amended post-conviction relief application with multiple allegations of ineffective assistance of Counsel. And at this time, Your Honor, we would ask Counsel to indicate which allegations he intends to move

1 forward on.

2 THE COURT: Just to follow up, sir.

3 MR. FALK: Well, we had filed in -- one of our grounds for
4 relief was failure to preserve for the record proposed voir
5 dire questions, and failure to preserve on the record. Let me
6 go to the ones that -- let me go to the ones we're going to
7 focus on that. The trial Counsel was ineffective and failing to
8 properly impeach Latoya Carson's prior inconsistent statements
9 pursuant to the procedure laid out in 613-CRE starting on Page
10 214 and continuing up intermittently through 221.
11 Trial Counsel failed to seek a proffer from Latoya Carson once
12 she invoked her Fifth Amendment rights. Trial Counsel failed to
13 object to prejudicial hearsay from the state's witness on Page
14 237. Trial Counsel was ineffective by allowing the Nadya Carson
15 to testify regarding fingerprint analysis, and trial Counsel
16 was ineffective for allowing James W. Green to testify
17 regarding ballistics analysis.

18 THE COURT: All right, sir.

19 MR. FALK: Thank you.

20 MR. BARLOW: And just to be clear, Your Honor, that's
21 numbers three, four, five, six and seven in the amended
22 application.

23 THE COURT: Yes, sir.

24 MR. BARLOW: Is Mr. Falk abandoning the other allegations?

25 MR. FALK: We'll include the failure to preserve his

1 objection to Marion Campbell's testimony, that's 1C.

2 THE COURT: Yes, sir.

3 MR. BARLOW: And just for the record to be clear, then
4 you're abandoning 1A, B, D, E and --

5 MR. FALK: I'm sorry. We're keeping -- we're keeping D,
6 we're abandoning E.

7 MR. BARLOW: Okay. So abandoning 1A, B, E, Number 2 and
8 Number 8.

9 MR. FALK: Yes.

10 MR. BARLOW: Okay.

11 THE COURT: Are you ready, sir.

12 MR. FALK: Yes, Your Honor. We'll call Aaron Meyer to the
13 stand.

14 THE COURT REPORTER: Do you swear or affirm the testimony
15 that you will give? Is the truth, the whole truth, and nothing
16 but the truth, so help you God?

17 THE WITNESS: Yes, ma'am.

18 THE COURT REPORTER: You may have a seat, sir. Please
19 state your name for the record and spell your last name.

20 THE WITNESS: Aaron Mayer. M-A-Y-E-R.

21 **DIRECT EXAMINATION OF WITNESS, AARON MAYER**

22 BY: MR FALK

23 Q Hello, Mr. Mayer.

24 A Hello.

25 Q Where are you currently living?

1 A In Mount Pleasant.

2 Q For some reason, I thought you'd moved to North Carolina.
3 What's your current occupation?

4 A I'm not currently working.

5 Q Okay. How long were you practicing law before you started
6 representing Valentino Hayward?

7 A Okay. I graduated from law school in 2009 and went to work
8 at a firm in Florida where we did class action stuff. I was
9 there for a couple of years and then came up to Charleston, and
10 I think I started doing criminal work around 2012.

11 Q Were you appointed to this case as a conflict attorney, or
12 were you retained?

13 A I was retained.

14 Q Okay. Can you tell me kind of what was this case about?

15 A Yeah. So the allegations in the case were that my client
16 shot a gentleman who was known as Chucky. And there was a big
17 question as to whether he did it, you know, the identity of the
18 person who did it. And so it was -- it was really all about the
19 identity of the shooter.

20 Q Okay. Did the state offer -- what was the most compelling
21 testimony that the state offered if you can?

22 A Well, I think the worst evidence against our side was the
23 jail tapes in my -- in my opinion. You know, my recollection of
24 the trial was and this was my first and only, hopefully, my
25 last murder trial. But my recollection was, I was getting some

1 good eye contact from the jurors. I felt like the trial was
2 going reasonably well for our side until the jail tapes were
3 played.

4 Q Did you --

5 A Yeah.

6 Q Did they introduce any fingerprint evidence?

7 A Oh, boy. I think there was a palm print.

8 Q And that was the issue about the left hand or the right
9 hand on top of the car, right?

10 A Yes, sir.

11 Q Okay. So they did introduce evidence, whether it's
12 fingerprint or palm print. They did introduce that evidence; is
13 that correct?

14 A That's my memory of it. But, I confess that I kind of did
15 a quick review of the record based on the application. I didn't
16 review the whole 1000 pages or whatever it was. But I will say
17 that when the jail tape thing came out for the trial, I
18 probably hadn't listened to them all. I probably didn't know
19 quite what was going to be said on the jail tape. And I felt
20 really bad in that moment because I felt like I hadn't
21 effectively counseled MR. Hayward to not talk on the jail
22 phones. So I felt like I'd failed him there.

23 Q But you weren't -- you were in possession of all the jail
24 tapes. I mean, they provided the discovery.

25 A They provided disks and disks and disks. Yes, sir. I think

1 I probably tried to spot check them. I was a one-man band, if
2 you will. Judge, I was -- I didn't have co-counsel doing the
3 trial trying to run a law practice at the same time and had
4 probably too many irons in the fire.

5 Q Did you ever ask the solicitor's office whether or not
6 they had -- that they would designate which jail types were
7 important?

8 A I don't remember what the conversation was. I feel like
9 Mr. Simpson had told me, you know, just listen to him. But
10 that's like saying just go spend 1000 hours, you know, doing
11 something. So it's -- it was very burdensome. I tried to spot
12 check them. I didn't know what might have been said. A lot of
13 them weren't even my client's pin. It was like -- it seemed
14 like there were other people's calls.

15 Q Let me interrupt you for a minute.

16 A Yeah.

17 MR. FALK: Judge, in light of Mr. Mayer's testimony, I've
18 asked that we can amend our application to allow that trial
19 Counsel was ineffective for failing to review the jail tapes.

20 THE COURT: MR. Barlow?

21 MR. BARLOW: I'm not working without --

22 THE COURT: Well, so proceed, sir. Amended.

23 BY: MR. FALK

24 Q All right. So just explain to whoever's going to be
25 reading this transcript. What's a pin?

1 A Well, my understanding and knock on wood, I've not been
2 locked up at Leeds, but my understanding is that when a person
3 is incarcerated at Leeds Detention Centre, they have a unique
4 identifier that they type into the phone there to make a call
5 and think they have money that it draws from their account to
6 make that call. And then beyond that, I don't know. But it
7 seemed like some of the calls that were included were not even

8 MR. Hayward's pin.

9 Q But it was his voice.

10 A I don't know.

11 Q Okay.

12 A I don't know.

13 Q Because you didn't -- you didn't listen to all the tapes.

14 A I didn't listen to all of them. There were some with his
15 voice on there, for sure. But there are also, you know, plenty
16 of people with a low country accent, too, who are locked up at
17 Leeds.

18 Q So what was on the jail tape that you thought was damning
19 was critical.

20 A The one that was played in trial, when all the -- when the
21 jurors who were making eye contact then stopped making eye
22 contact. I believe what it said, I believe it was purporting to
23 ask a person outside the jail to eliminate a witness.

24 Q And when did the tapes come into evidence? When did this
25 come in? Was this on cross exam?

1 A This was -- this was -- this was -- pretty far into the
2 trial, I thought, because, you know, I thought we were kind of
3 running the gauntlet fairly well up to that point. And then
4 that was -- that was -- that was kind of the turning point. I
5 don't recall about when that would have been towards the end of
6 the State's case as my memory.

7 Q But it was part of the State's case.

8 A Yes, sir, I believe so.

9 Q And did MR. Hayward testify?

10 A No, sir.

11 Q Okay. Would you have handled this case differently had you
12 known that there was that jail tape that could be played if
13 this case goes to trial?

14 A Yeah, I think -- I think I would have.

15 Q Were there ever any pleas made? Plea offers?

16 A I'm trying to think about that. I'll be honest with you,
17 my friend. I had a number of other cases at the time, and I
18 just don't recall. I don't recall what the -- what the
19 situation was around negotiations before this trial. I just
20 don't recall.

21 Q If you wanted to settle a case, you would -- would you
22 have?

23 A I could have, yes. If I -- if I had damning information
24 that I felt like we couldn't get past, I would have gone to
25 MR. Simpson and talked about some sort of plea deal, which

1 we never did as far as I recall, there was no appreciable
2 effort to have both sides have a meeting of the minds and try
3 and find some resolution without a trial.

4 Q Excuse me one moment, please.

5 A Yes, sir.

6 Q Do you have a copy of the transcript?

7 A I do.

8 Q All right. I'm going to just show you something --

9 A Yes, sir.

10 Q Page 442.

11 A Thanks, sir.

12 Q If you could look at the witness starts testifying on Page
13 442.

14 A It says Nadya Kirsten, Kirsten.

15 Q I mean, would you think -- those pages are in the volume?

16 A Yes, sir. I'm going to flip, too. I've got it.

17 Q Okay. So what did she testify? Tell me what -- take you
18 some time to just kind of review yourself to see what role she
19 played.

20 A Yes, sir.

21 Q She offered as an expert. As a fingerprint analysis?

22 A Yes, sir. I see here that she was.

23 Q Okay. And was there -- do you recall the discussion about
24 her doing a peer review, somebody else's work?

25 A Let me see if I can refresh my memory on that. She's

1 talking about international standards --

2 Q I also did.

3 A Okay. All good.

4 Q If you can sort of just read yourself on that.

5 A Okay.

6 Q Starting again on page, what's the page?

7 A 452.

8 Q 452 --

9 A Okay.

10 Q -- explain what the peer review process is.

11 A Okay. Yes, sir. Okay.

12 Q And so if you could then turn up, flip over to the next

13 page, and I've marked this section with a pen.

14 A Okay.

15 Q You see that?

16 A Yes, sir, I do. It's on Page 453 Lines 15 to 18. It looks

17 like.

18 Q So she was actually -- she did actually, she actually did

19 not do this fingerprint analysis; is that correct?

20 A It looks like the person who did it retired, someone named

21 Kathleen.

22 Q Okay. So the state tried to offer an expert's report

23 through the testimony of another expert. Is that about the size

24 of it?

25 A That's what it seems to have happened here. Yes, sir.

1 Q Did you consider objecting to that testimony?

2 A It certainly seems objectionable. Don't remember what my
3 thought process was, or if I was just too in the weeds trying
4 to think about other things. But it certainly seems
5 objectionable.

6 Q Are you familiar with the case law that says, in effect,
7 that you cannot -- one expert can't bootstrap another expert's
8 testimony?

9 A Generally, I'm familiar with the concept. I don't know if
10 I could cite a case.

11 Q Okay.

12 Your Honor, just for yours. The cases are in there. They're
13 listed in the paragraph. If you have my amended one, but we
14 would cite THE COURT to State versus McRae, which is 413.
15 South Carolina 76.

16 THE COURT: Yes, sir.

17 MR. FALK: Melendez-diaz versus Massachusetts, 557 US 305.

18 THE COURT: Yes, sir.

19 MR. FALK: Then there's Bullcoming Vs. New Mexico.

20 MR. BARLOW: Your Honor, all of that case law is also on
21 number six and seven of the amended application.

22 THE COURT: Yes, sir.

23 MR. FALK: I didn't know if you had the amended
24 application. No. It doesn't --

25 THE COURT: It's okay.

1 MR. FALK: Right. So those cases I cited there, Your
2 Honor, is what I would draw your attention to --

3 THE COURT: Yes, sir.

4 MR. FALK: And certainly, I think those cases stand for
5 the fact that the state cannot, in effect, introduce the work
6 of one expert. You know, an analysis conducted by one expert
7 through the testimony of another expert.

8 THE COURT: Yes, sir.

9 BY: MR. FALK

10 Q Now, let me -- I'm going to show you some pages on Page
11 989, so you don't have to bring that here

12 A Okay. Yes, sir.

13 Q You can sort of read Lines 18 sort of to the end just to
14 yourself?

15 A Yes, sir.

16 Q So is it fair to say that the state in the closing was
17 drawing the jury's attention to the Palmprint analysis that was
18 on top of the car?

19 A Yeah. It looks like he was making a big deal of it.

20 Q Okay. And how did that relate to, do you remember how that
21 related to the case?

22 A Well, it again, they were trying to identify the person
23 who came up to the car when the victim and Ms. Latoya parked
24 there. And so they're trying to link, you know, this print to
25 the shooter. But I hope argued, I don't see my argument here,

1 but I hope I argued that they were acquaintances, so he could
2 have easily have left his print on the car. But ...

3 Q But the state -- and the state used the testimony of a
4 fingerprint expert or the print expert who incorporated that
5 testimony into its closing argument?

6 A Most certainly. There are a couple of pages here all about
7 it.

8 Q Okay. It's a transcription document?

9 A Yes, sir. I'm trying to find that testimony. Who do you
10 need, MR. Green?

11 Q Oh, this one.

12 A Okay.

13 Q Oh, I'm sorry. Yes. It's 576.

14 A Okay.

15 Q So that would be in the volume two.

16 A Volume 2? Okay, great. 576.

17 Q He starts testifying at Page 576.

18 A Yes, sir.

19 Q And if you could just kind of skim through there, could
20 you just confirm that that was the state's ballistics expert?

21 A Yeah, it looks like he was. He's a firearms' examiner. The
22 SLED. Yes, sir.

23 Q And can you read sort of further through that and see that
24 he did not actually conduct the firearms' analysis?

25 A Okay. Let me see.

1 Q Because it was actually analysis as performed by Ken
2 Whittler.

3 A Wittler. Yeah. Ken Whittler was a firearms' examiner at
4 SLED. And it looks like, according to MR. Green's testimony,
5 he also had retired.

6 Q So any objection that you could have made to the
7 fingerprint experts, you could have also made to the firearms
8 expert's testimony?

9 A Seems that way. Yes, sir.

10 Q With this case, is there a possibility that this case
11 could have gone differently had they not offer that forensic
12 evidence? I mean, I guess you can't speak to that.

13 A I don't know. But they, you know, it certainly would have
14 been 1 or 2 less things they could beat us up with.

15 Q And I just want to show you [indiscernible] the quote. You
16 can look at sort of that paragraph that's marked 904.

17 A 994 around Line 15.

18 Q Yes.

19 A You get a whole lot more from Greene than from SLED, the
20 ballistics from Green -- from SLED, the ballistics expert.

21 Q So the state is again calling the jury's attention to the
22 ballistics expert.

23 A They're calling -- they think they get a whole lot from
24 him.

25 Q Actually, if you could flip two pages in front of that.

1 A Yes, sir.

2 Q I think I also highlighted two lines where it's going to
3 hurt from a certified ballistics expert.

4 A Yes, sir. Page 990, lines 4 through maybe 17. In there, it
5 states from the -- it's the solicitor's closing argument. He
6 states, you heard from a certified print expert, and then he
7 goes on and talks about that. And then he's making the argument
8 about the difference in weight between a 38 and a nine
9 millimeter. So it seems like there would have been some room
10 for doubt there since they're so close, ballistically speaking.

11 Q Is this a case where there was an eyewitness.

12 A There was not an eyewitness?

13 Q Is this a case where MR. Hayward's DNA was found at
14 the scene?

15 A No, sir.

16 Q How did the discussion about the turn by turn directions
17 come into play?

18 A Well, it was a really unusual situation because that
19 witness think Ms. Carson, Ms. Latoya Carson. Latoya, I remember
20 the name. I don't remember her last name, but she was charged
21 with murder. She had a murder charge pending on herself at the
22 time of this trial for MR. Hayward. So maybe needless to say,
23 I've never dealt with that before. And I felt like in my heart
24 of hearts, she wasn't clear, free and clear from not being a
25 suspect in the murder of MR. Chucky that MR. Hayward

1 was charged with. So I felt that it was important to try and
2 understand, you know, who were the instructions for where to
3 drive this car to where Chucky was driving the car with her in
4 it. Who were those instructions really coming from?

5 Q So did she make a deal?

6 A I don't recall. I don't recall if she made a deal
7 regarding this case or any case at all. I don't recall.

8 Q Well, part of your direct examination, you ask her some
9 questions, and she invoked her Fifth Amendment, right?

10 A Yes, I recall that.

11 Q Did you consider whether or not you could still try and
12 get a proffer of the testimony there?

13 A You know, I was not aware that you could proffer Fifth
14 Amendment stuff in that way. I kind of thought that a Fifth
15 Amendment invocation like she made there during the testimony
16 kind of prevented that whole subject from being discussed while
17 she had a pending murder charge herself.

18 Q Was a pending murder charge on this case or another case.

19 A No, sir, there is a different case.

20 Q Okay. But, why did the state talk about the turn by turn
21 directions?

22 A You know, I think the turn by turn directions were
23 relevant to suggest as to who MR. Chucky was on the phone
24 talking to. That person was the one leading him into this kind
25 of danger area, is -- what is the state's argument?

1 Q Okay.

2 A And our argument was the only person we have telling that
3 is someone who's charged with a different murder. Like, how
4 believable, how believable is she, you know, for something like
5 that.

6 Q Let me prompt you with Lines 9 through 15 on Page 237.

7 A Yes, sir.

8 Q So at this time -- at this -- at that time, David Osborne
9 was a detective?

10 A Right.

11 Q And is he testifying as to what he heard somebody saying
12 on the telephone?

13 A He's testifying as to what MS. Latoya told him, which I
14 shouldn't have allowed to happen.

15 Q So, I mean, you Would agree that that's hearsay?

16 A Yes, sir. Yeah, I mean, coming from a police officer
17 probably gives it a lot more credibility than coming from Ms.
18 Latoya.

19 Q Okay.

20 A I definitely should have objected.

21 Q The state used that discussion about the turn by turn
22 directions to prove he was at the neighborhood that they called
23 home, right?

24 A What's the last part of your question? I'm sorry, I didn't
25 hear it.

1 Q Well, this -- do you remember that this neighborhood was
2 referred to as the hull?

3 A I don't remember it referred to it that way. I remember
4 SAG, St Andrew's Gardens? Maybe.

5 Q But the turn by turn directions showed that they were
6 telling somebody how to get to the location where the murder
7 took place, right?

8 A That was the -- that was the suggestion. Yes, sir.

9 Q Okay. I'm going to show you some testimony from Marion
10 Campbell on Page 287. And maybe if you could just sort of look,
11 maybe going from Line 8.

12 A Yes, sir. Yes, sir. I'm --

13 Q So what -- why did you object to that testimony?

14 A Well, I felt like the -- well, don't I don't recall
15 exactly, but it seemed -- it seemed like the witness was there
16 trying to say that my client texted him saying he's about to
17 rob somebody, which I think would have been brand-new
18 information for us. And then it seems like here Lines 13 and
19 14. The witness then equivocated a little bit. The question
20 was, did the Defendant ever text you he was about to rob
21 someone? Answer, yes, he was -- no, he didn't say he was about
22 to. He said, I'm -- I'm talk to somebody. So I wish I could
23 remember more clearly why I objected to that, but I don't -- I
24 don't know offhand.

25 Q And there was a bench conference after that.

1 A Yeah. It says the bench conference in the transcript. Yes,
2 sir.

3 Q So nobody knows, nobody can tell why that objection was
4 made. So it wasn't preserved for review; is that correct?

5 A It was not preserved.

6 Q So if you could just look at part of this direct
7 examination of Richard Holmes, was he the detective on this
8 case?

9 A I feel like he was one of them.

10 Q Yeah?

11 A Yes, sir.

12 Q It's about halfway down that page, you asked to approach
13 the court.

14 A Okay.

15 Q Looking at Page 334. I'm sorry.

16 A Yeah.

17 Q Okay. Okay. Yeah, I see it on Line 24. Yes, sir.

18 Q Are we talking about a polygraph test?

19 A Let me get some context. Am I doing -- am I doing this
20 exam?

21 Q I bet you direct.

22 A This is the -- this is the direct stakes exam. Okay. It's
23 talking about how he interviews subjects. Typically, he goes in
24 and just let them tell him what they want to tell him. And it
25 looks like he --

1 Q Does he say that he gives him a polygraph test?

2 A No, it doesn't say he gave him a polygraph test. Not right
3 there anyhow.

4 Q I was trying to see if that was what your objection was
5 there.

6 A The discussion about a polygraph test. I looked at the
7 transcript here this week to prepare for this testimony today
8 and the discussion about the polygraph test. I believe that was
9 my cross of this witness.

10 Q Okay. Okay.

11 A Let me see if I can find it. Here's the cross. The cross
12 starts on Page 341. Okay. And the polygraph discussions on Page
13 343.

14 Q But that's in your cross?

15 A Yes, sir.

16 Q All right. We're not going to go any further.

17 A Okay.

18 Q Okay. Let me grab my tracker.

19 A Yes, sir. Let's just talk briefly about Latoya Carson's
20 testimony.

21 Q I'll bring up Page 220. Look at Page 214, Lines 22 to 25.

22 A Yes, sir. Thank you. Yes, sir. I've got it.

23 Q All right. So you were trying to -- that's actually on
24 your cross-examination, right?

25 A Let me just double-check. Yes, sir. This is during my

1 cross. Yes, sir.

2 Q All right. And so had she testified to something different
3 than what she reported on the police reports?

4 A Oh, boy. Possibly.

5 Q It looks like you're trying to -- it looks like you said
6 there was a prior statement made.

7 A It's entirely possible. I remember I was trying to nail
8 her down on this whole, you know, supposedly there was a call
9 made and this kind of thing.

10 Q So you were trying to assert that she was being, she was
11 providing conflicting testimony or inconsistent testimony?

12 A I think that's right. Yes, sir.

13 Q All right. Let me grab my transcript back.

14 Your Honor, I have no further questions to ask.

15 THE COURT: [Indiscernible].

16 MR. FALK: Yes, sir.

17 THE COURT: MR. Barlow

18 MR. BARLOW: Yes, sir. Thank you, Your Honor.

19 **CROSS EXAMINATION OF WITNESS, AARON MEYER**

20 BY: MR. BARLOW

21 Q Mr. Mayer, I'm going to kind of try to go in line with the
22 allegations.

23 May I approach, Your Honor.

24 THE COURT: Yes, sir. Do you want another transcript?

25 MR. BARLOW: Huh?

1 THE COURT: He can use my transcript. So would that make
2 it quicker?

3 MR. BARLOW: Sure.

4 THE WITNESS: Don't want to take away from your steps,
5 gentlemen.

6 MR. BARLOW: I need my step [indiscernible].

7 THE WITNESS: Thank you.

8 MR. FALK: Effort to make things move.

9 THE WITNESS: Yes, sir. All right. I've got volume one and
10 two here.

11 BY: MR. BARLOW

12 Q Perfect. All right. So we're going to start with volume
13 one. It's Page 287. And this is to the allegation that you
14 failed to preserve the objection to Mary Campbell's testimony.
15 And 387 is Lines 11 through 19. You read through this just a
16 second ago, correct?

17 A Correct. Yes, I did.

18 Q Okay. What can you read, please? Lines 20 through 24.

19 A Out loud or...

20 Q Just to yourself?

21 A Okay. Yes, sir.

22 Q Does that refresh your memory anymore as to what the
23 injection was? I mean, or would you consider that the court is
24 laying out exactly what the objection was?

25 A I don't know if it -- I don't know if Judge Jefferson made

1 | it clear to me now, as I read this here, what the objection had
2 | been. Judge Jefferson is very active from the bench. I don't
3 | know if you've been in front of her, but she's -- she'll put in
4 | her own train of thought, even if that's not what the bench
5 | conference was about, if that makes any sense. So she like,
6 | here in Line 22, she says, And you need to lay the appropriate
7 | foundation. I'm pretty sure my objection was not based on lack
8 | of foundation. My objection -- my objections typically would
9 | have been substantive objections, not procedural ones.

10 | Q I agree, and, back towards indulgence?

11 | A Yes, sir.

12 | Q So let's move on to Number 3. You were ineffective for
13 | properly, or for failing to properly, impeach Latoya Carson's
14 | inconsistent statements. And that's on Page 214.

15 | A Okay. I've got 214 here.

16 | Q And that's going to be Line 22 to 25.

17 | A Yes, sir. I see it.

18 | Q And you are answering these, if you could just skim
19 | through this through Page 216, I believe his allegation is all
20 | the way up to 221.

21 | A Yeah. I'm laying the groundwork to impeach her. That's
22 | right. And then we had another binge conference based on MR.
23 | Simpson's objection, and then the judge is telling me how to
24 | impeach a witness but didn't have prior testimony from her. It
25 | was just this -- it was -- it was just this police report, I

1 think. So I don't know if it even would have been proper for
2 impeachment. I don't know. I hadn't practiced law in a while,
3 so I'm a little rusty on the rules here.

4 Q Okay. Let's move to Number 4. I'm not challenging Ms.
5 Carson's invocation of her Fifth Amendment right, but not
6 having her proper testimony. That's right Page 220, Lines 2 and
7 3.

8 A Yes, sir. I see it.

9 Q So she invoked her Fifth Amendment right. Is it your
10 understanding that you could have proffered her testimony even
11 after she invoked her fifth?

12 A I don't know the answer to that. I still, as I sit here
13 today, I don't know. I'm pretty sure that at the time I would
14 have been under the impression that once someone invokes their
15 Fifth Amendment right, I need to cease that line of
16 questioning.

17 Q Are you familiar with proffer testimony?

18 A Yes.

19 Q And is proper testimony, testimony that is placed into the
20 record a lot of times for appellate review?

21 A That is my understanding.

22 Q Right. So it does go into the record?

23 A I would expect so.

24 Q And would it be appropriate if she's in your opinion,
25 would it be appropriate if she's invoked her Fifth Amendment

1 right to have her testify to something that may terminate her,
2 that would be in the record?

3 A Well, right. And that's the rub, right. So maybe it wasn't
4 -- maybe it wasn't right for her to be able to do that. But
5 that's -- that's certainly what she did. Yeah. I mean, I don't
6 know what I would have found if I'd have been able to dig after
7 it, but...

8 Q Okay. Moving along to Number 5, we've got failure to
9 object to prejudicial hearsay testimony from David Osborne.
10 It's record 237 Lines, 9 to 15. And I think in your direct, you
11 said that you should have investigated her, excuse me, you
12 should have objected there.

13 A I should have objected there.

14 Q Okay. But for that objection would trial, in your opinion,
15 would trial have been different? Is that what caused him to be
16 found guilty?

17 A I really don't know. I really don't know because it's one
18 thing, right, to hear it from a woman who was accused of murder
19 herself to say, well, you know, I think he was on the phone and
20 well, might have been the other hand, you know, there were
21 holes in her -- there were potential holes in her story that I
22 wanted to exploit. And I'm very disappointed with myself. I
23 actually didn't know that I failed to object to that until it
24 was pointed out to me in this petition.

25 But I'm very disappointed in myself for not objecting to it

1 because here now it's coming from like a fairly decorated type
2 officer where the jury is hearing it out of his mouth,
3 thinking, well, this seems legitimate now. So I'm still very
4 disappointed with myself for not objecting to that. I can only
5 speculate, you know, how the jury received it or didn't. You
6 know, I don't know.

7 Q Moving up to Number 6. I'd like you to -- in the
8 amendment, actually, he does not point out the page. Let's see.
9 I know it started -- I can recuperate, it's 451.

10 MR. FALK: I think they're flagged in there?

11 THE WITNESS: Okay. What are we looking for?

12 BY: MR. BARLOW

13 Q If you could go to the flag. It's in the -- it's about
14 451. Okay. And you were on direct. You discussed the
15 fingerprint analysis, and it was not a person who was
16 testifying, correct?

17 A That sounds right. Yes, sir.

18 Q And in your direct from where you were pointed by MR.
19 Paul, you testified that it appeared that she was testifying to
20 someone else's report, correct?

21 A Yes. It seems that Ms. Butler, Kathleen Butler, had done
22 the report and then retired before the trial.

23 Q All right. If you would do me a favor, turn to Page 453.

24 A Yes, sir.

25 Q And I want you to start at Lines 7.

1 A Line 7.

2 Q And go through 454, Line 3.

3 A And if we look at the reports in this case, will we see
4 your signature? No. Whose signature will we see? Well, two of
5 the reports are signed by Kathleen. One of the reports was
6 signed by me. Okay. And one signed by Kathleen. Can you testify
7 today that you looked at the same things she did? Yes, I was
8 the verifier for Kathleen's envelopes that she worked on. And
9 did you do the same? Would you have done the same analysis that
10 she did? Yes. Question, and you came to the same conclusions
11 that she did? Yes. And so you have personal knowledge of the
12 work done in this case? Answer Yes. Do you want me to keep
13 reading?

14 Q Up to Line 3.

15 A And in fact, and you in fact repeated that? Answer, yes, I
16 did.

17 Q So from your reading of that, is it -- would you consider
18 Ms. Kirsty (phonetic) as saying that she actually performed the
19 test herself as well?

20 A I really don't know what that means. I'm not sure I knew
21 what it meant at the time. I mean, at first, you testified that
22 two of the reports were Kathleen's and one of the reports was
23 hers.

24 Q Are you familiar with peer-reviewed work and how it works?

25 A Familiar with the concept where someone does a research

1 trial or something like that and submits it to a group of
2 people, scientists, for instance, who would look over the work
3 that was done and say whether it was done by the appropriate
4 scientific standards and this sort of thing.

5 Q Okay.

6 A Right.

7 Q Let me -- let's move to Number 7 real quick, because it's
8 along the same lines. And that's going to be on Page 5 Let's
9 have you go to 581.

10 A Yes, sir. That would be the next volume, I think, right?

11 Q Correct.

12 A Okay.

13 Q And bring to yourself --

14 A Okay.

15 Q -- lines. Well, first, let me ask you this, on direct you
16 stated that the ballistics analysis that was testified by MR.
17 James Green, you -- it appeared that he was testifying to
18 someone else's work, correct?

19 A Again, just doing a cursory scan of this record here now
20 in court. That's what it seems.

21 Q Okay. Let me -- let me have you do this. Go to Page 580
22 and start at Line 8 and read to yourself through 581 Line 22.

23 A Okay. To Line 22 On what page? I'm sorry.

24 Q The next page.

25 A Okay. All right.

1 MR. FALK: Counselor, could you -- what pages are you on?

2 THE WITNESS: It's --

3 MR. BARLOW: Page 580 to 581.

4 THE WITNESS: That's right. Yeah. Okay.

5 BY: MR. BARLOW

6 Q All right. And from your reading of that, so the first
7 part of it basically tells you how the peer review process
8 works there.

9 A Correct.

10 Q And what does it tell you on Page 581?

11 A It says that they had an internal policy at SLED at the
12 time where before any information was sent out to a community
13 police force that their testing results would be micro verified
14 by one of their colleagues in their department. And the
15 assertion by the witness here, MR. Green, is that he went
16 and micro verified Ken Whittler work regarding the ballistics
17 in this case here? I don't -- he says that whoever verified the
18 work would have put their initials on it, but there's no other
19 talk about his initials being on the report.

20 Q All right. Let me ask you this, though. If you read down
21 through to 16. Read out for us lines on Page 581, Lines 14 to
22 22.

23 A Read out loud?

24 Q Please.

25 A Do you nevertheless have personal knowledge of the results

1 in this case? Was the solicitor's question. Answer, yes, sir. I
2 did the micro verification in this case and also did the
3 technical administrative review of his case file? Do you want
4 me to keep reading?

5 Q Yeah, to 22.

6 A Okay. Question Just to be clear, this is not just you
7 reading someone else's report. You did the same work in this
8 case? Answer, yes.

9 Q Okay. And from that, what would you do -- do you believe
10 that this explains that he did the work, the same work that the
11 other person did?

12 A I would be inclined to believe that were true if there
13 were his initials on the report, because he says earlier,
14 anyone who does this review like I did, puts their initials on
15 it. So if his initials were on it, I would think either he's
16 really fabricating something or he actually did the review. I
17 don't remember offhand if his initials were on it.

18 Q Could you tell me again where it was that you found that
19 his signature was not on there?

20 A I'm not saying I found that. I'm just saying I don't see
21 that it was talked about if his -- if his initials were on
22 there, and Page 581 Lines 5 through 9, he says, oh, whoever
23 does it puts their initials on the -- on the report and was
24 just trying to scan ahead to my cross-examination to see if we
25 had his initials on it. I just don't see where we covered that.

1 Q But it -- but the testimony he had given the question was,
2 he did the same work himself, correct? And he answered, yes.

3 A That's his assertion.

4 Q Okay.

5 A As a defense lawyer, you got to be skeptical about this
6 stuff, that you got to --

7 Q Sure, but he's under oath --

8 A Check and double check.

9 Q -- correct?

10 A He's under oath. Yes, sir.

11 Q Okay. Is there any reason to believe that the witness was
12 telling a lie?

13 A Only if there's not initial on that report. But no, not
14 other than that.

15 Q And there were some discussions about the jailhouse calls.
16 Let me ask you about that real quick.

17 A Yes, sir.

18 Q You said, I believe in your directness, jailhouse calls
19 were the calls that that that really tipped the point of this
20 case, correct?

21 A That was -- that was my perception of it, yes, sir. As
22 trial Counsel.

23 Q And do you recall the tapes that were played at trial, if
24 they were the applicant MR. Hayward's voice.

25 A I would be reluctant to try and identify that the

1 recordings are very low quality. And just in my short time
2 doing criminal law in Charleston County, I can tell you there's
3 a disproportionate number of people at the detention center
4 here with the same sort of accent, voice inflection, intonation
5 as Mr. Heyward. And it's a -- it's like a low country effect,
6 and the voice that almost takes the ear a while to tune into
7 the person on the recording had the same sort of inflection and
8 accent. You know, I don't I don't feel comfortable saying 100
9 percent it was him or, or the other way either, you know.

10 Q Are you familiar with the jailhouse calls and how they
11 work?

12 A Generally speaking.

13 Q Are they informed at the beginning of a jailhouse call
14 that the tape that is being recorded?

15 A I don't recall.

16 Q You don't recall?

17 Your Honor, no further questions. Mr. Falk?

18 MR. FALK: Just on redirect. Just to clarify.

19 **REDIRECT EXAMINATION OF WITNESS, AARON MEYER**

20 BY: MR. FALK

21 Q So there was testimony about a report that was conducted
22 that was prepared by Kathleen Butler; is that right?

23 A Kathleen --

24 Q She was the one --

25 A Being the woman who did the fingerprint work. Yes, sir.

1 Q Did you have an opportunity to cross-examine her on the
2 stand about the methodology she vowed?

3 A No, sir.

4 Q And there was a report -- there was testimony on a report
5 by Ken Whittler; is that correct? He's the ballistics guy.

6 A Yes, sir.

7 Q Did you have an opportunity to cross-examine MR.
8 Whittler about the methodology he vowed?

9 A I did not.

10 MR. FALK: No further questions

11 THE COURT: MR. Barlow?

12 MR. BARLOW: Back towards indulgence, Your Honor.

13 THE COURT: Yes, sir.

14 MR. BARLOW: Nothing further, Your Honor.

15 THE COURT: You may step down, sir.

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: May he be excused.

18 MR. FALK: It's fine by me.

19 MR. BARLOW: I'm -- yes, sir.

20 THE COURT: Have a good day, sir.

21 THE WITNESS: Thank you, Judge.

22 THE COURT: Thank you.

23 [WITNESS, excused]

24 MR. Falk?

25 MR. FALK: We have no further witnesses.

1 THE COURT: Mr. Barlow?

2 MR. BARLOW: Back towards indulgence. Your Honor, nothing
3 from the state.

4 THE COURT: Okay.

5 MR. BARLOW: No further witnesses.

6 THE COURT: All right.

7 MR. FALK: Your Honor, can I just make a summary of
8 comments?

9 THE COURT: Yes, sir.

10 Your Honor, if you will look at the McRae case, you'll find a
11 fact pattern very similar to what happened in this case, where
12 it was about DNA testimony. And the person who conducted the
13 DNA analysis was not present for whatever reason. And there was
14 lots of testimony about the peer review process that SLED
15 follows. And trial Counsel in that case ultimately objected to
16 the testimony based on confrontation clause issues. And if you
17 look at the appeal on that case, THE COURT of Appeals agreed
18 that the testimony -- that, you know, that testimony should
19 have been inadmissible because of a Sixth Amendment violation.
20 The conviction wasn't overturned because there was a lot of
21 other evidence in that case. But, you know, so factually,
22 that's the only factual difference between the McRae case, the
23 fact pattern there in this case, because as we heard testimony,
24 there was no eyewitness, there was no DNA. And I think it's the
25 South Carolina's the Stokes case, there's as a PCR case where

1 | they talk about, you know, you can't always say there was
2 | always overwhelming evidence of guilt.
3 | This is the exact kind of case where it was a lot of
4 | circumstantial testimony. And this is the type of case where
5 | the admission of the forensic testimony was highly prejudicial.
6 | And the state, I would think, would agree that the testimony
7 | was pretty, I mean, certainly hurt MR. Valentino's case.
8 | Otherwise, they wouldn't have talked so much about it in the
9 | closing argument. But this is the same fact pattern as far as
10 | the peer review SLED'S process.

11 | THE COURT: Yes, sir.

12 | MR. BARLOW: And Your Honor, briefly, I would disagree
13 | with MR. Falk in terms of the McRae case. If you look at
14 | that case, Your Honor, it was an expert who testified to
15 | another expert's report that had never conducted the testing,
16 | that it was -- they were not part of the testing. They were not
17 | -- they did nothing other than read from the report.
18 | Your Honor, I submit to THE COURT, if you read the transcript
19 | in the areas that I pointed you, the peer review process has
20 | gone through very, very thoroughly in this transcript. Some
21 | places that did not point out, but the argument, I mean excuse
22 | me, the transcript, at least I submit to this court imparts on
23 | me that the people who the two that testified at that hearing
24 | actually did the testing themselves as well. And I believe that
25 | they are permitted to testify to stuff that they actually

1 tested. And I would say that it is not, it does not fall in
2 line with McRae. McRae does not apply to this case. And I would
3 just ask, Your Honor, to review that record as pointed out, and
4 the McRae case.

5 MR. FALK: Just one last thing.

6 THE COURT: Yes, sir.

7 MR. FALK: The state's argument doesn't make a little bit
8 of sense because if the other person had conducted the report,
9 why didn't Mr. Greene? Why didn't they just use Mr. Greene to,
10 you know, if he conducted all the examinations, if he actually
11 did the reports, why didn't he testify to it? Why was he even
12 mentioned about the other guy in the same with the fingerprint
13 person, if they really did all the work and did the reports?
14 Why didn't the reports come in? Why didn't they use their
15 reports? And I can tell you, you know, the one thing you're not
16 going to get from the opinion in McRae, but could hand you the
17 transcript from McRae that there were several pages of the same
18 kind of testimony about this peer review process that they
19 follow.

20 THE COURT: Could you forward to me those particular
21 pages?

22 MR. FALK: Yeah.

23 THE COURT: [Indiscernible].

24 MR. BARLOW: Your Honor. Briefly, just respond to that,
25 just real quick. The peer review process, it is my

1 understanding at SLED, is that two individuals perform the same
2 exact test. Those tests are then submitted for review and
3 neither finding is -- is disclosed to the other person. And
4 then if those two are the same, then that is when the report is
5 issued. So, if one is doing it or the other is doing it, and
6 they are the same thing and that's the report, the final report
7 issued, then you would only need the testimony of one person
8 because they both conducted the exact same testing.

9 MR. FALK: I don't think that's factually what was going
10 on here. And I mean, you could look at both coming. You could
11 look at the Menendez case. They're all similar cases where one
12 expert does the testimony. The other expert testifies about
13 what that person said.

14 THE COURT: Okay. Did they assume.

15 MR. FALK: I mean, we're just going to keep -- Your Honor,
16 I've got the transcript from McCrae. I mean, that's my case.

17 THE COURT: Okay. If you will just show me those -- those
18 pages you mentioned, though.

19 MR. BARLOW: I already have it.

20 THE COURT: Folks --

21 MR. FALK: You have the transcript page.

22 MR. BARLOW: No, no. I have the -- I have the -- the
23 record.

24 THE COURT: Okay. You know, I'm going to tell you I'm
25 going to take this under consideration. I've got to. I've got

1 to. I want to dig into the -- those cases much deeper than I
2 can here today. So bear with me I will get back to you soon.

3 MR. FALK: Thank you, Your Honor.

4 MR. BARLOW: Thank you.

5 THE COURT: Thank you all for your patience.

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1 CERTIFICATE OF TRANSCRIBER

2 I, ERIN REILY, a court-approved transcriber, do hereby certify
3 that the foregoing is a true, accurate and complete Transcript
4 of Record of the proceedings had and evidence introduced in the
5 trial of the captioned case, relative to appeal, in the South
6 Carolina Circuit Court 9, Charleston County, South Carolina,
7 on the 10th day of February, 2023.

8

9 I do further certify that I am neither of kin, counsel, nor
10 interest to any party hereto.

11

October 3rd, 2023

12

ERIN REILLY

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
VALENTINO M. HAYWARD, #366107,	)	
	)	Case No.: 2019-CP-10-2108
Applicant,	)	
	)	
vs.	)	ORDER GRANTING
	)	POST-CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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JULIE J. ARMS, ESQUIRE
CLERK OF COURT

FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed on April 23, 2019. Respondent filed a return on October 31, 2019. This Court convened an evidentiary hearing in this matter on February 10, 2023. Applicant, Valentino M. Hayward (Hayward), was present at the hearing with his attorney of record, James K. Falk, Esquire, and the State of South Carolina was represented by Russell Barlow, Esquire, of the South Carolina Attorney General's Office.

Aaron C. Mayer, Esquire, (hereinafter referred to as "trial counsel") was present and testified. Hayward did not testify. This Court considered the testimony and evidence presented at the evidentiary hearing, the trial transcript, the records of the Charleston County Clerk of Court regarding the conviction, the direct appeal records, Hayward's SC Department of Corrections records, and the pleadings herein.

I. PROCEDURAL HISTORY

In May 2014, the Charleston County Grand Jury indicted Hayward for Murder (2014-GS-10-3322). On November 9, 2015, Hayward proceeded to trial by jury before the Honorable Deadra L. Jefferson. He retained the services of trial counsel to represent him on the underlying charge. The State was represented by Assistant Solicitors Chad Simpson and Lauren Mulkey. The jury



found Hayward guilty as indicted. Judge Jefferson sentenced him to thirty-eight (38) years of imprisonment. Hayward is currently incarcerated in the South Carolina Department of Corrections.

Mr. Hayward filed a timely notice of appeal and was represented by Susan B. Hackett, Esquire, of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Hayward's conviction on March 20, 2019. State v. Hayward, Op. No. 2019-UP-12 (S. C. Ct. App. Filed March 20, 2019). The remittitur was returned to the circuit court on April 5, 2019.

On April 23, 2019, Hayward filed his initial Application for Post Conviction Relief. On October 31, 2019, the State filed its Return and Motion for More Definite Statement. On March 4, 2022, Hayward filed an amended post-conviction relief application.

II. ALLEGATIONS

In his initial application, Hayward alleged that he is being held in custody unlawfully based on ineffective assistance of trial counsel. In his amended application, he alleged multiple allegations of ineffective assistance of counsel to include the following reasons:

1. Trial counsel made the following objections to but failed to preserve the record thereby making appellate review of the Court's decisions impossible.
 - a. Trial counsel submitted proposed voir dire questions that the trial court did not use. The record reflects that trial counsel objected to the court's refusal to ask his proposed voir dire questions, 20, 23, 24, 26, and 28. However, by failing to submit his proposed voir dire as an exhibit, the trial court's decision was not preserved for review. (Record page 34)
 - b. Once the jury was empaneled, there was a bench conference (Record page 51). Other than the notation in the record, there is no record of the issues addressed at the bench conference. Trial counsel should have challenged the State's preemptory strikes pursuant to *Batson v Kentucky*. If trial counsel raised the *Batson* issue during the bench conference he provided ineffective assistance of counsel by not ensuring that the record was preserved. If trial counsel did not make a *Batson* challenge during this bench conference, his failure to do so would amount to ineffective assistance of counsel.

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- c. Counsel failed to preserve his objection to Marian Campbell's testimony. (Record page 287 lines 11-19).
 - d. Counsel failed to preserve his objection to Richard Holmes's testimony, (record page 334 lines 24-25)).
 - e. Counsel abandoned his response to the State's objection to counsel's question to Richard Holmes regarding a polygraph test. (Record page 343 lines 11 -25)
2. Trial counsel failed to object to the state's leading questions during its direct examination of Latoya Carson (Record page 206 line 5 through 210 line 5)
 3. Trial counsel was ineffective in failing to properly impeach Laytoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (Record p. 214 line 22 – 25; page 215 line 5-11; page 221 lines 18-20).
 4. Trial counsel was ineffective in not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (Record page 220 line 2-3).
 5. Trial counsel failed to object to prejudicial hearsay testimony from David Osborne. (Record 237 lines 9-15).
 6. Trial counsel was ineffective in failing to object to allowing Nada Kerstein testify to the results of a fingerprint analysis performed by Kathleen Butler. (See *State v. McCrav*. 413 S.C. 76; *Melendez-Diaz v. Massachusetts*. 557 U.S. 305 (2009); *Bullcoming v. New Mexico*. 131 S.Ct. 2705 (2011); *United States v. Palacios*. 677 F.3d 234 (4th Cir. 2012).
 7. Trial counsel was ineffective in failing to object to allowing James W Green testify to the results of a fire arms/ ballistics analysis performed by Ken Whittler. (See *State v. McCrav*. 413 S.C. 76; *Melendez-Diaz v. Massachusetts*. 557 U.S. 305 (2009); *Bullcoming v. New Mexico*. 131 S.Ct. 2705 (2011); *United States v. Palacios*. 677 F.3d 234 (4th Cir. 2012).
 8. Trial counsel provided ineffective assistance of counsel by failing to move to suppress the results of the "digital dump" of Applicant's cell phone records including the introduction of State's exhibits 32 and 33.

At the evidentiary hearing, Hayward proceeded with the allegations 1(c), 1(d), 3, 4, 5, 6, and 7. Hayward abandoned all other allegations. Based on the testimony at the hearing, the Court



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allowed the application to be amended to also allege that counsel was ineffective for failing to review the jail tapes provided by the State in discovery.

III. RELEVANT TESTIMONY

Mr. Mayer's Testimony

Hayward's trial counsel, Aaron Mayer, testified that he graduated from law school in 2009. He worked at a firm in Florida for a couple of years doing class action cases. He then moved to Charleston and started practicing criminal law around 2012. Hayward was arrested in December 2013. Trial counsel was retained to represent Hayward in February 2014. Trial counsel testified the case was all about the identity of the shooter. Trial counsel testified that the worse evidence against Hayward was recorded phone calls purported made by Hayward while he was incarcerated pretrial. Trial counsel testified that he received copies of the recorded calls as part of the discovery, but he did not fully review all of the information. He stated he spot checked the disks that contained the jail calls, but had not listened to them all because it was very burdensome. He testified that had he known what was on the jail tapes given to him, he would have handled the case differently, including talking with the solicitor about some sort of plea deal. He testified that he never discussed any plea offers with the solicitor.

Trial counsel testified that witness, Nada Kerstein, was offered by the State as an expert in fingerprint analysis. During trial, Kerstein testified from the report of another expert witness who had retired and was not presented by the State. Kerstein did not actually perform the fingerprint analysis she was testifying about. Trial counsel testified that he did not object to Kerstein's testimony. He testified that he did not "remember what my thought process was, or if I was just too in the weeds trying to think about other things." Trial counsel explained that Kerstein testified on direct examination that she verified the work of the expert who performed the original analysis,

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that she did the same analysis and came to the same conclusions as the expert who performed the original analysis. Trial counsel further testified that he was not sure he knew what that meant at the time, but he was familiar with the concept of peer-reviewed work.

Trial counsel testified that witness James Green was offered by the State as a firearm or ballistic expert. Green offered testimony from the report of another expert and did not actually conduct the firearm analysis himself. The expert who performed the analysis and generated the report had retired and did not testify. Trial counsel testified that he did not object to Green's testimony from the report of another expert. During his testimony, trial counsel read positions of expert Green's testimony from the trial.

Trial counsel explained that Latoya Carson testified for the State. Carson had a pending murder charge unrelated to this case. She was also a possible suspect in the murder for which Hayward was being tried. Counsel testified that he attempted to impeach Carson with her prior inconsistent statements and nail her down on her story. While he was attempting to impeach Carson, the State objected and, after a bench conference, the judge told counsel how to impeach a witness. He testified that he had not practiced law in a while and was a little rusty on the rules.

During cross-examination, Carson invoked her Fifth Amendment rights when trial counsel questioned about her pending unrelated murder charge. Trial counsel testified that he did not request to proffer her testimony after she invoked her rights. He was not aware then and he was still unclear now whether he could proffer testimony once a witness invoked their Fifth Amendment rights in order to preserve the issue for appellate review.

Trial counsel testified that he did not object to prejudicial hearsay testimony from witness David Osborne although he should have. He testified that his failure to object probably gave a lot

more credibility to witness Carson. Trial counsel testified that he objected during the testimony of Marian Campbell during the trial.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed the testimony accordingly. This Court has reviewed the records submitted by the parties and the legal arguments made by the attorneys. Pursuant to § 17-27-80 of the South Carolina Code, this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

In a PCR action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, the applicant must prove that counsel’s performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”



Id. (citing *Strickland*, 466 U.S. at 690). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel’s deficient performance must have prejudiced applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).



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Ineffective Assistance of Trial Counsel

Failure to Review Discovery

During the evidentiary hearing, trial counsel testified that he did not thoroughly review the discovery materials provided by the State. Hayward amended his application to allege that counsel was ineffective for failing to review the recorded phone calls purportedly made by Hayward while he was incarcerated pretrial, which were provided as part of the discovery. Counsel testified that “the worst evidence against our side was the jail tapes in my - - in my opinion.” (PCR Tr. Pg 7, Line 22-23). Counsel only did a quick review of the discovery materials, including the jail tapes. He explained, “I probably tried to spot check them. I was a one-man band, if you will. Judge I was - - I didn’t have co-counsel doing the trial trying to run a law practice at the same time and had probably too many irons in the fire.” (PCR Tr. Pg 9, Lines 1-4). Counsel stated that the amount of information and the amount of time needed to review that information was very burdensome so he only spot checked the materials. The State used one of the recorded calls during its case to show that someone was purportedly asking a person outside of the jail to eliminate a witness. The State alleged that Hayward was caller. Counsel testified that the admission of the recorded call was a turning point for the defense and that he would have handled the case differently if he had thoroughly reviewed the discovery and knew this damning evidence existed. He explained, “. . . if I had damning information that I felt like we couldn’t get past, I would have gone to Mr. Simpson [the solicitor] and talked about some sort of plea deal, which we never did as far as I recall, there was no appreciable effort to have both sides have a meeting of the minds and try and find some resolution without a trial.” (PCR Tr. Pg 11, Lines 23-25; Pg 12, Lines 1-3).

This Court finds Counsel’s testimony on this issue credible. Counsel was deficient for failing to thoroughly review the discovery, specifically the recorded jail calls, and counsel’s

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deficient performance prejudiced Hayward. The recorded conversation published to the jury was evidence of consciousness of guilt and highly incriminating. *See State v. White*, 437 S.C. 490, 879 S.E.2d 21 (Ct. App. 2022). Trial counsel testified that had he known about the existence of this recorded conversation, he would have advised Hayward to plead guilty and attempted to secure a favorable plea offer from the State. Therefore, Hayward is granted post-conviction relief based on this allegation.

Failure to Preserve the Record

Hayward claims that Counsel was ineffective for failing to preserve the record for appellate review regarding objections made during the trial. During the direct examination by the State of Marian Campbell, trial counsel objected to a question about a text message exchange between the witness and Hayward. Trial counsel requested a bench conference and upon returning to the record, the Court overruled the objection. Trial counsel failed to place on the record what was discussed or argued during the bench conference or request the objection be placed on the record outside of the hearing of the jury. The exchange at trial was:

MR. MAYER: Judge, objection.

THE COURT: Basis?

MR. MAYER: May we approach?

(Bench conference was had; following proceedings were had in open court)

THE COURT: The objection is overruled. It is relevant, probative. In addition to that, it is an admission against interest. And you need to lay the appropriate foundation to this line of questioning as to time and place. You may proceed.

MS. MULKY: Thank you, Your Honor.

(Trial Tr Pg 287, Lines 15-25).



This Court finds counsel deficient for failing to place his objection on the record. An objection made during an off-the-record bench conference which is not made part of the record does not preserve the objection for appellate review. *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). Trial counsel must put the objection on the record after a bench conference or in chambers discussion and he failed to do so here.

This Court finds trial counsel's deficient performance prejudiced Hayward. If counsel had properly placed his objection on the record, there is a reasonable probability appellate counsel would have raised the issue on direct appeal and the appellate court would have held the trial judge abused his discretion by admitting the evidence. Campbell was permitted to testify over objection that on the day of the shooting Hayward texted her and stated "he was talking to somebody about" robbing another person. This evidence was not relevant and was inadmissible hearsay. See Rule 401, SCRE, and Rule 802, SCRE. The error in its admission was not harmless because the testimony was in direct contradiction to the defense. This Court cannot say beyond a reasonable doubt that its erroneous admission did not contribute to the verdict. Accordingly, Hayward established that trial counsel's performance was deficient and prejudicial. Therefore, the relief based on this allegation is granted.

Failure to Impeach Carson's Prior Inconsistent Statements

Hayward claims trial counsel was ineffective for failing to properly impeach Latoya Carson with her prior inconsistent statements as allowed pursuant to Rule 613, SCRE. During direct examination, Carson provided a different description of the person who approached the car than she had provided in a prior statement to the police. On cross examination, trial counsel attempted to question Carson about the inconsistent statements she made to the police. However, when Carson denied the inconsistent statement, trial counsel failed to use her previous statements to

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impeach her as permitted pursuant to Rule 613, SCRE. Trial counsel's questioning appeared to be leading to impeachment, but the assistant solicitor objected. After a bench conference, the objection was withdrawn, but counsel abandoned the line of questioning and never impeached Carson with the inconsistent statement. The following exchange took place at trial:

MR. MAYER: Do you recall telling the police that the person who walked up to the car had on a short-sleeved shirt?

LATOYA CARSON: No.

Q: You told the police it was a dark shirt, but you said it was short sleeved. You don't recall doing that?

A: No.

Q: And you told police that whoever walked up put their left hand on the car; do you recall doing that?

A: I don't know exactly if I said which hand it was. I just know that he walked up on the passenger side and touched the car, like, and leaned in.

Q: Okay. But the police took your statement shortly after this happened?

A: Yeah.

Q: When your memory was a lot fresher?

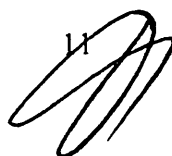
A: Yeah. My memory was fresher, but I had a lot of thoughts going through my head.

Q: But if you had said at the time it was a left hand, there wouldn't be any reason to think that was wrong?

MR. SIMPSON: May we approach?

(Bench conference was had; following proceedings were held in open court.)

THE COURT: Objection is withdrawn, you may proceed. And before you can impeach the witness, you need to ask the exact question and give her the opportunity to admit or deny the statement to establish that it is inconsistent.



(Trial Tr. Pg. 214, Lines 22-15; Pg. 215, Lines 1-25, Pg. 216, Lines 1-4).

Trial counsel admitted that the judge told him how to properly impeach the witness, that he did not know how to impeach the witness at the time, and that he was a little rusty on the rules. Based on counsel's testimony, he believed he could only impeach the witness if the witness had given prior *testimony*. However, Rule 613, SCRE, does not require that the prior statement be actual sworn testimony in order for it to be used for impeachment purposes. Counsel was aware Carson had given a previous recorded statement to the police because it was his last question to the witness, but he failed to properly use it to impeach her.

This Court finds Counsel's testimony on this issue credible. Counsel's knowledge of the Rules of Evidence was not within the range of competence for a criminal defense attorney and rendered his performance deficient. Counsel's deficient performance prejudiced Hayward because Carson's credibility was crucial to the state's case against Hayward and counsel failed to properly impeach her credibility in front of the jury. If the jury had learned Carson provided inconsistent testimony, there is a reasonable probability the outcome of Hayward's trial would have been different. Accordingly, Hayward satisfied his burden to prove ineffective assistance of counsel regarding this allegation and relief is granted.

Challenging Carson's Invocation of Fifth Amendment

Hayward contends that trial counsel was ineffective for failing to challenge Latoya Carson's invocation of her Fifth Amendment right and by not proffering her testimony. Trial counsel testified that as he questioned the witness, she invoked her Fifth Amendment right and he believed he could not go into any additional information about her unrelated case. He testified that he was familiar with proffering testimony and that a proffer would have put the testimony on the record for appellate review. Trial counsel testified that he did not know he could proffer



Carson's testimony after she invoked the Fifth Amendment. Although he was familiar with the concept of a proffer, trial counsel was not aware of how to proffer and preserve the testimony.

This Court finds counsel's performance was deficient. Trial counsel should have requested to proffer Carson's testimony and allowed the trial court to determine on a question by question basis whether Carson could assert the privilege. *See State v. Lawrence*, 439 S.C. 611, 889 S.E.2d 557 (2023). Hayward was prejudiced by trial counsel's deficient performance because Carson was a crucial witness for the state and her excluded testimony could have negatively impacted her credibility. Additionally, Carson's testimony was not proffered for the trial court to consider whether she could assert the Fifth Amendment or for the appellate court to review for error. Accordingly, this Court finds Hayward satisfied his burden to prove ineffective assistance of counsel regarding this allegation and relief is granted.

Hearsay Testimony of David Osborne

Hayward claims that trial counsel was ineffective for failing to object to prejudicial hearsay testimony from David Osborne. This Court agrees. Osborne was a former law enforcement officer who later attended law school and ultimately became a prosecutor with the Charleston County Solicitor's Office. At the time of the decedent's death, Osborne was a "detective sergeant" in charge of the homicide unit at the Charleston Police Department. During trial, Osborne testified to a phone conversation that the decedent allegedly had shortly before his death. Specifically, Osborne testified that Latoya Carson told law enforcement the decedent was talking on the phone just prior to his death. "The person he [the decedent] was speaking to was directing him, giving him turn-by-turn directions to a location [where] he would end up being shot and killed." Tr. 237, ll. 3-15.



This Court finds Osborne's testimony was inadmissible hearsay pursuant to Rule 802, SCRE, and trial counsel was deficient for failing to object. The State sought to admit Osborne's testimony for the truth of the matter asserted. More specifically, it was used by the state to show a person spoke to the decedent shortly before his death and gave him directions to a location where he was ultimately shot and killed. Accordingly, if counsel had properly objected, there is a reasonable probability the trial judge would have sustained the objection and excluded the inadmissible hearsay testimony.

This Court further finds Hayward was prejudiced by counsel's deficient performance. Trial counsel admitted Osborne's testimony bolstered and vouched for Carson's credibility. Osborne's testimony was also used by the State to establish Hayward's involvement in the murder as the state later alleged Hayward was the person on the other line giving the decedent directions. Consequently, this Court finds Hayward satisfied his burden to prove ineffective assistance of counsel regarding this allegation and relief is granted.

Expert Bootstrapping

Hayward claimed trial counsel was ineffective for failing to object to Nada Kerstein's testimony on the results of a fingerprint analysis performed by another expert and to James Green's testimony on the ballistic analysis performed by another expert. Nada Kerstein was a latent prints examiner employed with the City of Charleston Police Department. The latent prints examiner who performed analysis in Hayward's case retired prior to trial. The State presented Kerstein as a witness to get the results of the retired examiner into evidence. While trial counsel asked Kerstein questions in the form of voir dire to challenge her education, training and experience, he failed to objection to her qualification and her testimony regarding the results.



James Green was qualified without objection as an expert in firearms identification. Green testified that Kenneth Whitler, another firearms examiner at the South Carolina Law Enforcement Division, initially analyzed the ballistic evidence in this case and Green merely verified Whitler's conclusions. Green testified was the results of the analysis from Whitler's report. Trial counsel testified did not object. Counsel testified at the evidentiary hearing as follows:

Q: Did you consider objecting to that testimony?

A: It certainly seems objectionable. Don't remember what my thought process was, or if I was just too in the weeds trying to think about other things. But it certainly seems objectionable.

Q: Are you familiar with the case law that says, in effect, that you cannot - - one expert can't bootstrap another expert's testimony?

A: Generally, I'm familiar with the concept. I don't know if I could cite case.

(Tr. Page 14, Lines 1-10)

This Court finds trial counsel was deficient for failing to object to Kerstein and Green's testimony. If counsel had properly objected to the admission of their testimony based on the Confrontation Clause, there is a reasonable probability the trial court would have sustained the objection. If an expert did not offer any independent opinions regarding the results of the testing or produce an original product that could be tested through cross-examination, then that expert is merely serving as a conduit to introduce the results of another expert who did not testify. *State v. Brewer*, 438 S.C. 37, 882 S.E.2d 156 (2022); *State v. McCray*, 413 S.C. 76; *United States v. Palacios*, 677 F.3d 234 (4th Cir. 2012). Hayward should have had an opportunity to cross-examine the expert who performed the original testing. Hayward established that trial counsel's performance was deficient and that he was prejudiced by this defect because it violated his rights under the Confrontation Clause.

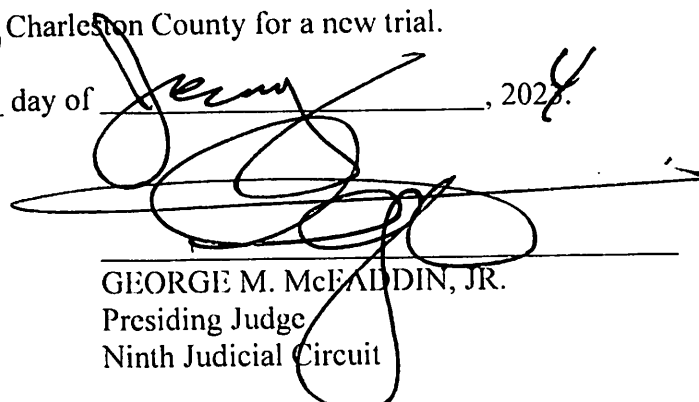
V. CONCLUSION

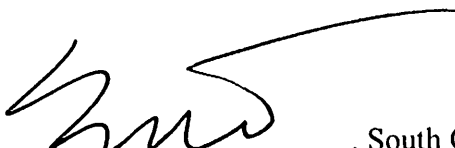
After careful consideration and based on all the foregoing, this Court finds that trial counsel rendered ineffective assistance of counsel and that Hayward was prejudiced by counsel's deficient performance. Therefore, this Court grants Hayward post-conviction relief and vacates his conviction and sentence. This case is remanded for a new trial.

IT IS THEREFORE ORDERED, that:

1. The application for post-conviction relief is granted on the basis of ineffective assistance of counsel;
2. The conviction herein is vacated; and
3. The Applicant be transported back to Charleston County for a new trial.

AND IT IS SO ORDERED this 22 day of January, 2028.


 GEORGE M. McEADDIN, JR.
 Presiding Judge
 Ninth Judicial Circuit


 _____, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Valentino M. Hayward, #366107,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT

) CASE NO. 2019-CP-10-2108

**RESPONDENT'S MOTION TO
RECONSIDER, ALTER, OR AMEND
PURSUANT TO RULE 59(e), SCRPC**

The matter before this Court is an action for post-conviction relief (PCR) application filed on April 23, 2019, by Valentino M. Hayward (Applicant). Respondent, the State of South Carolina, made its Return, dated October 28, 2019, requesting an evidentiary hearing. An evidentiary hearing was convened at the Charleston County Courthouse on February 10, 2023, before the Honorable George M. McFaddin, Jr. Applicant was present and represented by James K. Falk, Esquire (PCR Counsel). Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant presented the testimony of Aaron C. Mayer (Trial Counsel). Applicant did not testify.

This Court granted relief by filed order on January 10, 2024¹, finding Applicant established the following:

1. "Trial Counsel was deficient for failing to thoroughly review the discovery, specifically the recorded jail calls, and counsel's deficient performance prejudiced Hayward. The recorded conversation published to the jury was evidence of consciousness of guilt and highly incriminating."
2. "Trial Counsel was deficient for failing to preserve the objection to Campbell's testimony. "If [Trial Counsel] had properly placed his objection on the record, there is a reasonable probability

¹ Respondent received notice of filing of the Order Granting Post-Conviction Relief on January 12, 2024.

appellate counsel would have raised the issue on direct appeal and the appellate court would have held the trial judge abused his discretion by admitting the evidence."

3. "[Trial] Counsel's knowledge of the Rules of Evidence was not within the range of competence for a criminal defense attorney and rendered his performance deficient. [Trial] Counsel's deficient performance prejudiced Hayward because Carson's credibility was crucial to the state's case against Hayward and counsel failed to properly impeach her credibility in front of the jury. If the jury had learned Carson provided inconsistent testimony, there is a reasonable probability the outcome of Hayward's trial would have been different."
4. "This Court finds [Trial Counsel's] performance was deficient. Trial Counsel should have requested to proffer Carson's testimony and allowed the trial court to determine on a question by question basis whether Carson could assert the privilege. See State v. Lawrence, 439 S.C. 611, 889 S.E.2d 557 (2023). Hayward was prejudiced by trial counsel's deficient performance because Carson was a crucial witness for the state and her excluded testimony could have negatively impacted her credibility. Additionally, Carson's testimony was not proffered for the trial court to consider whether she could assert the Fifth Amendment or for the appellate court to review for error."
5. "Trial Counsel was deficient for not objecting to Osborne's inadmissible hearsay pursuant to Rule 802, SCRE. "This Court further finds [Applicant] was prejudiced by counsel's deficient performance. Trial Counsel admitted Osborne's testimony bolstered and vouched for Carson's credibility. Osborne's testimony was also used by the State to establish Hayward's involvement in the murder as the state later alleged Hayward was the person on the other line giving the decedent directions."
6. "This Court finds Trial Counsel was deficient for failing to object to Kerstein and Green's testimony. If [Trial Counsel] had properly objected to the admission of their testimony based on the Confrontation Clause, there is a reasonable probability the trial court would have sustained the objection. [Applicant] established that Trial Counsel's performance was deficient and that he was prejudiced by this defect because it violated his rights under the Confrontation Clause."

(Order Granting PCR Relief pp. 8-15).

Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRCP, would respectfully show the Court:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. In May 2014, the Charleston County Grand Jury indicted Applicant for murder (2014-GS-10-3322). Aaron C. Mayer,² represented Applicant. Ninth Circuit Assistant Solicitors Chad Simpson and Lauren Mulkey prosecuted the case.

On November 9, 2015, Applicant proceeded to trial before the Honorable Deadra L. Jefferson. The jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to thirty-eight years imprisonment for murder.

Applicant filed a timely notice of appeal. On May 5, 2017, Appellate Defender Susan B. Hackett, of the Office of Appellate Defense, perfected the appeal by filing an Anders³ brief. By order dated April 9, 2018, the Court of Appeals directed the parties to brief the issue of admissibility of the two photographs from Applicant's cell phone. The South Carolina Court of Appeals affirmed Applicant's conviction on March 20, 2019. State v. Hayward, Op. No. 2019-UP-I 12 (Ct. App. filed March 20, 2019). The Remittitur was returned to the circuit court on April 5, 2019.

CURRENT ACTION BEFORE THIS COURT

In his initial PCR application, Applicant alleged he is being held in custody unlawfully based on the following:

1. Ineffective Assistance of Counsel

² Mr. Mayer is currently suspended from the practice of law in South Carolina. See In Re Aaron Cole Mayer, Sup. Ct. Order 2018-08-24-01 (Decided August 24, 2018).

³ Anders v. California, 386 U.S. 738 (1967)

On March 4, 2022, Applicant filed an amended PCR application with the following allegations:

1. Trial counsel made the following objections to but failed to preserve the record thereby making appellate review of the Court's decisions impossible.
 - a. Trial counsel submitted proposed voir dire questions that the trial court did not use. The record reflects that trial counsel objected to the court's refusal to ask his proposed voir dire questions, 20, 23, 24, 26, and 28. However, by failing to submit his proposed voir dire as an exhibit, the trial court's decision was not preserved for review. (Record page 34)
 - b. Once the jury was empaneled, there was a bench conference (Record page 51). Other than the notation in the record, there is no record of the issues addressed at the bench conference. Trial counsel should have challenged the State's preemptory strikes pursuant to Batson v Kentucky. If trial counsel raised the Batson issue during the bench conference he provided ineffective assistance of counsel by not ensuring that the record was preserved. If trial counsel did not make a Batson challenge during this bench conference, his failure to do so would amount to ineffective assistance of counsel.
 - c. Counsel failed to preserve his objection to Marian Campbell's testimony. (Record page 287 lines 11-19).
 - d. Counsel failed to preserve his objection to Richard Holmes's testimony, (record page 334 lines 24-25)).
 - e. Counsel abandoned his response to the State's objection to counsel's question to Richard Holmes regarding a polygraph test. (Record page 343 lines 11-25)
2. Trial counsel failed to object to the state's leading questions during its direct examination of Latoya Carson (Record page 206 line 5 through 210 line 5)
3. Trial counsel was ineffective in failing to properly impeach Laytoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (Record p. 214 line 22 - 25; page 215 line 5-11; page 221 lines 18-20).
4. Trial counsel was ineffective in not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (Record page 220 line 2-3).
5. Trial counsel failed to object to prejudicial hearsay testimony from David Osborne. (Record 237 lines 9 -15).
6. Trial counsel was ineffective in failing to object to allowing Nada Kerstein testify to the results of a fingerprint analysis performed by Kathleen Butler. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).

7. Trial counsel was ineffective in failing to object to allowing James W Green testify to the results of a fire arms/ ballistics analysis performed by Ken Whittier. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).
8. Trial counsel provided ineffective assistance of counsel by failing to move to suppress the results of the "digital dump" of Applicant's cell phone records including the introduction of State's exhibits 32 and 33.

An evidentiary hearing was held on February 10, 2023, before the Honorable George M. McFaddin, Jr. Applicant was present and represented by James K. Falk, Esquire (PCR Counsel). Assistant Attorney General D. Russell Barlow, II, represented Respondent. At the outset of the hearing, PCR Counsel indicated that Applicant was abandoning allegations 1(a), 1(b), 1(e), 2, and 8. Testimony was only provided by Trial Counsel at the hearing. During Trial Counsel's testimony, PCR Counsel moved to amend and add the allegation that the Trial Counsel was ineffective for failing to review all of the jailhouse calls. At the close of the evidentiary hearing, this Court took the matter under advisement.

By written order filed January 10, 2024, this Court granted the post-conviction relief and remanded the matter to the Charleston County Court of General Sessions for a new trial, finding Trial Counsel ineffective and Applicant prejudiced by Trial Counsel's deficiencies in every allegation. This motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCP, follows.

ARGUMENTS IN SUPPORT OF RECONSIDERATION

Respondent moves this Court to reverse its earlier decision and deny post-conviction relief because Applicant failed to meet his burden of establishing Trial Counsel was constitutionally deficient and Applicant was prejudiced by Trial Counsel's alleged deficiency.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained

prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625.

Respondent respectfully asserts this Court's order is based on numerous legal and factual errors. Accordingly, this Court's grant of post-conviction relief should be reconsidered, and relief should be denied.

APPLICANT FAILED TO SHOW HOW HE WAS PREJUDICED FROM TRIAL COUNSEL'S ALLEGED FAILURE TO REVIEW ALL THE JAILHOUSE CALLS

In its order granting relief, this Court found Trial Counsel "was deficient for failing to thoroughly review the discovery, specifically the recorded jail calls, and [Trial Counsel's] deficient performance prejudiced [Applicant]. The recorded conversation published to the jury was evidence of consciousness of guilt and highly incriminating. See State v. White, 437 S.C. 490, 879 S.E.2d 21 (Ct. App. 2022). Trial Counsel testified that had he known about the existence of this recorded conversation, he would have advised [Applicant] to plead guilty and attempted to secure a favorable plea offer from the State." (Order Granting PCR Relief pp. 8-9). The Court's order found Trial Counsel's testimony credible on this issue. (Trial Tr. p. 8). Respondent respectfully asserts that this Court's finding Applicant was prejudiced by Trial Counsel's alleged deficiency is erroneous because Trial Counsel's assertion that had he known about the jailhouse calls published to the jury, he would have advised Applicant to plead guilty and sought a plea deal from the Solicitor is mere speculation and the record refutes Trial Counsel's claim.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Likewise, in order to prevail on a claim that counsel did not review discovery with applicant, the applicant must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Id.

Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is insufficient to support a relief grant. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Here, Trial Counsel's alleged deficiency is that he did not fully review all of the jailhouse calls, and had he known the substance of the calls published to the jury, he would have advised Applicant to plead guilty and sought a plea deal from the Solicitor. The Court's order seemingly suggests that the prejudice Applicant suffered was that Trial Counsel would have sought a plea deal from the Solicitor's Office had he known the substance of the jailhouse calls published to the jury. However, the record does not support Trial Counsel's speculation, and thus Trial Counsel's speculation fails the prejudice prong.

In fact, the record refutes Trial Counsel's assertions as to what he would have done had he known the substance of the jailhouse calls because the record provides that the Solicitor was never open to Applicant pleading to anything but murder. At trial, the Solicitor was asked by the trial

court whether there had been any definitive offers made to Applicant that he rejected, and the Solicitor replied:

No formal offers were made. We had some discussion and **we made it clear that any sort of offer would include a plea to the charge of murder, and that was a nonstarter —**

(Trial Tr. pp. 74, l. 19 – 73, l. 8) (emphasis added). The Solicitor clearly indicated to the trial court that they were never open to Applicant pleading to anything but murder, and that was a "nonstarter." *Id.* Furthermore, aside from the record before this Court, Applicant presented no evidence to the Court that the Solicitor's Office had extended a plea offer, nor any evidence that the Solicitor's Office was willing to extend a plea offer to Applicant.

Assuming, *in arguendo*, Trial Counsel discovered the jailhouse calls and decided to negotiate with the Solicitor's Office, it is mere speculation that 1. Applicant would have accepted the plea offer; 2. The plea would have been entered without prosecution canceling it or the trial court would have accepted it; and 3. The results would have been more favorable to Applicant. See generally Collins v. State, 422 S.C. 250, 263, 810 S.E.2d 871, 878 (2018); Missouri v. Frye, 566 U.S. 134 (2012) and Lafler v. Cooper, 566 U.S. 156, 174 (2012). While not directly on point, the analysis of the Collins, Missouri, and Lafler cases and remedy discussions are applicable in the present case in which Applicant claims he would have sought a plea offer had he been fully aware of the substance of the jailhouse calls.

Specifically, the Court's holding in Collins, directly addresses this issue in their analysis as follows:

Here, Collins proceeded to trial rather than plead guilty. At the PCR hearing, Collins testified only that after he became aware of the expired plea offer, he told trial counsel he wanted more information about the offer. Consequently, **the record is void of any testimony that Collins expressed a desire to accept the expired offer.** More importantly, even if Collins wanted to plead guilty, **there is no evidence or testimony from the solicitor that the expired offer**

was still available before trial, nor is there any evidence or testimony that a new offer existed for Collins to accept. Thus, Collins failed to demonstrate a reasonable probability that he would have accepted any offer, new or expired. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding the PCR applicant bears the burden of proving the allegations in their application). Therefore, we conclude the record does not support the PCR judge's finding that Collins suffered any prejudice from trial counsel's handling of the expired plea offer.

(Collins v. State, 422 S.C. 250, 262–63, 810 S.E.2d 871, 877–78 (2018)) (emphasis added). Before this Court is Trial Counsel's testimony and the record—and the record provides that Applicant pleading to murder was a "non-starter." (Trial Tr. p. 74). Furthermore, Applicant was present for his evidentiary hearing and chose not to testify, so the record is void of any testimony that Applicant expressed a desire to accept any plea offer. Rather, the record is uncontroverted that no appreciable plea offers were made to Applicant, and nothing other than murder would have been offered. Id.

Respondent respectfully requests that this Court review the record as the record does not support its findings because Applicant failed to demonstrate any prejudice from Trial Counsel's alleged deficiency. Respondent further requests a hearing on this matter or in the alternative Respondent respectfully asserts this Court should reconsider and amend its ruling on this issue and deny PCR relief.

APPLICANT FAILED TO SHOW HOW HE WAS PREJUDICED BY THE FAILURE TO PRESERVE THE OBJECTION TO MARIAN CAMPBELL'S TESTIMONY

In its order granting relief, this Court found Trial Counsel was "deficient for failing to place his objection on the record." (Order Granting PCR Relief p. 10). Additionally, this Court held that Applicant was prejudiced by Trial Counsel's alleged deficiency because:

If counsel had properly placed his objection on the record, there is a reasonable probability appellate counsel would have raised the issue on direct appeal and the appellate court would have held the trial

judge abused his discretion by admitting the evidence. Campbell was permitted to testify over objection that on the day of the shooting [Applicant] texted her and stated "he was talking to somebody about" robbing another person. This evidence was not relevant and was inadmissible hearsay. See Rule 401, SCRE, and Rule 802, SCRE. The error in its admission was not harmless because the testimony was in direct contradiction to the defense."

(Order Granting PCR Relief p. 10). This Court then concluded that it "cannot say beyond a reasonable doubt that its erroneous admission did not contribute to the verdict." (Order Granting PCR Relief p. 10). Respondent respectfully submits that the Court's order erroneously finds Applicant was prejudiced and further speculates that had it been preserved for appeal, the introduction of this evidence would have been reversed as an abuse of discretion.

As an initial matter, this Court's order granting PCR cites York v. Conway Ford Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) to support its finding that the issue was not preserved. Respondent respectfully asserts that York does not support this Court's order as this Court presumes. This Court's order granting PCR finds, citing York, "An objection made during an off-the-record **bench** conference which is not made part of the record does not preserve the objection for appellate review." (Order Granting PCR p. 10) (emphasis added). However, the holding in York does not apply to bench conferences; rather it applies to "off-the-record conference[s]," and York cites Benton v. Davis, 248 S.C. 402, 150 S.E.2d 235 (1966). The holding in Benton went to conferences that were informal and in chambers. Here, there was a bench conference before the jury, which was not informal. Moreover, the trial judge clearly stated her ruling on the record, and from that ruling, it can be inferred what the objection entailed. Rule 103(a)(1), SCRE, only requires specificity where the ground for objection is not apparent from the context of the discussion contained in the record. See State v. New, 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct. App. 1999).

The admission or exclusion of evidence is within the trial judge's sound discretion and is reversible only for an abuse of discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008); State v. Paean, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The relevance, materiality, and admissibility of evidence are matters within the trial court's sound discretion, and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999). Respondent respectfully asserts the trial court did not abuse its discretion in the admission of Marian Campbell's (Campbell) testimony.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

When an issue was unpreserved for appellate review, a PCR court must examine whether Applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether Applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through the same lens that would be applied on appeal . . . ") (emphasis added) (citation omitted). "The likelihood of a different result **must be substantial, not just conceivable.**" Harrington v. Richter, 562 U.S. 86, 112 (2011) (emphasis added).

At trial, the following colloquy occurred:

Q. Did the defendant ever text you he was about to rob someone?

A. Yes. He was – no, he didn't say he was about to. He said, I'm talk to somebody –

MR. MAYER: Judge, objection.

THE COURT: Basis?

MR. MAYER: May we approach?

(Bench conference was had; following proceedings were had in open court.)

THE COURT: The objection is overruled. **It is relevant, probative. In addition to that, it is an admission against interest.** And you need to lay the appropriate foundation to this line of questioning as to time and place. You may proceed.

(Trial Tr. p. 287).

In this Court's order granting PCR, the order fails to identify the lack of evidentiary support or the errors of law that the trial court made in admitting Campbell's testimony. Rather, this Court's order granting PCR speculates that "there is a reasonable probability that appellate counsel would

have raised the issue on direct appeal and the appellate court would have held the trial judge abused [her] discretion by admitting the evidence." (Order Granting PCR p. 10). This Court's order granting PCR further finds that the "evidence was not relevant and was inadmissible hearsay" pursuant to Rules 401 and 802, SCRE. Id. Respondent respectfully asserts that this Court's finding is clearly erroneous.

Rule 401, SCRE provides that "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The trial court held that the evidence Campbell testified to was relevant and probative.

Rule 802, SCRE provides "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." This Court's order granting PCR does not elucidate how Campbell's testimony is hearsay, nor does it elucidate how Campbell's testimony does not fall within any of the hearsay exceptions. Also, and again, this Court's order granting PCR disregarded the trial court's finding that Campbell's testimony was "an admission against interest." (Trial Tr. p. 287). Respondent respectfully asserts that the trial court correctly⁴ admitted the evidence because the text messages were from Applicant, and the recipient of those text messages laid the foundation for admissibility pursuant to Rule 801(d)(2), SCRE. Thus, a party's own statement offered against him is *not* hearsay. See Rule 801(d)(2), SCRE.

Respondent respectfully requests this Court reevaluate and reverse its findings on this issue because the trial court did not abuse its discretion. First, Campbell's testimony was relevant and probative. Second, Campbell's testimony was admissible as a party's own statement against him,

⁴ Respondent notes that the trial court ruled it a statement against interest, however, the correct analysis for this evidence is Rule 801, SCRE.

not hearsay. Third, even if preserved, there is no merit to this issue. Moreover, even if Trial Counsel was deficient, Applicant has failed to prove how he was prejudiced when this was not hearsay; it was admissible under Rule 801(d)(2), SCRE, and there was no basis for an objection.

Accordingly, this Court should reverse its ruling on this issue and deny PCR relief.

APPLICANT FAILED TO SHOW HOW HE WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO IMPEACH CARSON'S PRIOR INCONSISTENT STATEMENTS

In its order granting relief, this Court found Trial Counsel "was ineffective for failing to properly impeach Latoya Carson with her prior inconsistent statements as allowed pursuant to Rule 613, SCRE." (Order Granting PCR Relief p. 10). This Court further found, "[Trial] Counsel's knowledge of the Rules of Evidence was not within the range of competence for a criminal defense attorney and rendered his performance deficient. [Trial] Counsel's deficient performance prejudiced [Applicant] because Carson's credibility was crucial to the state's case against [Applicant], and counsel failed to properly impeach her credibility in front of the jury. If the jury had learned Carson provided inconsistent testimony, there is a reasonable probability the outcome of [Applicant]'s trial would have been different." (Order Granting PCR Relief p. 12). Respondent respectfully asserts Applicant failed to show this Court how Trial Counsel was deficient and failed to show any prejudice from the alleged deficiency. Further, Respondent respectfully submits there are multiple errors in its order granting PCR.

Upon review, trial counsel's actions are given great deference because "it is all too tempting for a defendant to second guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Furthermore, the court in Strickland makes clear that "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant

in another." Id. at 691. In addition to this approach against second-guessing the tactics of counsel, where there exists an articulable reason for employing their strategy, "such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977). "Impeachment tactics are generally held to be matters of trial strategy which are to be afforded deference." Gustave v. United States, 627 F.2d 901, 906 (9th Cir. 1980).

At the evidentiary hearing on direct examination, the following colloquy occurred:

- A. Yes, sir. Let's just talk briefly about Latoya Carson's testimony.
- Q. I'll bring up Page 220. Look at Page 214, Lines 22 to 25.
- A. Yes, sir. Thank you. Yes, sir. I've got it.
- Q. All right. So you were trying to -- that's actually on your cross-examination, right?
- A. Let me just double-check. Yes, sir. This is during my cross. Yes, sir.
- Q. All right. And so had she testified to something different than what she reported on the police reports?
- A. Oh, boy. Possibly.
- Q. It looks like you're trying to -- it looks like you said there was a prior statement made.
- A. It's entirely possible. I remember I was trying to nail her down on this whole, you know, supposedly there was a call made and this kind of thing.
- Q. So you were trying to assert that she was being, she was providing conflicting testimony or inconsistent testimony?
- A. I think that's right. Yes, sir.

(PCR Tr. pp. 23-24).

On cross-examination, the following colloquy occurred:

- Q. So let's move on to Number 3. You were ineffective for properly, or for failing to properly, impeach Latoya Carson's inconsistent statements. And that's on Page 214.
- A. Okay. I've got 214 here.
- Q. And that's going to be Line 22 to 25.
- A. Yes, sir. I see it.
- Q. And you are answering these, if you could just skim through this through Page 216, I believe his allegation is all the way up to 221.

- A. Yeah. I'm laying the groundwork to impeach her. That's right. And then we had another binge conference based on MR. Simpson's objection, and then the judge is telling me how to impeach a witness but didn't have prior testimony from her. It was just this -- it was -- it was just this police report, I think. So I don't know if it even would have been proper for impeachment. I don't know. I hadn't practiced law in a while, so I'm a little rusty on the rules here.

(PCR Tr. pp. 26-27).

In this Court's order granting PCR, it found that "Trial [C]ounsel admitted that the judge told him how to properly impeach the witness, that he did not know how to impeach the witness at the time, and that he was a little rusty on the rules." (Order Granting PCR p. 12). Respondent respectfully asserts that the PCR transcript does not provide what this Court found. Trial Counsel did not testify that he did not know how to impeach a witness. Rather, Trial Counsel answered the question as he read what was happening at trial. In other words, Trial Counsel was referring to his knowledge of the Rules of Evidence at the evidentiary hearing and not at trial. Notably, Trial Counsel is suspended from the practice of law in South Carolina, and has been suspended since 2018. See fn. 2 *supra*. Nothing in the record suggests Trial Counsel did not know how to impeach a witness.

Contrary to the findings in this Court's order granting PCR, the record provides quite the opposite. Trial Counsel had the opportunity to cross-examine Carson regarding her prior inconsistent statements. The relevant portions of that exchange took place between Trial Counsel and Carson as follows:

Q: Do you recall telling the police that the person who walked up to the car had on a short-sleeved shirt?

A: No.

Q: You told the police it was a dark shirt, but you said it was short sleeved. You don't recall doing that??

A: No.

Q: And you told police that whoever walked up put their left hand on the car; do you recall doing that?

A: I don't know exactly if I said which hand it was. I just know that he walked up on the passenger side and touched the car, like, and leaned in.

Q: When your memory was a lot fresher?

A: Yeah. My memory was fresher, but I had a lot of thoughts going through my head.

Q: But if you had said at the time it was a left hand, there wouldn't be any reason to think that was wrong?

MR. SIMPSON: May we approach?

(Bench conference was had; following proceedings were held in open court.)

THE COURT: Objection is withdrawn, you may proceed. And before you can impeach the witness, you need to ask the exact question and give her the opportunity to admit or deny the statement to establish that it is inconsistent.

(Trial Tr. p. 214, ll. 22-15; p. 215, ll. 1-25, p. 216, ll. 1-4).

Q: Okay. At some point when you were being interviewed by the police, you and the officer went through the details of these calls and you guys came up with a time frame, right?

A: Yeah, because I didn't know exactly what time. I couldn't give him any times, but by me being on, that chat site and it being prerecorded, the time that I mentioned that I heard the gunshot, it was all prerecorded. You could play it back and hear it and see the time.

(Trial Tr. p. 217, ll. 9-18).

Q: So on the night that this happened with Chucky, isn't it true that on the way there it was you who was giving him directions?

A: No.

Q: And it was you who was on the phone setting up someone to meet you there?

A: No.

Q: And that's all because of some kind of outside beef that you guys were involved in?

A: No.

Q: Somebody named Raphael Ward?

A: No.

Q: Raphael Ward being a friend of yours?

A: I don't even know who that is.

Q: So you've lied to the cops before and you lied to them again on this night, didn't you?

A: No.
 Q: But there's nobody else who can say whether Chucky was getting directions from somebody on the phone or getting directions from you?
 A: No.
 Q: We just have to take your word for it; huh? Is that right?
 A: I'm pretty sure his phone records show who he been on the phone with and the calls were made and placed to somebody within the time frame, so his phone can say. I'm the only person -that I can say that I was in the car when he was on the phone with somebody getting directions, yes.
 MR. Mayer: Court's indulgence?
 BY MR. Mayer:
 Q: Do you recall giving a recorded statement to the police?
 A: I guess.
 MR. Mayer: Okay. No further questions.

(Trial Tr. p. 220, ll. 12-25; p. 221, ll. 1-22).

In reaching its conclusion that Trial Counsel's knowledge of the Rules of Evidence was not within the range of competence for a criminal defense attorney and rendered his performance deficient,"⁵ this Court focused on Rule 613, SCRE, which provides:

Subject to the provisions of S.C. Code Ann. §§ 19-1-80, 19-1-90 and 19-1-100:

(a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

⁵ Order Granting PCR Relief p. 12.

However, Respondent respectfully submits that the singular failure of Trial Counsel to impeach a witness with extrinsic evidence of prior inconsistent statements does not rise to the level of deficiency required by Strickland.

Additionally, Respondent respectfully submits that the Court's order fails to find how Applicant was prejudiced by Trial Counsel's alleged deficiency. Specifically, the Court's order states that Applicant was prejudiced by Trial Counsel's alleged deficient performance under Rule 613, SCRE, because "Carson's credibility was crucial to the state's case against [Applicant] and counsel failed to properly impeach her credibility in front of the jury. If the jury had learned Carson provided inconsistent testimony, there is a reasonable probability the outcome of [Applicant]'s trial would have been different." (Order Granting PCR Relief p. 12).

The record provides Trial Counsel did cross-examine Carson on her inconsistent statements in accordance with Rule 613(a), SCRE. Thereby placing before the jury that Carson had made prior inconsistent statements. Trial Counsel's cross-examination of Carson concerning her prior statements to the police gave the jury the opportunity to observe the declarant and make a determination on the credibility of the witness on that point. Therefore, Respondent submits that Trial Counsel's alleged deficiency could not and did not prejudice Applicant.

In Rutland⁶, the Supreme Court of South Carolina found that the Applicant was prejudiced by trial counsel's deficient performance, where trial counsel failed to cross-examine the State's key witness as to her prior inconsistent statements. But what is notable from Rutland and distinct from the instant case is that Rutland's trial counsel did not cross-examine the witness on their prior inconsistent statements. Additionally, the witness in Rutland was "the only independent witness and any inconsistencies in her statements could have negatively impacted her credibility,"

⁶ Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016)

rendering the witness's testimony essential. *Id.* at 575. In the instant case, Carson witnessed this incident; however, she was a close friend of the victim and, therefore, not an independent witness.

Further, Carson's credibility was already in question at the time of her testimony, as was highlighted during Trial Counsel's cross-examination of the witness. This fact was again noted by Trial Counsel's testimony during Applicant's PCR hearing. Trial Counsel explained the issue of credibility he saw pertaining to Carson's testimony as follows:

...[I]t's one thing, right, to hear it from a woman who was accused of murder herself to say, well, you know, I think he was on the phone and well, might have been the other hand, you know, there were holes in her-- there were potential holes in her story that I wanted to exploit....

(PCR Tr. p. 28).

Moreover, Carson was questioned about issues about her credibility during direct (Trial Tr. p. 209) and cross-examination (Trial Tr. p. 213) of Applicant's trial. Accordingly, the Court's holding that because Carson's credibility was crucial to the State's case, "If the jury had learned Carson provided inconsistent testimony, there is a reasonable probability the outcome of Hayward's trial would have been different,"⁷ is not supported by the record.

Additionally, in Rutland, the Supreme Court of South Carolina disagreed with the PCR Court's finding that the applicant had failed to show prejudice created by trial counsel's alleged deficiency, where the applicant presented no testimonial evidence on the matter during his evidentiary hearing. The Court's holding was as follows:

Principally, the PCR judge was incorrect in finding petitioner failed to produce extrinsic evidence of Kestner's statements at the PCR hearing. To the contrary, petitioner produced both the written copy of Kestner's statement to law enforcement, as well as affidavits from individuals attesting to have heard Kestner state the victim was armed at the time of the shooting. Accordingly, there is no evidence

⁷ Order Granting PCR Relief p. 12.

of probative value supporting the PCR judge's ruling that petitioner failed to present extrinsic evidence of Kestner's prior inconsistent statements. See Holland, 322 S.C. at 113, 470 S.E.2d at 379; Webb, 281 S.C. at 238, 314 S.E.2d at 839.

(Id. at 577). The Court's finding in Rutland established that although the witness did not testify at the PCR hearing, the applicant's production of the signed police statement wherein the witness made their statements inconsistent with those presented at trial satisfied the Applicant's burden.

Here, Applicant has offered no evidence of what information would have additionally been gained from impeaching Carson with her prior inconsistent statements to police. Notably, those statements were not presented to this Court. Therefore, Applicant cannot establish that Trial Counsel's alleged deficient representation prejudiced him in accordance with the requirements of Strickland. Therefore, whether impeaching Campbell's testimony would have changed the trial's outcome is mere speculation. See Clark, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice).

Respondent respectfully submits the record before this Court does not support its finding that Trial Counsel was deficient for failing to impeach Carson with her prior inconsistent statements, nor does it support a claim that those alleged deficiencies prejudiced Applicant.

Accordingly, this Court should reverse its ruling on this issue and deny PCR relief.

APPLICANT FAILED TO SHOW TRIAL COUNSEL WAS DEFICIENT AND FAILED TO SHOW ANY PREJUDICE FROM TRIAL COUNSEL'S ALLEGED FAILURE TO CHALLENGE CARSON'S INVOCATION OF THE FIFTH AMENDMENT

In its order granting PCR, this Court found Trial Counsel "was ineffective for failing to challenge Latoya Carson's invocation of her Fifth Amendment right and by not proffering her testimony." (Order Granting PCR Relief p. 12). This Court further found that "Trial [C]ounsel should have requested to proffer Carson's testimony and allowed the trial court to determine on a question-by-question basis whether Carson could assert the privilege. See State v. Lawrence, 439

S.C. 611, 889 S.E.2d 557 (2023). [Applicant] was prejudiced by [T]rial [C]ounsel's deficient performance because Carson was a crucial witness for the state, and her excluded testimony could have negatively impacted her credibility." (Order Granting PCR Relief p. 13). Respondent respectfully asserts that this Court's findings fail as a matter of law.

Both the United States Constitution and the South Carolina Constitution provide that no person shall "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; S.C. Const. art. I, § 12. Further, "[n]o person shall be required to answer any question tending to incriminate himself." S.C. Code Ann. § 19-11-80 (2014). The Supreme Court of South Carolina "has explained that the Fifth Amendment is an assurance that an individual will not be compelled to produce evidence or information which may be used against him in a later criminal proceeding." State v. Lawrence, 439 S.C. 611, 617, 889 S.E.2d 557, 561 (2023) (citing Grosshuesch v. Cramer, 377 S.C. 12, 22, 659 S.E.2d 112, 117 (2008) (internal quotation marks omitted)). Further, the privilege extends not only beyond incriminating answers or information but also "to answers furnishing a link in the chain of evidence needed to prosecute an individual." *Id.* (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

The protections of the Fifth Amendment are not limitless: "[I]t is well-settled that an invocation of the privilege is confined to instances where a person has reasonable cause to apprehend danger from his answer." *Id.* (citing Hoffman, 341 U.S. at 486). Moreover, a trial court is limited to compel a person's testimony if it is "perfectly clear" the testimony will not result in criminal liability, and the testimony "cannot possibly have [a] tendency to incriminate." Hoffman, 341 U.S. at 486 (internal quotation marks omitted). Furthermore, the Fifth Amendment privilege remains applicable not just during an individual's own criminal trial but during "any other proceeding, civil or criminal, formal or informal," in which the testimony or answers being sought

from the individual could conceivably be self-incriminating in some way. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

When confronted with a witness's invocation of the privilege, the trial judge is tasked with determining whether the witness's silence is justified. Hoffman, 341 U.S. at 486. In making that determination, the trial judge must generally consider and answer the following two questions: (1) whether the information is incriminating in nature; and (2) whether there is a sufficient possibility of criminal prosecution to trigger the privilege. Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117; see United States v. Sharp, 920 F.2d 1167, 1170 (4th Cir. 1990) (explaining there are "essentially two things" for a trial judge to consider when analyzing whether a sufficient hazard of incrimination exists to justify an invocation of the privilege against self-incrimination).

At trial, the relevant testimony referenced by this Court's order took place between Trial Counsel and Carson as follows:

Q: Now, this murder that you're currently in jail for, that you're accused of, who was the decedent in that case?

A: I invoke my right, the Fifth Amendment. I don't want to talk about my case.

Q: Somebody named Happy, though, right?

THE COURT: She's invoked her right. You need to move on to your next question.

BY MR. MAYER:

Q: Are you aware that that person was Chucky's best friend?

A: I'm invoking my right. I don't want to speak about my case.

(Trial Tr. p. 219, ll. 24-25; p. 220, ll. 1-11).

Through this Court's order granting PCR, Trial Counsel was deemed to have rendered ineffective assistance of counsel where he did not request to proffer Carson's testimony and determine on a question-by-question basis whether Carson could assert the privilege. However, this requirement is not applicable in the instant case, as Carson did not assert a "blanket" invocation

of the Fifth Amendment, but instead only invoked the Fifth Amendment where it was "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." See Hoffman, 341 U.S. at 486–87, 71 S.Ct. 814.

Here, Carson faced a real risk of self-incrimination if compelled to provide the requested substantive testimony or answers about the incident that led to the murder charges for which she had been indicted, as she was awaiting trial on those pending criminal charges. As the Solicitor (Trial Tr. p. 210) and Trial Counsel (Trial Tr. pp. 219-220) referenced during direct and cross-examination of Carson, she was charged with, incarcerated for, and awaiting trial on her indictment of murder in a separate case. Accordingly, Carson only invoked the Fifth Amendment on those questions which sought an analysis of the substantive issues regarding her pending charges. See Lawrence, 439 S.C. 611, 889 S.E.2d 557 (2023).

Under the circumstances, Carson could not legally be compelled in any proceeding to provide substantive testimony or answers about what occurred during the incident that led to her criminal charges due to the obvious potential for such information to be self-incriminating. Therefore, when the trial judge correctly informed Trial Counsel to "move on to [his] next question" (Trial Tr. p. 220) following Carson's invocation, doing so was reasonable. Carson's invocation of the Fifth Amendment was proper under these circumstances as it was not perfectly clear her testimony or answers could not possibly have a tendency to be self-incriminating. Trial Counsel did not render deficient representation by failing to proffer Carson's testimony as she was awaiting trial on the charges at the time of Applicant's trial.

Respondent respectfully submits that the Court's order granting PCR on this allegation fails as a matter of law. Further, Respondent respectfully submits this Court's order erroneously finds Trial Counsel was deficient and Applicant was prejudiced by Trial Counsel's alleged deficiency.

Pursuant to the requirements of invoking the Fifth Amendment in this context, the witness only refused to answer those questions referencing her pending murder charges, where she faced a significant risk of self-incrimination in those matters. See Hoffman, 341 U.S. at 486–87, 71 ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."); State v. McGuire, 272 S.C. 547, 550–51, 253 S.E.2d 103, 105 (1979) ("[I]n any case, it is well settled that a witness who is not also a defendant can invoke that privilege only after the incriminating question has been put.").

Also, in its order granting PCR, this Court found Applicant was prejudiced because "Carson was a crucial witness for the state, and her excluded testimony could have negatively impacted her credibility." (Order Granting PCR p. 13). However, this finding is also not supported by the law because even if Trial Counsel requested an *in-camera* hearing to proffer the Carson's testimony, it would be found that Carson had properly invoked the Fifth Amendment. Accordingly, even under the Court's finding that Carson was a crucial witness for the State, Applicant's desire to answer specific questions could not trump Carson's constitutional right not to be compelled to incriminate herself. See United States v. Mabrook, 301 F.3d 503, 506 (7th Cir. 2002) (emphasizing a defendant's constitutional right to compulsory process does *not* trump a witness's constitutional right against self-incrimination). Critically, that fact is "one consequence" of the constitutional privilege against self-incrimination, which is of fundamental importance to our country's justice system.

Lastly, Applicant did not call Carson as a witness at the PCR hearing and provided no evidence of what Carson's testimony would have been. Applicant provided nothing about what information could have been gained through Carson's potential answers. Therefore, Applicant

cannot establish that Trial Counsel's alleged deficient representation prejudiced him in accordance with the requirements of Strickland.

Respondent respectfully submits the record before this Court does not support its finding that Trial Counsel was deficient for failing to request an *in-camera* hearing to proffer Carson's testimony, nor does it support a claim that Applicant was prejudiced by that alleged deficiency. Thus, Applicant failed to show Trial Counsel was deficient and failed to prove any prejudice flowing from the alleged deficiency.

Accordingly, this Court should reverse its ruling on this issue and deny PCR relief.

APPLICANT FAILED TO SHOW TRIAL COUNSEL WAS DEFICIENT AND FAILED TO SHOW ANY PREJUDICE FROM TRIAL COUNSEL'S ALLEGED FAILURE TO OBJECT TO HEARSAY TESTIMONY OF DAVID OSBORNE

In its order granting PCR, this Court found Trial Counsel was ineffective for failing to object to prejudicial hearsay testimony from David Osborne (Osborne). (Order Granting PCR Relief p. 13). The Court's order granting PCR further held that "Osborne's testimony was inadmissible hearsay pursuant to Rule 802, SCRE, and trial counsel was deficient for failing to object. The State sought to admit Osborne's testimony for the truth of the matter asserted. More specifically, it was used by the state to show a person spoke to the decedent shortly before his death and gave him directions to a location where he was ultimately shot and killed. Accordingly, if counsel had properly objected, there is a reasonable probability the trial judge would have sustained the objection and excluded the inadmissible hearsay testimony. This Court further finds Hayward was prejudiced by counsel's deficient performance. Trial counsel admitted Osborne's testimony bolstered and vouched for Carson's credibility. Osborne's testimony was also used by the State to establish Hayward's involvement in the murder as the state later alleged Hayward was the person on the other line giving the decedent directions." (Order Granting PCR Relief p. 14). Respondent respectfully asserts that Osborne's testimony was not inadmissible hearsay and was

admissible under Rule 803(1), SCRE, and this Court should reverse its ruling and deny relief on this allegation.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The relevant testimony referenced by the Court's order took place between the Solicitor and Osborne as follows:

Q: And on December 11th of 2013, how did that involvement come to be?

A: I was off, I got a phone call stating that we'd had a shooting in the Ardmore subdivision, it was possibly going to end up being a murder. I responded to the scene. While on the way, I started trying to figure out what our personnel was like, manpower issues, who we would need to call out to help with the investigation.

Q: And so you did go to the scene that night?

- A: I did.
- Q: And, again, you were the supervisor. You were sort of running the investigative wing of this investigation at the time?
- A: Yes.
- Q: Were you in your role as a supervisor, were you briefed or apprised of the statements given by Latoya Carson?
- A: Yes, I was.
- Q: And where -- as an investigator, where did that information lead you?
- A: It was my understanding when I got there that Latoya was with the victim. The victim had -- was speaking on the phone prior to the murder. The person that he was speaking to was directing him, giving him turn-by-turn directions to a location that he would end up being shot and killed. So my main focus at that point was to try to identify the number, then the person, that the victim was speaking to just prior to his death.

(Trial Tr. p. 236, ll. 12-25; p. 237, ll. 1-18). The Court's order finds that Osborne's statement was inadmissible hearsay pursuant to Rule 802, SCRE, and Trial Counsel was deficient for failing to object to its admission as the State sought to introduce it for the truth of the matter asserted.

Hearsay is a statement made by someone other than the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE. In the instant case, Osborne was not reiterating a statement made to him by any other party in his testimony. Instead, Osborne testified to his understanding of the events in question when he led the investigation into this matter and how that understanding influenced his areas of focus at that point. Osborne's testimony was permissible under Rule 803(1), SCRE, as an exception to the hearsay rule. Under Rule 803(1), SCRE, a statement describing or explaining an event or condition is admissible if "made while the declarant was perceiving the event or immediately thereafter." As the statement was permissible, Trial Counsel had no legal basis to object to Osborne's statement. Trial Counsel cannot be deficient for failure to object when there is no legal basis for the objection.

Further, Respondent respectfully submits that the Court's order granting PCR erroneously finds Applicant was prejudiced by Trial Counsel's alleged deficiency. Osborne's testimony was admissible under Rule 803(1), SCRE. However, even if Osborne's statement had been hearsay, the Court's finding that but for this one statement, the outcome of trial would have been different is wholly without merit. This case was not merely a circumstantial evidence case—this case had incontrovertible DNA and palm print evidence directly linking Applicant to the murder.

Further, the Court's finding that the testimony "bolstered and vouched for Carson's credibility," and was also "used by the State to establish Hayward's involvement in the murder as the state later alleged Hayward was the person on the other line giving the decedent directions" thereby prejudicing Applicant, is not supported by the record. See State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001) (improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a jury supports the testimony.) (Overruled on other grounds.).

Osborne's statements do not amount to bolstering Carson's credibility as they do not convey to the jury the credibility of the State's witnesses based upon the prosecutor's personal knowledge or information outside of the evidence presented at trial. At the time that Osborne rendered this testimony, Carson herself had already stated this same version of events. (Trial Tr. p. 190-209). Additionally, Osborne testified that the victim's phone records had also been analyzed to show that the victim had been on the phone for approximately eleven minutes before his murder with an individual under the contact name "Tino." (Trial Tr. p. 241-243). Therefore, Applicant's involvement in the case had been established through the aforementioned testimony and by evidence, including but not limited to, Applicant's handprint on the hood of the victim's car and his DNA positively identified.

Respondent respectfully submits the record before this Court does not support its finding that Trial Counsel was deficient for failing to object to Osborne's testimony because it was permissible and there was no basis for an objection. Nor does the record before this Court support a finding that Applicant was prejudiced by the alleged deficiency as Applicant's involvement in the case had been thoroughly established through the scope of the evidence presented at trial. Thus, Applicant failed to show Trial Counsel was deficient and failed to show any prejudice flowing from the alleged deficiency.

Accordingly, this Court should reverse its ruling on this issue and deny PCR relief.

APPLICANT FAILED TO SHOW TRIAL COUNSEL WAS DEFICIENT AND FAILED TO PROVE ANY PREJUDICE FROM THE ALLEGED DEFICIENCY FOR FAILING TO OBJECT TO EXPERT NADA KERSTEIN AND JAMES GREEN'S TESTIMONY

In support of its findings, this Court found Trial Counsel "was deficient for failing to object to Kerstein and Green's testimony. If [Trial Counsel] had properly objected to the admission of their testimony based on the Confrontation Clause, there is a reasonable probability the trial court would have sustained the objection. If an expert did not offer any independent opinions regarding the results of the testing or produce an original product that could be tested through cross-examination, then that expert is merely serving as a conduit to introduce the results of another expert who did not testify. State v. Brewer, 438 S.C. 37, 882 S.E.2d 156 (2022); State v. McCray, 413 S.C. 76; United States v. Palacios, 677 F.3d 234 (4th Cir. 2012). [Applicant] should have had an opportunity to cross-examine the expert who performed the original testing. [Applicant] established that [T]rial [C]ounsel's performance was deficient and that he was prejudiced by this defect because it violated his rights under the Confrontation Clause." (Order Granting PCR Relief p. 15) (emphasis added).

However, each of the South Carolina cases this Court cites in support of its findings is distinguishable from the case *sub judice*. In Brewer, the South Carolina Supreme Court found that

the pathologist who testified from another expert's report and findings of opioid pain medication in a cup when the pathologist did not perform the analysis violated the right of confrontation provided by the Sixth Amendment. In essence, "the Confrontation Clause mandates that an individual who actually performed the forensic testing be subject to cross-examination." Brewer, 438 S.C. at 55, 882 S.E.2d at 165. In McCray, the South Carolina Supreme Court held that a DNA expert who peer-reviewed another expert's report but did not conduct the DNA testing could not testify to the other expert's report because he "did not offer any independent opinions regarding the results of the tests or produce an original product that could be tested through cross-examination." McCray, 413 S.C. at 90-91, 773 S.E.2d at 922. Lastly, Palacios provides "[t]he touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." Palacios, 677 F.3d at 243 (quoting United States v. Johnson, 587 F.3d 625, 635 (4th Cir.2009)) (internal quotation marks omitted).

Nada Kerstein's Testimony Regarding the Print Analysis

At trial, Nada Kerstein (Kerstein) testified in her capacity as a latent prints examiner with the City of Charleston Police Department. Kerstein explained to the trial court what peer review is and that the body of another expert's work is looked at to ensure "that the information is correct, that [the] reports are correct, that [the] worksheets are correct, that the information that [is being put] out is correct, that [the] conclusions are in line." (Trial Tr. p. 452). Kerstein testified that her recently retired co-worker Kathleen Butler (Butler) had originally done the print analysis. (Trial Tr. p. 452). Kerstein then testified to the following:

- Q. In the present case, however, did you peer review her work?
 A. Yes, I did.

- Q. And if we look at the reports in this case, will we see your signature?
- A. No.
- Q. Whose signature will we see?
- A. Well two of the reports are signed by Kathleen, **one of the reports was signed by me.**
- Q. **Okay. And one signed by Kathleen, can you testify today that you looked at the same things she did?**
- A. **Yes. I was the verifier for Kathleen's envelopes that she-worked on.**
- Q. **And did you do the same — would you have done the same analysis that she did?**
- A. **Yes.**
- Q. **And you came to the same conclusions that she did?**
- A. **Yes.**
- Q. **And so you have personal knowledge of the work done in this case?**
- A. **Yes.**
- Q. **And you, in fact, repeated that?**
- A. **Yes, I did.**
- Q. Okay. Ms. Kerstein, I'm handing you what's been marked as State's Exhibit 18.

....

- Q. Take a moment and look at that envelope and review that item.

....

- Q. Have you had a moment with State's Exhibit 18?
- A. Yes.
- Q. Do you recognize that item?
- A. Yes.
- Q. And what is that item?
- A. This is the latent print card that was in envelope number 2 on case number 1320144.
- Q. Is that the case we're here on today?
- A. Yes.
- Q. Who submitted that item to your lab?
- A. Jennifer Wooley.
- Q. And how is it described in that submission?
- A. You want to know what she wrote on the note card?
- Q. Yes.
- A. TMobile cell phone 301.
- Q. And is that a latent lift card?
- A. Yes, it is.

- Q. **Did you analyze that lift?**
 A. **Yes, I did.**
 Q. **What were your conclusions?**
 A. **Latent fingerprint A was identified to the number one finger, which is the right thumb of the ten-print card bearing the name of Valentino Hayward.**

....

- Q. Ms. Kerstein, I'm handing you what was entered as State's Exhibit 24.
 A. I need the scissors again.
 Q. Do you recognize those items?
 A. Yes, I do.
 Q. And what are they? '
 A. These are the five latent lift cards that were submitted in envelope 3 on case 1320144.
 Q. Is that the case we're here about today?
 A. Yes.
 Q. And who submitted those cards to you?
 A. Mary Phillips.
 Q. And I would like to ask you about the card containing the label, print one.
 A. Okay.
 Q. Can you locate that card?
 A. Yes.
 Q. **Did you analyze that card?**
 A. **Yes, I did.**
 Q. **Describe your conclusions in that analysis to the jury.**
 A. Do you want everything?
 Q. Sure.
 A. Latent lift B was identified to the right palm of the ten-print card bearing the name Valentino Hayward. Latent lift A and C were identified to the eight and nine finger of the ten-print card bearing the name of Anna Dobson.

(Trial Tr. pp. 453-457) (emphasis added).

The records conclusively provide that Kerstein had personal knowledge of the work done because she performed the work herself to confirm that Butler's findings were correct. Unlike Brewer and McCray, Kerstein's testimony was subject to cross-examination based on her own findings because she repeated the tests, which satisfies the touchstone test outlined in Palacio. In fact, on cross-examination at trial, the following occurred:

- Q. So you're not the person who did the full analysis on these, is that correct?
- A. It was not my original case. I was the verifier on the case which means I repeated all of the steps, the analysis, the comparison, and the evaluation. And it also means that I reviewed her report, I reviewed her worksheet, so I reviewed the entire body of her work.
-
- Q. Do you recall or do you have knowledge of whether Valentino Hayward's fingerprints are of the arch variety, the loop variety, or the whirl variety?
- A. If I can look at my notes, I can look at what I used as the ten-print card.
- Q. Do you have them there?
- A. Yes, I do.
- Q. Please.
- A. He has a combination of loops and whirls.

(Trial Tr. pp. 458-459; p. 462).

Again, the record before this Court provides that Kerstein repeated the tests that Butler performed—compared the results—and came to her own conclusions. Also, Trial Counsel had the opportunity to cross-examine Kerstein on her knowledge of the analysis she conducted.

Based upon the record before this Court, Respondent respectfully submits that Applicant cannot prove Trial Counsel was deficient for failing to object to the testimony of Kerstein when her testimony is remarkably clear that she performed the analysis of the prints herself, she wrote her own report, and she did not just merely testify from another expert's report. Also, Respondent respectfully submits the record supports a finding that the case *sub judice* is distinguishable from Brewer and McCray—and—the record supports that the touchstone, as outlined in Palacio, is satisfied and Kerstein's testimony did not violate the Confrontation Clause of the Sixth Amendment. Therefore, any objection by Trial Counsel would have been non-meritorious because there was no basis for an objection. Thus, Applicant cannot show Trial Counsel was deficient, and he cannot prove any prejudice flowing from the alleged deficiency.

Accordingly, this Court should reverse its ruling on this issue and deny PCR relief.

James Green's Expert Ballistics Testimony

At trial, James Green (Green) testified in his capacity as a ballistics expert with the South Carolina Law Enforcement Department. Green testified that his co-worker, Kenneth Whitler (Whitler), had retired about a year prior to the trial. (Trial Tr. p. 579). Green explained the peer review process in the following colloquy:

- Q. Can you explain to the jury -- we've had a bit of this, it's kind of a theme we have going, but explain what peer review is and why it's important in any scientific endeavor?
- A. Peer review is basically the fact that if I do something, somebody can come behind me and replicate what I do. That's one of the hallmarks of science is reproducibility and can be replicated. At the SLED Lab, particularly the firearms department, we have a 100 percent peer review or micro verification policy. That means for any report that 's given out to a community agency, before any phone calls are made, if it's a rush case sometimes the investigators call and say, we can't wait for the report, we need to know the answer now. Before any of that information can be given out, another second court qualified firearms examiners comes in and looks at the evidence and — and — like I would go to Ken if he was still there and say, I need you to micro verify a case. He would come down to my microscope, look at my evidence, and he would formulate his own opinion on it .
- Q. And that information isn't released or reported until both people agree on the conclusions?
- A. Yes, sir. No conclusions are given out to anyone, not even our supervisor, until my initials, or whoever the micro verifier's initials are, are on the worksheet saying that we agree with what the results are.
- Q. Now, if we look into the report that your department gave on this case, would we see the name Ken Whitler's name? •
- A. Yes.
- Q. Do you, nevertheless, have personal knowledge of the results in this case?
- A. Yes, sir. I did the micro verification in this case and I also did the technical administrative review of his case file.
- Q. **Just to be clear, this is not just you reading someone else's report. You did the same work in this case?**
- A. Yes, sir.

(Trial Tr. pp. 580-581) (emphasis added).

Respondent respectfully submits that the record does not support this Court's granting of PCR relief based on Green's testimony being impermissible and akin to Brewer and McCray. Rather, the opposite is true here. While Whitler's report was used, Green testified that he performed all of the analysis that Whitler did on the same evidence and came to the same conclusions. To be clear, Green testified that he was "not just reading from someone else's report" and that "he performed the same work in this case." (Trial Tr. p. 581). Nevertheless, Trial Counsel was able to cross-examine Green on the evidence that Green had personal knowledge of and had personally performed the analysis thereby satisfying the Confrontation Clause of the Sixth Amendment. Respondent respectfully submits the record before this Court does not support its finding Trial Counsel deficient for failing to object to Green's testimony because it was permissible and there was no basis for an objection. Thus, Applicant cannot show Trial Counsel was deficient and he cannot prove any prejudice flowing from the alleged deficiency.

Accordingly, this Court should reverse its ruling on this issue and deny PCR relief.

[SIGNATURE PAGE FOLLOWS]

CONCLUSION

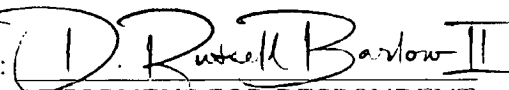
For all the foregoing reasons, the State asks this Court to reconsider its prior ruling, alter or amend its judgment pursuant to Rule 59(e), SCRCP, and find Applicant failed to meet his burden of proving he was entitled to a grant of relief and deny and dismiss his application.

Respectfully submitted,

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Attorney General

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January 22, 2024

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Valentino M. Hayward, #366107,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
)

) CASE NO. 2019-CP-10-2108
)
)

CERTIFICATE OF SERVICE BY
EMAIL

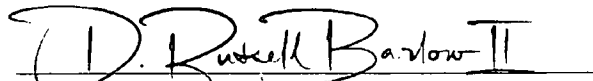
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2024 JAN 25 PM 12:00
CLERK OF COURT

1. I am an employee of the Respondent in the above-captioned action.
2. I have this day served a copy of the corrected version Respondent's Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e), SCRCP, in the above-captioned matter on the following person by electronic mail to the e-mail address listed for counsel in the Attorney Information System (AIS):

The Honorable George M. McFaddin, Jr.
Circuit Court Judge
215 N. Harvin St.
Sumter, SC 29150

Hervy B.O. Young, Esquire
Deputy Director and General Counsel
S.C. Commission on Indigent Defense
PO Box 11433
Columbia SC 29211-1433

DATED this 22nd day of January, 2024.


D. Russell Barlow, II
Attorney for Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
VALENTINO M. HAYWARD, #366107,	)	
	)	Case No.: 2019-CP-10-2108
Applicant,	)	
	)	
vs.	)	REPLY TO MOTION
	)	TO RECONSIDER
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

The Applicant hereby replies to the Respondent's Motion to Reconsider the Court's Order granting post-conviction relief in the above matter. Applicant would respectfully request that Court deny the Respondent's Motion to Reconsider, Alter, or Amend.

I. PROCEDURAL HISTORY

In May 2014, the Charleston County Grand Jury indicted Hayward for Murder (2014-GS-10-3322). On November 9, 2015, Hayward proceeded to trial by jury before the Honorable Deadra L. Jefferson. He retained the services of trial counsel to represent him on the underlying charge. The State was represented by Assistant Solicitors Chad Simpson and Lauren Mulkey. The jury found Hayward guilty as indicted. Judge Jefferson sentenced him to thirty-eight (38) years of imprisonment. Hayward is currently incarcerated in the South Carolina Department of Corrections.

Mr. Hayward filed a timely notice of appeal and was represented by Susan B. Hackett, Esquire, of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Hayward's conviction on March 20, 2019. State v. Hayward, Op. No. 2019-UP-12 (S. C. Ct. App. Filed March 20, 2019). The remittitur was returned to the circuit court on April 5, 2019.

On April 23, 2019, Hayward filed his initial Application for Post Conviction Relief. On October 31, 2019, the State filed its Return and Motion for a More Definite Statement. On March

4, 2022, Hayward filed an amended post-conviction relief application. On February 10, 2023, an evidentiary hearing was held. On January 10, 2024, this Court granted post-conviction relief. The State filed a Motion to Reconsider, Alter or Amend pursuant to Rule 59(e), SCRC. The State alleges that the Applicant failed to meet his burden of establishing that Trial Counsel was constitutionally deficient, and that Applicant was prejudiced by Trial Counsel's alleged deficiency.

ARGUMENTS IN SUPPORT OF DENIAL OF MOTION

1. Credible Testimony

At the evidentiary hearing, the Court was presented with one witness. This witness was presented by the applicant. The State did not present any witnesses nor did the State refute the testimony of the witness. The witness presented was the Applicant's trial counsel. The testimony the Court relied upon to reach its findings was that of the trial counsel. Trial counsel's testimony provided evidence of the prejudice to the Applicant. To grant the State's Motion to Reconsider, Alter or Amend, this will have to determine that the witness' testimony was not persuasive or credible.

The trial counsel's testimony was well-recalled of relevant background, facts, discussions, and actions regarding his representation. Trial counsel testified credibly that this was his first and only murder trial. He testified that he did not review all discovery materials and that he failed to object to various testimony introduced during the trial. Trial counsel acknowledged that his failure to review materials provided in discovery affected his advice to the Applicant and affected Applicant because he was not able to negotiate a plea deal based on the damning information contained in the materials. Trial counsel testified that he failed to challenge the ability of experts to testify about examinations that were completed by other experts. As a result, the testimony about forensic analysis performed by non-testifying witnesses was allowed to be

presented to the jury and was strongly relied upon to convict the Applicant. The failure to challenge this was a defect in the representation. Trial counsel's testimony was that he did not know or understand a number of principles of trial work such as proffering testimony and understanding peer review vs. conducting the examination directly. Notably, the State did not provide this Court with any evidence nor elicit any contrary testimony from the witness that established that trial counsel's representation was not deficient. The crucial factor is that the unchallenged testimony of the trial counsel clearly established that his failures to object, challenge, and/or investigate were not strategic choices of reasonable professional judgment.

This Court observed the witness and heard his testimony. This court found his testimony to be both persuasive and credible. Because the only testimony was that of the trial counsel, the Court would have to now determine that trial counsel's testimony was in fact not persuasive and credible to grant the State's motion. Because of the consistency in the testimony and the failure of the State to contradict the testimony, it is not plausible for the Court to determine that the trial counsel was credible in some parts of his testimony and not credible in other parts. The credibility of witnesses is at the backbone of determining facts. For the evidentiary hearing, this Court determined that trial counsel testified credibly. The Applicant presented credible evidence to meet the burden that trial counsel's representation was ineffective.

2. Prejudice to the Applicant

It is clear from the testimony elicited by the Applicant's trial counsel that the prejudice to the Applicant is that he was not provided an opportunity to consider any plea negotiations, he went forward with a jury trial on the incomplete advice of counsel and because of the deficiencies in counsel's representation at the trial, he was convicted and to 38 years imprisonment. Trial counsel testified during direct and cross examination that had he fully reviewed discovery materials

provided he would have found the “damning information that I felt like we couldn’t get past” and discussed some sort of plea deal with the solicitor. Trial Counsel testified that his failed to proffer testify did not preserved the record for the Applicant and that he failure to challenge expert testimony allowed damaging information into evidence that the solicitor relied on heavily in making his closing argument to sway the jury. While the testimony presented establishes the prejudice, the Court can take judicial notice that had trial counsel performed the tasks discussed during his testimony, this defendant would have more than likely accepted a guilty plea offer that would have result in a sentence less than 38 years of imprisonment.

In its Motion to Reconsider, the State argues that the Applicant was not prejudiced because the Solicitor was not willing to extend an offer. The State speculates that plea negotiations would not have resulted in an offer. However, its own reference to the trial transcript contradicts that speculation because the Solicitor’s comment was that no formal offer was extends and any offer would have included a murder charge. We do not know what would have resulted because the unchallenged testimony of trial counsel was that he did not engage in plea negotiations because he did not fully review and assess the “damning information.” It is just as possible that plea negotiations would have resulted in a lesser sentence if not lesser charges.

3. Closing Argument

The State failed the Motion to Reconsider because it does not like the finding of the Court that trial counsel provided ineffective assistance of counsel because of defect in his performance. The Court made its decision after reviewing the trial court and appellate court records, the PCR record, testimony from the evidentiary hearing and arguments from both the State and the Applicant. The Court gave the parties an opportunity to argue their position at the conclusion of the evidentiary hearing. The parties choose to focus their closing summaries on the *State v.*

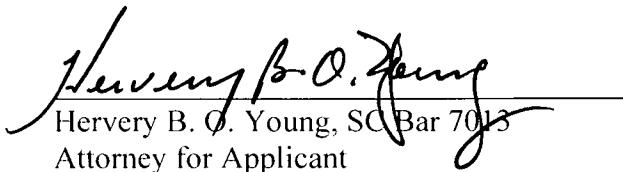
McCray, 413 SC 76, issue. Each had the opportunity in their closing remarks to cover all raised issues. The parties had the opportunity to ask the court to keep the record open for a period to allow the submission of any additional information. Likewise, the parties had from the date of the evidentiary hearing (February 10, 2023) until the court ruled on the case (June 15, 2023) to supplement their argument in writing. The State relied upon its cross examination of the trial attorney and its closing statement. The State did not present any evidence or witnesses to refute the testimony.

The Court found that Mr. Hayward is entitled to a new trial based on the testimony of trial counsel and applicable case law as it relates to the expert witness testimony. The Court should not reconsider, amend, or alter its decision because the State does not like the decision or its presented defense at the hearing.

CONCLUSION

The Court reviewed the testimony presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed the testimony accordingly. This Court reviewed the records submitted by the parties and the legal arguments made by the attorneys. Pursuant to § 17-27-80 of the South Carolina Code, this Court makes the following findings of fact and conclusions of law based upon all the probative evidence presented. This Court found that the applicant met the burden of proving the allegations in his application. This Court applied the two-prong test of *Strickland* and determined that trial counsel did not provide representation that was within the range of competence required in criminal cases and that his performance was not due to tactical reasons. This Court further found that but for the errors of trial counsel, the Applicant was prejudiced by not having a meaningful opportunity to plea negotiations and a less severe sentence.

Therefore, the Court should deny the State's Motion to Reconsider, Amend or Alter the Court's findings and order.



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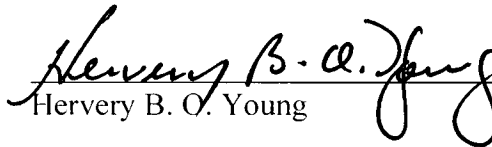
May 24, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
VALENTINO M. HAYWARD, #366107,	)	
	)	Case No.: 2019-CP-10-2108
Applicant,	)	
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

The undersigned hereby certifies that on this date, he served a copy of the Applicant's Reply to the State's Motion to Reconsider, Alter or Amend Pursuant to Rule 59(e), SCRC in the above captioned matter on the following by depositing the same in the mail, postage paid, and by electronic mail at the official AIS email address on record.

Honorable George M. McFaddin, Jr
Circuit Court Judge
215 N. Harvin Street
Sumter, SC 29150
gmcfaddinsc@sccourts.org

Russ Barlow
Assistant Attorney General
Post Office Box 11549
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russbarlow@scag.gov


Hervery B. O. Young

May 28, 2024

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Valentino M. Hayward, #366107,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

) CASE NO. 2019-CP-10-02108

**ORDER GRANTING RESPONDENT'S
MOTION TO RECONSIDER PURSUANT
TO RULE 59(c), SCRPC, AND DENYING
POST-CONVICTION RELIEF.**

2025 JUL 28 AM 11:09
JULIE J. ARNOLD
CLERK OF COURT
State of South Carolina
Application filed

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The matter before this Court is an action for post-conviction relief (PCR) application filed on April 23, 2019, by Valentino M. Hayward (Applicant). Respondent, the State of South Carolina, made its Return, dated October 28, 2019, requesting an evidentiary hearing. An evidentiary hearing was convened at the Charleston County Courthouse on February 10, 2023, before the Honorable George M. McFaddin, Jr. Applicant was present and represented by James K. Falk, Esquire (PCR Counsel). Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Applicant presented the testimony of Aaron C. Mayer (Trial Counsel). Applicant did not testify. Thereafter, by filed Order dated January 10, 2024, this Court granted Applicant post-conviction relief.

On January 25, 2024, Respondent filed a timely Motion to Reconsider Alter, or Amend Pursuant to Rule 59(e), SCRCp. On May 31, 2025, Applicant filed his Reply to Motion to Reconsider.

After thoroughly reviewing the record once again, along with motions, returns, the testimony and evidence presented at the evidentiary hearing, the evidentiary transcript, and the arguments made within the motion to reconsider, alter, or amend, this Court hereby grants Respondent's motion to reconsider the judgment, rescinds and vacates the order granting post-

[Signature]

conviction relief, and finds Applicant has failed to establish any constitutional deprivations entitling him to relief on any of the grounds raised, and accordingly, denies the application in full.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. In May 2014, the Charleston County Grand Jury indicted Applicant for murder (2014-GS-10-03322). Aaron C. Mayer¹ represented Applicant. Ninth Circuit Assistant Solicitors Benjamin Chad Simpson and Lauren Mulkey Frierson prosecuted the case.

On November 9, 2015, Applicant proceeded to a jury trial before the Honorable Deadra L. Jefferson. The jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to thirty-eight (38) years imprisonment for murder.

Applicant filed a timely notice of appeal. On May 5, 2017, Appellate Defender Susan B. Hackett, of the Office of Appellate Defense, perfected the appeal by filing an Anders² brief. By order dated April 9, 2018, the Court of Appeals directed the parties to brief the issue of the admissibility of the two photographs from Applicant's cell phone. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Hayward, Op. No. 2019-UP-1 12 (S.C. Ct. App. filed March 20, 2019). The Remittitur was returned on April 5, 2019.

CURRENT ACTION BEFORE THIS COURT

In his initial PCR application, Applicant alleged he is being held in custody unlawfully based on the following:

1. Ineffective Assistance of Counsel

¹ Mr. Mayer is currently suspended from the practice of law in South Carolina. See In Re Aaron Cole Mayer, Sup. Ct. Order 2018-08-24-01 (Decided August 24, 2018).

² Anders v. California, 386 U.S. 738 (1967).



On March 4, 2022, Applicant filed an amended PCR application with the following allegations:³

1. Trial Counsel made the following objections to but failed to preserve the record thereby making appellate review of the Court's decisions impossible.
 - a. ~~Trial Counsel submitted proposed voir dire questions that the trial court did not use. The record reflects that Trial Counsel objected to the court's refusal to ask his proposed voir dire questions, 20, 23, 24, 26, and 28. However, by failing to submit his proposed voir dire as an exhibit, the trial court's decision was not preserved for review. (Record page 34)~~
 - b. ~~Once the jury was empaneled, there was a bench conference (Record page 51). Other than the notation in the record, there is no record of the issues addressed at the bench conference. Trial Counsel should have challenged the State's preemptory strikes pursuant to Batson v Kentucky. If Trial Counsel raised the Batson issue during the bench conference he provided ineffective assistance of counsel by not ensuring that the record was preserved. If Trial Counsel did not make a Batson challenge during this bench conference, his failure to do so would amount to ineffective assistance of counsel.~~
 - c. Trial Counsel failed to preserve his objection to Marian Campbell's testimony. (Record page 287 lines 11-19).
 - d. Trial Counsel failed to preserve his objection to Richard Holmes's testimony, (record page 334 lines 24-25).
 - e. ~~Trial Counsel abandoned his response to the State's objection to counsel's question to Richard Holmes regarding a polygraph test. (Record page 343 lines 11-25)~~
2. ~~Trial Counsel failed to object to the state's leading questions during its direct examination of Latoya Carson (Record page 206 line 5 through 210 line 5)~~
3. Trial Counsel was ineffective in failing to properly impeach Laytoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (Record p. 214 line 22 - 25; page 215 line 5-11; page 221 lines 18-20).
4. Trial Counsel was ineffective in not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (Record page 220 line 2-3).
5. Trial Counsel failed to object to prejudicial hearsay testimony from David Osborne. (Record 237 lines 9-15).
6. Trial Counsel was ineffective in failing to object to allowing Nada Kerstein testify to the results of a fingerprint analysis performed by Kathleen Butler. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).

³ At the outset of the hearing, PCR Counsel indicated that Applicant was abandoning allegations 1(a), 1(b), 1(e), 2, and 8. Testimony was only provided by Trial Counsel at the hearing. During Trial Counsel's testimony, PCR Counsel moved to amend and add the allegation that the Trial Counsel was ineffective for failing to review all of the jailhouse calls.



7. Trial Counsel was ineffective in failing to object to allowing James W Green to testify to the results of a firearms/ ballistics analysis performed by Ken Whittier. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).
8. Trial Counsel ~~provided ineffective assistance of counsel by failing to move to suppress the results of the "digital dump" of Applicant's cell phone records including the introduction of State's exhibits 32 and 33.~~
9. Trial Counsel failed to review all the jailhouse calls entered at trial. (See fn. 3).

An evidentiary hearing was held on February 10, 2023, before the Honorable George M. McFaddin, Jr. During Trial Counsel's testimony, PCR Counsel moved to amend and add the allegation that the Trial Counsel was ineffective for failing to review all of the jailhouse calls.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act⁴ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v.

⁴ S.C. Code Ann. §§ 17-27-10 to -160.



Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When



analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325



S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the



record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witness, which allowed the Court to evaluate and scrutinize his credibility. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

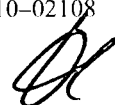
Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(c), SCRCF (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of fact and conclusions of law as required by § 17-27-80 of the South Carolina Code:

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Allegation 1c: Trial Counsel failed to preserve his objection to Marian Campbell's testimony. (Record page 287 lines 11-19).

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to preserve his objection to Marian Campbell's (Campbell) testimony at page 287, lines 11-19 of



the trial transcript. For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any prejudice with regard to this allegation.

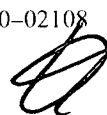
In the order granting relief, this Court found Trial Counsel was "deficient for failing to place his objection on the record." (Order Granting PCR Relief p. 10). Additionally, this Court held that Applicant was prejudiced by Trial Counsel's alleged deficiency because:

If counsel had properly placed his objection on the record, there is a reasonable probability appellate counsel would have raised the issue on direct appeal and the appellate court would have held the trial judge abused his discretion by admitting the evidence. Campbell was permitted to testify over objection that on the day of the shooting [Applicant] texted her and stated "he was talking to somebody about" robbing another person. This evidence was not relevant and was inadmissible hearsay. See Rule 401, SCORE, and Rule 802, SCORE. The error in its admission was not harmless because the testimony was in direct contradiction to the defense."

(Order Granting PCR Relief p. 10). This Court then concluded that it "cannot say beyond a reasonable doubt that its erroneous admission did not contribute to the verdict." (Order Granting PCR Relief p. 10).

Respondent argued that the Court's order granting relief erroneously found Applicant was prejudiced and further speculated that had it been preserved for appeal, the introduction of this evidence would have been reversed as an abuse of discretion.

The admission or exclusion of evidence is within the trial judge's sound discretion and is reversible only for an abuse of discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008); State v. Paeon, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The relevance, materiality, and admissibility of evidence are matters within the trial

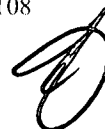


court's sound discretion, and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999).

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

When an issue was unpreserved for appellate review, a PCR court must examine whether Applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether Applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through



the same lens that would be applied on appeal . . . ") (emphasis added) (citation omitted). "The likelihood of a different result **must be substantial, not just conceivable.**" Harrington v. Richter, 562 U.S. 86, 112 (2011) (emphasis added).

In this Court's order granting PCR relief, the Court cited York v. Conway Ford Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) to support its finding that the issue was not preserved. This Court's order granting PCR found, citing York, "An objection made during an off-the-record **bench** conference which is not made part of the record does not preserve the objection for appellate review." (Order Granting PCR p. 10) (emphasis added). However, after further review of the record, this Court finds that Trial Counsel did object and the trial judge held a bench conference on the objection. The following occurred with the trial court:

Q. Did the defendant ever text you he was about to rob someone?

A. Yes. He was – no, he didn't say he was about to. He said, I'm talk to somebody

–

MR. MAYER: Judge, objection.

THE COURT: Basis?

MR. MAYER: May we approach?

(Bench conference was had; following proceedings were had in open court.)

THE COURT: The objection is overruled. **It is relevant, probative. In addition to that, it is an admission against interest.** And you need to lay the appropriate foundation to this line of questioning as to time and place. You may proceed.

(Trial Tr. p. 287) (emphasis added).

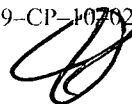
After a careful review of the record and consideration of the arguments of the parties, this Court finds that while Trial Counsel did not place the precise reason for his objection on the record, the trial court's ruling on the objection made it apparent what the context of the objection was and therefore this objection was preserved. See Rule 103(a)(1), SCRE ("In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."); see also State v.



Bowers, 428 S.C. 21, 832 S.E.2d 623 (Ct. App. 2019) ("The failure to raise specific grounds for an objection will not prevent the appellate court from addressing an issue when the record indicates that the trial court and the State understood the basis for the objection. State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (citing State v. Kromah, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013)).").

Turning to whether the evidence was relevant and admissible. Rule 401, SCRE, provides that "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The trial court held that the evidence Campbell testified to was relevant and probative. Rule 802, SCRE, provides "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Upon this Court's review of the record, this Court finds the trial court was correct when it found Campbell's testimony relevant and admissible under the hearsay exception of an admission against interest. The text messages Campbell testified to were from Applicant, and Campbell was the recipient of those text messages, which makes them admissible pursuant to Rule 801(d)(2), SCRE.

In summation, this Court finds 1) Campbell's testimony was relevant and probative; 2) Campbell's testimony was admissible as an admission against interest; and 3) the issue was preserved for appellate review and would not have been reversed on appeal. Thus, Applicant has failed to prove how he was prejudiced when this was not hearsay; it was admissible under Rule 801(d)(2), SCRE, and it was properly preserved for appeal, but would not have been reversed had it been raised on appeal.



Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1d: Trial Counsel failed to preserve his objection to Richard Holmes's testimony, (Record page 334 lines 24-25).

Applicant briefly addressed this allegation on direct examination of Trial Counsel; however, instead of addressing the merits of the allegation, PCR Counsel stated on the record that "We're not going to go any further" and moved on. Based on the record, this Court deems this allegation abandoned. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)).

Allegation 3: Trial Counsel was ineffective in failing to properly impeach Latoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (Record p. 214 line 22-25; page 215 line 5-11; page 221 lines 18-20).

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to properly impeach Latoya Carson's prior inconsistent statements as allowed under Rule 613 SCRE. (R. p. 214 ll. 22-25; p. 215 ll. 5-11; p. 221 ll. 18-20). For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any deficiency by Trial Counsel and any resulting prejudice from the alleged deficiency with regard to this allegation.

Upon review, trial counsel's actions are given great deference because "it is all too tempting for a defendant to second guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

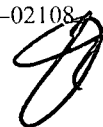


unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Furthermore, the court in Strickland makes clear that "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. In addition to this approach against second-guessing the tactics of counsel, where there exists an articulable reason for employing their strategy, "such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977). "Impeachment tactics are generally held to be matters of trial strategy which are to be afforded deference." Gustave v. United States, 627 F.2d 901, 906 (9th Cir. 1980).

In the order granting relief, this Court found Trial Counsel "was ineffective for failing to properly impeach Latoya Carson with her prior inconsistent statements as allowed pursuant to Rule 613, SCRE." (Order Granting PCR Relief p. 10). This Court further found, "[Trial] Counsel's knowledge of the Rules of Evidence was not within the range of competence for a criminal defense attorney and rendered his performance deficient. [Trial] Counsel's deficient performance prejudiced [Applicant] because Carson's credibility was crucial to the state's case against [Applicant], and counsel failed to properly impeach her credibility in front of the jury. If the jury had learned Carson provided inconsistent testimony, there is a reasonable probability the outcome of [Applicant]'s trial would have been different." (Order Granting PCR Relief p. 12). .

At the evidentiary hearing on direct examination of Trial Counsel, the following colloquy occurred:

- A. Yes, sir. Let's just talk briefly about Latoya Carson's testimony.
- Q. I'll bring up Page 220. Look at Page 214, Lines 22 to 25.
- A. Yes, sir. Thank you. Yes, sir. I've got it.
- Q. All right. So you were trying to -- that's actually on your cross-examination, right?
- A. Let me just double-check. Yes, sir. This is during my cross. Yes, sir.



Q. All right. And so had she testified to something different than what she reported on the police reports?

A. Oh, boy. Possibly.

Q. It looks like you're trying to -- it looks like you said there was a prior statement made.

A. It's entirely possible. I remember I was trying to nail her down on this whole, you know, supposedly there was a call made and this kind of thing.

Q. So you were trying to assert that she was being, she was providing conflicting testimony or inconsistent testimony?

A. I think that's right. Yes, sir.

(PCR Tr. pp. 23-24).

On cross-examination, the following colloquy occurred:

Q. So let's move on to Number 3. You were ineffective for properly, or for failing to properly, impeach Latoya Carson's inconsistent statements. And that's on Page 214.

A. Okay. I've got 214 here.

Q. And that's going to be Line 22 to 25.

A. Yes, sir. I see it.

Q. And you are answering these, if you could just skim through this through Page 216, I believe his allegation is all the way up to 221.

A. Yeah. I'm laying the groundwork to impeach her. That's right. And then we had another binge conference based on Mr. Simpson's objection, and then the judge is telling me how to impeach a witness but didn't have prior testimony from her. It was just this -- it was -- it was just this police report, I think. So I don't know if it even would have been proper for impeachment. I don't know. I hadn't practiced law in a while, so I'm a little rusty on the rules here.

(PCR Tr. pp. 26-27).

As an initial matter, this Court finds that it erred in finding "Trial [C]ounsel admitted that the judge told him how to properly impeach the witness, that he did not know how to impeach the witness at the time, and that he was a little rusty on the rules." (Order Granting PCR p. 12). After thoroughly reviewing the record, this Court finds Trial Counsel did not testify that he did not know how to impeach a witness; instead, Trial Counsel answered the question as he read what was happening at trial. This Court further finds Trial Counsel was referring to his knowledge of the Rules of Evidence at the evidentiary hearing and not at trial.



Furthermore, the record provides that Trial Counsel did impeach Carson with her prior inconsistent statements during the following exchange at trial:

Q: Do you recall telling the police that the person who walked up to the car had on a short-sleeved shirt?

A: No.

Q: You told the police it was a dark shirt, but you said it was short sleeved. You don't recall doing that??

A: No.

Q: And you told police that whoever walked up put their left hand on the car; do you recall doing that?

A: I don't know exactly if I said which hand it was. I just know that he walked up on the passenger side and touched the car, like, and leaned in.

Q: When your memory was a lot fresher?

A: Yeah. My memory was fresher, but I had a lot of thoughts going through my head.

Q: But if you had said at the time it was a left hand, there wouldn't be any reason to think that was wrong?

MR. SIMPSON: May we approach?

(Bench conference was had; following proceedings were held in open court.)

THE COURT: Objection is withdrawn, you may proceed. And before you can impeach the witness, you need to ask the exact question and give her the opportunity to admit or deny the statement to establish that it is inconsistent.

(Trial Tr. p. 214, ll. 22-15; p. 215, ll. 1-25, p. 216, ll. 1-4).

Q: Okay. At some point when you were being interviewed by the police, you and the officer went through the details of these calls and you guys came up with a time frame, right?

A: Yeah, because I didn't know exactly what time. I couldn't give him any times, but by me being on, that chat site and it being prerecorded, the time that I mentioned that I heard the gunshot, it was all prerecorded. You could play it back and hear it and see the time.

(Trial Tr. p. 217, ll. 9-18).

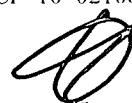
Q: So on the night that this happened with Chucky, isn't it true that on the way there it was you who was giving him directions?

A: No.

Q: And it was you who was on the phone setting up someone to meet you there?

A: No.

Q: And that's all because of some kind of outside beef that you guys were involved in?



A: No.

Q: Somebody named Raphael Ward?

A: No.

Q: Raphael Ward being a friend of yours?

A: I don't even know who that is.

Q: So you've lied to the cops before and you lied to them again on this night, didn't you?

A: No.

Q: But there's nobody else who can say whether Chucky was getting directions from somebody on the phone or getting directions from you?

A: No.

Q: We just have to take your word for it; huh? Is that right?

A: I'm pretty sure his phone records show who he been on the phone with and the calls were made and placed to somebody within the time frame, so his phone can say. I'm the only person -that I can say that I was in the car when he was on the phone with somebody getting directions, yes.

MR. Mayer: Court's indulgence?

BY MR. Mayer:

Q: Do you recall giving a recorded statement to the police?

A: I guess.

MR. Mayer: Okay. No further questions.

(Trial Tr. p. 220, ll. 12-25; p. 221, ll. 1-22).

Further, Carson's credibility was already in question at the time of her testimony, as was highlighted during Trial Counsel's cross-examination of the witness. This fact was again noted by Trial Counsel's testimony during Applicant's PCR hearing. Trial Counsel explained the issue of credibility he saw pertaining to Carson's testimony as follows:

...[I]t's one thing, right, to hear it from a woman who was accused of murder herself to say, well, you know, I think he was on the phone and well, might have been the other hand, you know, there were holes in her-- there were potential holes in her story that I wanted to exploit....

(PCR Tr. p. 28).

Moreover, Carson was questioned about issues regarding her credibility during direct (Trial Tr. p. 209) and cross-examination (Trial Tr. p. 213) of Applicant's trial. Accordingly, the Court's holding that, because Carson's credibility was crucial to the State's case, "If the jury had learned



Carson provided inconsistent testimony, there is a reasonable probability the outcome of Hayward's trial would have been different,"⁵ is not supported by the record.

This Court finds the record provides that Trial Counsel did cross-examine Carson on her inconsistent statements in accordance with Rule 613(a), SCRE. Thereby presenting to the jury that Carson had previously made inconsistent statements. Trial Counsel's cross-examination of Carson concerning her prior statements to the police provided the jury the opportunity to observe the declarant and make a determination on the credibility of the witness on that point. Thus, Trial Counsel cannot be found deficient.

Lastly, Applicant has failed to prove any prejudice from the alleged deficiency, where Applicant failed to present evidence of what information would have additionally been gained from impeaching Carson with her prior inconsistent statements to police. Notably, those statements were not presented to this Court. Therefore, Applicant cannot establish that Trial Counsel's alleged deficient representation prejudiced him in accordance with the requirements of Strickland. Thus, whether impeaching Campbell's testimony would have changed the trial's outcome is mere speculation. See Clark, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

⁵ Order Granting PCR Relief p. 12.



Allegation 4: Trial Counsel was ineffective in not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (Record page 220 line 2-3).

Applicant alleged Trial Counsel's representation was constitutionally ineffective for not challenging Latoya Carson's invocation of her 5th Amendment Right and by not having the witness proffer her testimony. (R. p. 220, ll. 2-3). For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any deficiency by Trial Counsel and any resulting prejudice from the alleged deficiency with regard to this allegation.

Both the United States Constitution and the South Carolina Constitution provide that no person shall "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; S.C. Const. art. I, § 12. Further, "[n]o person shall be required to answer any question tending to incriminate himself." S.C. Code Ann. § 19-11-80 (2014). The Supreme Court of South Carolina "has explained that the Fifth Amendment is an assurance that an individual will not be compelled to produce evidence or information which may be used against him in a later criminal proceeding." State v. Lawrence, 439 S.C. 611, 617, 889 S.E.2d 557, 561 (2023) (citing Grosshuesch v. Cramer, 377 S.C. 12, 22, 659 S.E.2d 112, 117 (2008) (internal quotation marks omitted)). Further, the privilege extends not only beyond incriminating answers or information but also "to answers furnishing a link in the chain of evidence needed to prosecute an individual." Id. (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

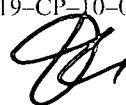
The protections of the Fifth Amendment are not limitless: "[I]t is well-settled that an invocation of the privilege is confined to instances where a person has reasonable cause to apprehend danger from his answer." Id. (citing Hoffman, 341 U.S. at 486). Moreover, a trial court is limited to compel a person's testimony if it is "perfectly clear" the testimony will not result in



criminal liability, and the testimony "cannot possibly have [a] tendency to incriminate." Hoffman, 341 U.S. at 486 (internal quotation marks omitted). Furthermore, the Fifth Amendment privilege remains applicable not just during an individual's own criminal trial but during "any other proceeding, civil or criminal, formal or informal," in which the testimony or answers being sought from the individual could conceivably be self-incriminating in some way. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

When confronted with a witness's invocation of the privilege, the trial judge is tasked with determining whether the witness's silence is justified. Hoffman, 341 U.S. at 486. In making that determination, the trial judge must generally consider and answer the following two questions: (1) whether the information is incriminating in nature; and (2) whether there is a sufficient possibility of criminal prosecution to trigger the privilege. Grosshuesch, 377 S.C. at 23, 659 S.E.2d at 117; see United States v. Sharp, 920 F.2d 1167, 1170 (4th Cir. 1990) (explaining there are "essentially two things" for a trial judge to consider when analyzing whether a sufficient hazard of incrimination exists to justify an invocation of the privilege against self-incrimination).

In the order granting PCR, this Court found Trial Counsel "was ineffective for failing to challenge Latoya Carson's invocation of her Fifth Amendment right and by not proffering her testimony." (Order Granting PCR Relief p. 12). This Court further found that "Trial [C]ounsel should have requested to proffer Carson's testimony and allowed the trial court to determine on a question-by-question basis whether Carson could assert the privilege. See State v. Lawrence, 439 S.C. 611, 889 S.E.2d 557 (2023). [Applicant] was prejudiced by [T]rial [C]ounsel's deficient performance because Carson was a crucial witness for the state, and her excluded testimony could have negatively impacted her credibility." (Order Granting PCR Relief p. 13).



At trial, the relevant testimony referenced by this Court's order took place between Trial Counsel and Carson as follows:

Q: Now, this murder that you're currently in jail for, that you're accused of, who was the decedent in that case?

A: I invoke my right, the Fifth Amendment. I don't want to talk about my case.

Q: Somebody named Happy, though, right?

THE COURT: She's invoked her right. You need to move on to your next question.

BY MR. MAYER:

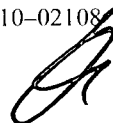
Q: Are you aware that that person was Chucky's best friend?

A: I'm invoking my right. I don't want to speak about my case.

(Trial Tr. p. 219, ll. 24-25; p. 220, ll. 1-11).

After careful reconsideration, this Court finds the requirement of Trial Counsel to request a proffer of Carson's testimony and determine on a question-by-question basis whether Carson could assert the privilege was not warranted because Carson did not assert a "blanket" invocation of the Fifth Amendment, but instead only invoked the Fifth Amendment where it was "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." See Hoffman, 341 U.S. at 486-87.

Here, Carson faced a real risk of self-incrimination if compelled to provide the requested substantive testimony or answers about the incident that led to the murder charges for which she had been indicted, as she was awaiting trial on those pending criminal charges. As the Solicitor (Trial Tr. p. 210) and Trial Counsel (Trial Tr. pp. 219-220) referenced during direct and cross-examination of Carson, she was charged with, incarcerated for, and awaiting trial on her indictment of murder in a separate case. Accordingly, Carson only invoked the Fifth Amendment on those questions which sought an analysis of the substantive issues regarding her pending charges. See Lawrence, 439 S.C. 611, 889 S.E.2d 557 (2023).



Under the circumstances, Carson could not legally be compelled in any proceeding to provide substantive testimony or answers about what occurred during the incident that led to her criminal charges due to the obvious potential for such information to be self-incriminating. Therefore, when the trial judge correctly informed Trial Counsel to "move on to [his] next question" (Trial Tr. p. 220) following Carson's invocation, doing so was reasonable. Carson's invocation of the Fifth Amendment was proper under these circumstances, as it was not perfectly clear her testimony or answers could not possibly have a tendency to be self-incriminating. Trial Counsel did not render deficient representation by failing to proffer Carson's testimony as she was awaiting trial on the charges at the time of Applicant's trial.

Further, pursuant to the requirements of invoking the Fifth Amendment in this context, the witness only refused to answer those questions referencing her pending murder charges, where she faced a significant risk of self-incrimination in those matters. See Hoffman, 341 U.S. at 486–87, 71 ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."); State v. McGuire, 272 S.C. 547, 550–51, 253 S.E.2d 103, 105 (1979) ("[I]n any case, it is well settled that a witness who is not also a defendant can invoke that privilege only after the incriminating question has been put.").

Additionally, even if Trial Counsel requested an *in-camera* hearing to proffer Carson's testimony, Applicant's desire for Carson to answer specific questions could not trump Carson's constitutional right not to be compelled to incriminate herself. See United States v. Mabrook, 301 F.3d 503, 506 (7th Cir. 2002) (emphasizing a defendant's constitutional right to compulsory process does *not* trump a witness's constitutional right against self-incrimination). Critically, that



fact is "one consequence" of the constitutional privilege against self-incrimination, which is of fundamental importance to our country's justice system.

Lastly, Applicant did not call Carson as a witness at the PCR hearing and provided no evidence of what Carson's testimony would have been. Applicant provided nothing about what information could have been gained through Carson's potential answers. Therefore, Applicant cannot establish that Trial Counsel's alleged deficient representation prejudiced him in accordance with the requirements of Strickland. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial.).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 5: Trial Counsel failed to object to prejudicial hearsay testimony from David Osborne. (Record 237 lines 9 -15).

Applicant alleged Trial Counsel's representation was constitutionally deficient for failing to object to prejudicial hearsay testimony from David Osborne. (R. p. 237, ll. 9-15). For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any deficiency by Trial Counsel and any resulting prejudice from the alleged deficiency with regard to this allegation.

In the order granting PCR, this Court found Trial Counsel was ineffective for failing to object to prejudicial hearsay testimony from David Osborne (Osborne). (Order Granting PCR Relief p. 13). The Court's order granting PCR further held that "Osborne's testimony was inadmissible hearsay pursuant to Rule 802, SCRE, and trial counsel was deficient for failing to



object. The State sought to admit Osborne's testimony for the truth of the matter asserted. More specifically, it was used by the state to show a person spoke to the decedent shortly before his death and gave him directions to a location where he was ultimately shot and killed. Accordingly, if counsel had properly objected, there is a reasonable probability the trial judge would have sustained the objection and excluded the inadmissible hearsay testimony. This Court further finds Hayward was prejudiced by counsel's deficient performance. Trial counsel admitted Osborne's testimony bolstered and vouched for Carson's credibility. Osborne's testimony was also used by the State to establish Hayward's involvement in the murder as the state later alleged Hayward was the person on the other line giving the decedent directions." (Order Granting PCR Relief p. 14). However, after a thorough review of the record and arguments by counsel, this Court finds that Osborne's testimony was not inadmissible hearsay and was admissible under Rule 803(1), SCRE, and this Court vacates and reverses its ruling and denies relief on this allegation.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland,

466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The relevant testimony at trial occurred between the Solicitor and Osborne as follows:

Q: And on December 11th of 2013, how did that involvement come to be?

A: I was off, I got a phone call stating that we'd had a shooting in the Ardmore subdivision, it was possibly going to end up being a murder. I responded to the scene. While on the way, I started trying to figure out what our personnel was like, manpower issues, who we would need to call out to help with the investigation.

Q: And so you did go to the scene that night?

A: I did.

Q: And, again, you were the supervisor. You were sort of running the investigative wing of this investigation at the time?

A: Yes.

Q: Were you in your role as a supervisor, were you briefed or apprised of the statements given by Latoya Carson?

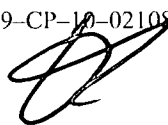
A: Yes, I was.

Q: And where -- as an investigator, where did that information lead you?

A: It was my understanding when I got there that Latoya was with the victim. The victim had -- was speaking on the phone prior to the murder. The person that he was speaking to was directing him, giving him turn-by-turn directions to a location that he would end up being shot and killed. So my main focus at that point was to try to identify the number, then the person, that the victim was speaking to just prior to his death.

(Trial Tr. p. 236, ll. 12-25; p. 237, ll. 1-18).

Hearsay is a statement made by someone other than the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE. In the instant case, this Court finds Osborne was not reiterating a statement made to him by any other party in his testimony. Instead, Osborne testified to his understanding of the events in question when he led the investigation into this matter and how that understanding influenced his areas of focus at that point. Osborne's testimony was permissible under Rule 803(1), SCRE,



as an exception to the hearsay rule. Under Rule 803(1), SCRE, a statement describing or explaining an event or condition is admissible if "made while the declarant was perceiving the event or immediately thereafter." As the statement was permissible, Trial Counsel had no legal basis to object to Osborne's statement. Trial Counsel cannot be deficient for failure to object when there is no legal basis for the objection.

Further, this Court finds that even if Osborne's statement had been hearsay, the result of the proceeding would not have been different. This case was not merely a circumstantial evidence case—this case had incontrovertible DNA and palm print evidence directly linking Applicant to the murder.

Additionally, this Court find that the testimony did not bolster and vouch for Carson's credibility and Applicant has failed to prove any prejudice flowing from the alleged deficiency. See State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001) (improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a jury supports the testimony.). Osborne's statements do not amount to bolstering Carson's credibility as they do not convey to the jury the credibility of the State's witnesses based upon the prosecutor's personal knowledge or information outside of the evidence presented at trial.

At the time that Osborne rendered this testimony, Carson herself had already stated this same version of events. (Trial Tr. pp. 190-209). Additionally, Osborne testified that the victim's phone records had also been analyzed to show that the victim had been on the phone for approximately eleven minutes before his murder with an individual under the contact name "Tino." (Trial Tr. pp. 241-243). Therefore, Applicant's involvement in the case had been established



through the aforementioned testimony and by evidence, including but not limited to Applicant's handprint on the hood of the victim's car and his DNA, which was positively identified.

Accordingly, for the reasons set forth *supra*, this Court vacates and reverses its prior ruling on this issue and finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 6: Trial Counsel was ineffective in failing to object to allowing Nada Kerstein testify to the results of a fingerprint analysis performed by Kathleen Butler. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).

Allegation 7: Trial Counsel was ineffective in failing to object to allowing James W. Green testify to the results of a fire arms/ ballistics analysis performed by Ken Whittier. (See State v. McCray, 413 S.C. 76 (Ct. App. 2015); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); United States v. Palacios, 677 F.3d234 (4th Cir. 2012).

Applicant alleged Trial Counsel's representation was constitutionally deficient for failing to object to Nada Kerstein testifying to the results of the fingerprint analysis performed by Kathleen Butler and James W. Green testifying to the ballistics analysis performed by Ken Whittier. For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any deficiency by Trial Counsel and any resulting prejudice from the alleged deficiency with regard to these allegations.

In Brewer, the South Carolina Supreme Court found that the pathologist who testified from another expert's report and findings of opioid pain medication in a cup when the pathologist did not perform the analysis violated the right of confrontation provided by the Sixth Amendment. In essence, "the Confrontation Clause mandates that an individual who actually performed the



forensic testing be subject to cross-examination." State v. Brewer, 438 S.C. 37, 55, 882 S.E.2d 156, 165 (2022).

In McCray, the South Carolina Court of Appeals held that a DNA expert who peer-reviewed another expert's report but did not conduct the DNA testing could not testify to the other expert's report because he "did not offer any independent opinions regarding the results of the tests or produce an original product that could be tested through cross-examination." State v. McCray, 413 S.C. 76, 90-91, 773 S.E.2d 914, 922 (S.C. Ct. App. 2015).

In Palacios, the Fourth Circuit Court of Appeals explained that "[t]he touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." United States v. Palacios, 677 F.3d 234, 243 (4th Cir. 2012) (quoting United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009)) (internal quotation marks omitted).

Nada Kerstein's Testimony Regarding the Print Analysis

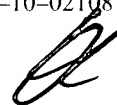
At trial, Nada Kerstein (Kerstein) testified in her capacity as a latent prints examiner with the City of Charleston Police Department. Kerstein explained to the trial court what peer review is and that the body of another expert's work is looked at to ensure "that the information is correct, that [the] reports are correct, that [the] worksheets are correct, that the information that [is being put] out is correct, that [the] conclusions are in line." (Trial Tr. p. 452). Kerstein testified that her recently retired co-worker Kathleen Butler (Butler) had originally done the print analysis. (Trial Tr. p. 452). Kerstein then testified to the following:

Q: In the present case, however, did you peer review her work?

A: Yes, I did.

Q: And if we look at the reports in this case, will we see your signature?

A: No.



Q: Whose signature will we see?

A: Well two of the reports are signed by Kathleen, **one of the reports was signed by me.**

Q: **Okay. And one signed by Kathleen, can you testify today that you looked at the same things she did?**

A: **Yes. I was the verifier for Kathleen's envelopes that she- worked on.**

Q: **And did you do the same — would you have done the same analysis that she did?**

A: **Yes.**

Q: **And you came to the same conclusions that she did?**

A: **Yes.**

Q: **And so you have personal knowledge of the work done in this case?**

A: **Yes.**

Q: **And you, in fact, repeated that?**

A: **Yes, I did.**

Q: Okay. Ms. Kerstein, I'm handing you what's been marked as State's Exhibit 18.

....

Q: Take a moment and look at that envelope and review that item.

....

Q: Have you had a moment with State's Exhibit 18?

A: Yes.

Q: Do you recognize that item?

A: Yes.

Q: And what is that item?

A: This is the latent print card that was in envelope number 2 on case number 1320144.

Q: Is that the case we're here on today?

A: Yes.

Q: Who submitted that item to your lab?

A: Jennifer Wooley.

Q: And how is it described in that submission?

A: You want to know what she wrote on the note card?

Q: Yes.

A: TMobile cell phone 301.

Q: And is that a latent lift card?

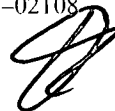
A: Yes, it is.

Q: **Did you analyze that lift?**

A: **Yes, I did.**

Q: **What were your conclusions?**

A: **Latent fingerprint A was identified to the number one finger, which is the right thumb of the ten-print card bearing the name of Valentino Hayward.**



....

Q: Ms. Kerstein, I'm handing you what was entered as State's Exhibit 24.

A: I need the scissors again.

Q: Do you recognize those items?

A: Yes, I do.

Q: And what are they? '

A: These are the five latent lift cards that were submitted in envelope 3 on case 1320144.

Q: Is that the case we're here about today?

A: Yes.

Q: And who submitted those cards to you?

A: Mary Phillips.

Q: And I would like to ask you about the card containing the label, print one.

A: Okay.

Q: Can you locate that card?

A: Yes.

Q: Did you analyze that card?

A: Yes, I did.

Q: Describe your conclusions in that analysis to the jury.

A: Do you want everything?

Q: Sure.

A: Latent lift B was identified to the right palm of the ten-print card bearing the name Valentino Hayward. Latent lift A and C were identified to the eight and nine finger of the ten-print card bearing the name of Anna Dobson.

(Trial Tr. pp. 453-457) (emphasis added).

Here, the record conclusively provides that Kerstein had personal knowledge of the work done because she performed the work herself to confirm that Butler's findings were correct. Unlike Brewer and McCray, Kerstein's testimony was subject to cross-examination based on her own findings because she repeated the tests, which satisfied the touchstone test outlined in Palacio. Notably, on cross-examination at trial, the following occurred:

Q: So you're not the person who did the full analysis on these, is that correct?

A: It was not my original case. I was the verifier on the case which means I repeated all of the steps, the analysis, the comparison, and the evaluation. And it also means that I reviewed her report, I reviewed her worksheet, so I reviewed the entire body of her work.

....



Q: Do you recall or do you have knowledge of whether Valentino Hayward's fingerprints are of the arch variety, the loop variety, or the whirl variety?

A: If I can look at my notes, I can look at what I used as the ten-print card.

Q: Do you have them there?

A: Yes, I do.

Q: Please.

A: He has a combination of loops and whirls.

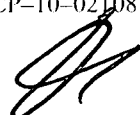
(Trial Tr. pp. 458-459; p. 462).

The record before this Court provides that Kerstein repeated the tests that Butler performed—compared the results—and came to her own conclusions. Also, Trial Counsel had the opportunity to cross-examine Kerstein on her knowledge of the analysis she conducted. Based upon the record before this Court, this Court finds Applicant has failed in his burden of proving Trial Counsel was deficient for failing to object to the testimony of Kerstein when her testimony is remarkably clear that she performed the analysis of the prints herself, she wrote her own report, and she did not just merely testify from another expert's report. This Court further finds from the record that Kerstein's testimony did not violate the Confrontation Clause of the Sixth Amendment. Therefore, any objection by Trial Counsel would have been non-meritorious because there was no basis for an objection.

Accordingly, for the reasons set forth *supra*, this Court vacates and reverses its prior ruling on this issue and finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

James Green's Expert Ballistics Testimony

At trial, James Green (Green) testified in his capacity as a ballistics expert with the South Carolina Law Enforcement Department. Green testified that his co-worker, Kenneth Whitler (Whitler), had retired about a year prior to the trial. (Trial Tr. p. 579). Green explained the peer review process in the following colloquy:



Q: Can you explain to the jury -- we've had a bit of this, it's kind of a theme we have going, but explain what peer review is and why it's important in any scientific endeavor?

A: Peer review is basically the fact that if I do something, somebody can come behind me and replicate what I do. That's one of the hallmarks of science is reproducibility and can be replicated. At the SLED Lab, particularly the firearms department, we have a 100 percent peer review or micro verification policy. That means for any report that's given out to a community agency, before any phone calls are made, if it's a rush case sometimes the investigators call and say, we can't wait for the report, we need to know the answer now. Before any of that information can be given out, another second court qualified firearms examiner comes in and looks at the evidence and — and — like I would go to Ken if he was still there and say, I need you to micro verify a case. He would come down to my microscope, look at my evidence, and he would formulate his own opinion on it.

Q: And that information isn't released or reported until both people agree on the conclusions?

A: Yes, sir. No conclusions are given out to anyone, not even our supervisor, until my initials, or whoever the micro verifier's initials are, are on the worksheet saying that we agree with what the results are.

Q: Now, if we look into the report that your department gave on this case, would we see the name Ken Whitler's name? •

A: Yes.

Q: Do you, nevertheless, have personal knowledge of the results in this case?

A: Yes, sir. I did the micro verification in this case and I also did the technical administrative review of his case file.

Q: Just to be clear, this is not just you reading someone else's report. You did the same work in this case?

A: Yes, sir.

(Trial Tr. pp. 580-581) (emphasis added).

After a thorough review of the record, this Court finds that while Whitler's report was used, Green testified that he performed all of the analysis that Whitler did on the same evidence and came to the same conclusions. To be clear, Green testified that he was "not just reading from someone else's report" and that "he performed the same work in this case." (Trial Tr. p. 581). Nevertheless, Trial Counsel was able to cross-examine Green on the evidence that Green had personal knowledge of and had personally performed the analysis, thereby satisfying the



Confrontation Clause of the Sixth Amendment. Thus, there was no basis for Trial Counsel to object to Green's testimony.

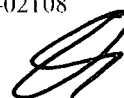
Accordingly, for the reasons set forth *supra*, this Court vacates and reverses its prior ruling on this issue and finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 9: Trial Counsel failed to review all the recorded jail calls entered at trial.

Applicant alleged Trial Counsel's representation was constitutionally ineffective for failing to review all the recorded jail house calls. For the reasons set out below, this Court vacates its former ruling on this issue and now finds that Applicant failed to satisfy his burden of proving any prejudice with regard to this allegation.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Likewise, in order to prevail on a claim that counsel did not review discovery with applicant, the applicant must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Id.

Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is insufficient



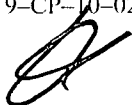
to support a relief grant. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

In the order granting relief, this Court found Trial Counsel "was deficient for failing to thoroughly review the discovery, specifically the recorded jail calls, and [Trial Counsel's] deficient performance prejudiced [Applicant]. The recorded conversations published to the jury were evidence of consciousness of guilt and highly incriminating. See State v. White, 437 S.C. 490, 879 S.E.2d 21 (Ct. App. 2022). Trial Counsel testified that had he known about the existence of this recorded conversation, he would have advised [Applicant] to plead guilty and attempted to secure a favorable plea offer from the State." (Order Granting PCR Relief pp. 8-9). The Court's order found Trial Counsel's testimony credible on this issue.⁶ (Order Granting PCR Relief p. 8).

Respondent argued in its Rule 59(e), SCRCP, motion that this Court's finding that Applicant was prejudiced by Trial Counsel's alleged deficiency was erroneous because Trial Counsel's assertion that had he known about the jailhouse calls published to the jury, he would have advised Applicant to plead guilty and sought a plea deal from the Solicitor was mere speculation, and the record refuted Trial Counsel's claim. This Court agrees with Respondent.

Here, the alleged deficiency of Trial Counsel lies in the claim that he did not thoroughly review all of the jailhouse calls. Trial Counsel testified that had he been aware of the content of those calls presented to the jury, he would have pursued a plea deal with the Solicitor's Office and advised Applicant to plead guilty. However, the record does not substantiate Trial Counsel's

⁶ This Court now clarifies its finding of credibility of Trial Counsel's testimony. This Court finds Trial Counsel credible in that at the moment of the evidentiary hearing, Trial Counsel believed he would have sought a plea deal from the Solicitor's Office. However, it is evident from Trial Counsel's testimony at the evidentiary hearing that he had not reviewed the entire record before his testimony at the evidentiary hearing.



assumptions, and therefore, his speculation does not meet the requirements for demonstrating prejudice.

In fact, the record refutes Trial Counsel's assertions as to what he would have done had he known the substance of the jailhouse calls because the record provides that the Solicitor was never open to Applicant pleading to anything but murder. At trial, the Solicitor was asked by the trial court whether there had been any definitive offers made to Applicant that he rejected, and the Solicitor replied:

No formal offers were made. We had some discussion and we made it clear that any sort of offer would include a plea to the charge of murder, and that was a nonstarter —

(Trial Tr. pp. 74, l. 19 – 73, l. 8) (emphasis added). The record provides that the Solicitor's Office was never open to Applicant pleading to anything but murder, and that was a "nonstarter." Id. Furthermore, aside from the record before this Court, Applicant presented no evidence to the Court that the Solicitor's Office had extended any plea offers, nor any evidence that the Solicitor's Office was willing to extend a plea offer to Applicant.

Assuming, *arguendo*, Trial Counsel discovered the jailhouse calls and decided to negotiate with the Solicitor's Office, it is mere speculation that 1. Applicant would have accepted the plea offer; 2. The plea would have been entered without prosecution canceling it or the trial court would have accepted it; and 3. The results would have been more favorable to Applicant. See generally Collins v. State, 422 S.C. 250, 263, 810 S.E.2d 871, 878 (2018); Missouri v. Frye, 566 U.S. 134 (2012) and Lafler v. Cooper, 566 U.S. 156, 174 (2012). While not directly on point, the analysis of the Collins, Missouri, and Lafler cases and remedy discussions is applicable in the present case, in which Applicant claims he would have sought a plea offer had he been fully aware of the substance of the jailhouse calls.



Specifically, the Court's holding in Collins, directly addresses this issue in their analysis as follows:

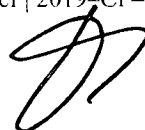
Here, Collins proceeded to trial rather than plead guilty. At the PCR hearing, Collins testified only that after he became aware of the expired plea offer, he told trial counsel he wanted more information about the offer. Consequently, **the record is void of any testimony that Collins expressed a desire to accept the expired offer.** More importantly, even if Collins wanted to plead guilty, **there is no evidence or testimony from the solicitor that the expired offer was still available before trial, nor is there any evidence or testimony that a new offer existed for Collins to accept.** Thus, Collins failed to demonstrate a reasonable probability that he would have accepted any offer, new or expired. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding the PCR applicant bears the burden of proving the allegations in their application). Therefore, we conclude the record does not support the PCR judge's finding that Collins suffered any prejudice from trial counsel's handling of the expired plea offer.

Collins v. State, 422 S.C. 250, 262–63, 810 S.E.2d 871, 877–78 (2018) (emphasis added). Before this Court is Trial Counsel's testimony and the record—and the record provides that Applicant pleading to murder was a "non-starter." (Trial Tr. p. 74). Furthermore, Applicant was present for his evidentiary hearing and chose not to testify; therefore, the record is devoid of any testimony indicating that Applicant expressed a desire to accept any plea offer. Instead, the record is uncontroverted that no appreciable plea offers were made to Applicant, and nothing other than murder would have been offered. Id.

Accordingly, for the reasons set forth *supra*, this Court vacates and reverses its prior ruling on this issue and finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his



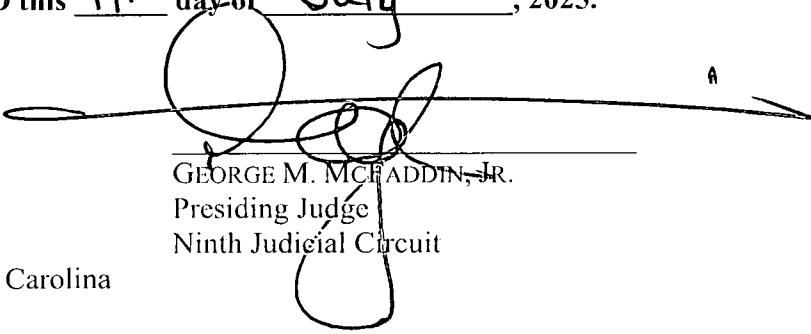
application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE**.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be **DENIED and DISMISSED WITH PREJUDICE**; and
2. The Order granting relief filed January 10, 2024, is hereby **RESCINDED AND VACATED**.
3. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 14th day of July, 2025.


 GEORGE M. MCFADDIN, JR.
 Presiding Judge
 Ninth Judicial Circuit

Sumter, South Carolina

1220

SAW20131209413

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

1320144

ARREST WARRANT NUMBER

K740117

DATE OF ARREST

December 12, 2013

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

MAY 12 2014

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2014GS1003322

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

May 2014 Term

THE STATE

vs.

VALENTINO M. HAYWARD

B/M

Indictment for

MURDER

FILED

5/15/2014 9:17:20 AM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

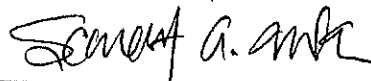
INDICTMENT

At a Court of General Sessions, convened on May 12, 2014, the Grand Jurors of Charleston County present upon their oath:

MURDER

That in Charleston County on or about December 11, 2013, with malice aforethought, **VALENTINO M. HAYWARD** unlawfully did kill Deontre Miles by shooting him, and that Deontre Miles did die in Charleston County as a proximate result thereof on December 11, 2013;
in violation of Section 16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SCARLETT A. WILSON
SOLICITOR

COUNTY OF CHARLESTON

STATE VS.

VALENTINO M HAYWARDAKA: Valentine Hayward, Valentino HaywardRace: Black/African American Sex: MDOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: [REDACTED]DL# [REDACTED] SID# [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: MurderIn violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45The charge is: ☒ As indicted, ☐ Lesser Included Offense,The plea is: ☐ Without Negotiations or Recommendation,

ATTEST:

[Signature] 71257
Benjamin Chad Simpson, Assistant Solicitor SC Bar #

Defendant

[Signature] 81261
Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: ☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives HearingTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Ordered PTUP days/hours Public Service EmploymentObtain GED ☐☐ Set by SCDPPPS Attend Voc. Rehab. Or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ Beginning \$ Paid to Public Defender FundOther: Recipient: *Fine: \$ §14-1-206 (Assessments 107.5%) \$ §14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00§14-1-211 (A)(2)(DUI Surcharge) \$100 \$ §56-5-2995 (DUI Assessment) \$12 \$ §56-1-286 (DUI Breath Test) \$25 \$ Proviso 47.9 (Public Def/Prob) \$500 \$ §14-1-212 (Law Enforce. Funding) \$25 \$ 25.00§14-1-213 (Drug Court Surcharge) \$150 \$ §50-21-114 (BUI Breath Test Fee) \$50 \$ §56-5-2942(J) (Vehicle Assessment) \$40/ea \$ Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ \$ 3.90TOTAL \$ 133.90Clerk of Court/Deputy Clerk: [Signature]Court Reporter: Denise SmithINDICTMENT/CASE#: 2014GS1003322A/W: K740117Date of Offense: 12/11/2013S.C. Code §: 16-03-0010, 0020CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSPresiding Judge: [Signature]Judge Code: 2128Sentence Date: 11/17/15