

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Laquavius T. Cleveland, #360829

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT

) CASE NO. 2017-CP-37-00327

RECEIVED

FEB 17 2026

SC Court of Appeals

ORDER OF DISMISSAL
WITH PREJUDICE

Presiding Judge:	Hon. Perry H. Gravely
Applicant's Attorney:	Bruce A. Byrholdt, Esq.
Respondent's Attorney:	D. Russell Barlow, II, Esq.
Trial Counsel:	Charles R. Griffin, Jr., Esq.
Appellate Counsel:	Lara M. Caudy
Assistant Solicitor:	Lindsey S. Simmons
Date of Hearing:	February 27, 2023
Court Reporter:	Lisa Scott

2026 JAN - 2 A 10: 58

FILED OCONEE COUNTY, SC
MELISSA C. BURTON
CLERK OF COURT

This matter comes before the Court by way of Laquavius T. Cleveland's (Applicant) application for post-conviction relief (PCR) filed on June 5, 2017. Respondent, the State of South Carolina, filed its Return and Motion for More Definite Statement on September 15, 2017, requesting an evidentiary hearing to resolve the claims as set forth in the application.

On February 27, 2023, an evidentiary hearing was convened before the Honorable Perry H. Gravely. Applicant was present and represented by Bruce A. Byrholdt, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. At the hearing, Applicant proceeded forward on all of the claims set forth in his amended application and on additional allegations raised during Applicant's testimony. In support of his claims, Applicant

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testified on his own behalf. Respondent presented testimony from Charles R. Griffin, Jr., Esquire, Lara M. Caudy, Esquire, and the Honorable Lindsey S. Simmons.¹

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the October 2013 term, the Oconee County Grand Jury indicted Applicant for Attempted Murder (2013-GS-37-01043) and Possession of a Weapon During the Commission of a Violent Crime (2013-GS-37-01044). Applicant was represented by Charles R. Griffin, Jr., Esquire (Trial Counsel). Tenth Circuit Assistant Solicitor Lindsey Satterfield Simmons (Simmons) and Assistant Solicitor David Rhys Wagner, Jr. (A.S. Wagner), prosecuted the case.

On July 21, 23–24, 2014, Applicant's case proceeded to a jury trial before the Honorable Alexander S. Macaulay. The jury found Applicant guilty as indicted. On July 24, 2014, Judge Macaulay sentenced Applicant to twenty-two (22) years imprisonment for Attempted Murder and five (5) years imprisonment for Possession of a Weapon During the Commission of a Violent Crime, to run consecutively with the first sentence. Special conditions were placed on both sentences requiring Applicant to obtain his GED, undergo drug and alcohol testing and treatment, and undergo substance abuse counseling. On July 28, 2014, Applicant filed a Motion to Vacate

¹ At the time of Applicant's trial, Simmons was an Assistant Solicitor with the Tenth Circuit Solicitor's Office.

his Conviction and/or Sentence. On August 15, 2014, a hearing was held, and Judge Macaulay denied all of Applicant's motions.

Applicant filed a timely Notice of Appeal. On June 3, 2015, Appellate Defender Lara M. Caudy (Appellate Counsel) of the South Carolina Commission on Indigent Defense perfected the appeal, presenting the following sole issue:

Whether the court erred by refusing to suppress Appellant's statements to law enforcement where Appellant was only sixteen years old, had been interviewed multiple times over the course of eight hours without his mother or friendly adult present, and was subjected to a polygraph exam and told the results showed he was being deceptive since under the totality of the circumstances the statements were not given freely and voluntarily?

The Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion, finding the issue raised by Applicant was not preserved for appellate review. State v. Cleveland, Op. 2016-UP-324 (S.C. Ct. App. filed June 22, 2016). The Remittitur was returned to the lower court on July 13, 2016.

FACTS ADDUCED AT TRIAL

Applicant stabbed his second cousin, Hakeem Kirkland (Victim), eleven times while Applicant was under house arrest. Prior to the jury trial, the trial court held a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964).

The Jackson v. Denno Hearing

The first witness in the Jackson v. Denno hearing was Sergeant Margaret Tinsley (Sergeant Tinsley). She testified that Applicant's aunt, Patrice, brought Applicant to Corporal Philip Robertson (Corporal Robertson), who in turn brought Applicant to the Sheriff's Office in his patrol car. Sergeant Tinsley testified that Applicant was not under arrest. Sergeant Tinsley spoke to Applicant at 5:48 P.M. Sergeant Tinsley testified that Applicant was not in handcuffs, was not denied anything, appeared to be in the right frame of mind, and was not under the influence of

anything. He was very polite. Sergeant Tinsley testified that Applicant was read his rights and signed and initialed the Miranda² rights form. (ROA pp. 6–11). Sergeant Tinsley testified that Applicant was not threatened or promised anything. (ROA p. 15). Applicant agreed to talk. Sergeant Tinsley explained that it was early in the investigation; she knew little about the crime. She knew that there was a stabbing, but did not know how many times Victim was stabbed or the extent of the injuries. (ROA p. 12).

The essence of Applicant's first statement was that Victim was trying to collect a debt and presented a gun. Applicant was scared and stabbed Victim a couple of times. Applicant signed this statement. (ROA p. 15). Applicant also told Sergeant Tinsley that the house had a security camera and that the whole incident was probably recorded. Sergeant Tinsley called Applicant's mother, Yashica Cleveland (Yashica), to request that she obtain a copy of the video. (ROA p. 24).

Sergeant Tinsley testified that at this point, they watched television while waiting for several hours for additional information. Other officers were out at Greenville Memorial, where Victim was being treated. Sergeant Tinsley testified that Victim was offered both food and drink. Applicant declined food but took up the offer for iced tea, so Applicant and Sergeant Tinsley both drank tea while watching television and waiting for more information. (ROA p. 16). Sergeant Tinsley testified on redirect that Applicant never complained of being tired or requested to leave during this period. Instead, he appeared to be patiently waiting to find out about the video he told Sergeant Tinsley about. It took a while because Yashica needed to wait for a break at work to call her ex-boyfriend, who had the software application on his phone to retrieve the video. (ROA p. 33).

Sergeant Tinsley found out that Victim was stabbed eleven times, not two times. She also

² Miranda v. Arizona, 384 U.S. 436 (1966).

discovered that Victim had provided text messages arranging a transaction between Victim and Applicant. She started interviewing Applicant again at 1:15 A.M. Accompanying her in the interview room was Captain Greg Reed (Captain Reed). (ROA pp. 17–18). Sergeant Tinsley testified that she did not threaten or coerce Applicant. She did, however, confront Applicant on the point "that it just wasn't adding up." Applicant agreed to talk some more. (ROA p. 19).

Applicant admitted in his second statement that he arranged by text messages to buy a gun and some marijuana from Victim. Applicant did not actually have the money for the purchase, and he intended to rob Victim and take the gun and marijuana. He admitted that he stabbed Victim with a butcher knife. (ROA p. 20).

Sergeant Tinsley testified that they asked him if he would provide a written statement, and Applicant said that he was tired. They asked Applicant to sign Sergeant Tinsley's notes instead, and Applicant agreed. Sergeant Tinsley read her notes back to him, and he signed them. (ROA p. 21). Sergeant Tinsley explained to him, "You let me know if I left anything out. You let me know if there's something in here that I have incorrect, that I need to change. If you need to change anything, just point it out, let me know." (ROA p. 21).

On cross-examination, Sergeant Tinsley explained that Corporal Robertson initially asked Yashica if she minded if they spoke with Applicant, and she said that she did not. (ROA p. 24). Applicant agreed to a polygraph test. When he took the polygraph test, he showed signs of deception. (ROA pp. 24–26).

Sergeant Tinsley testified that Applicant was willfully staying and was cooperative. Sergeant Tinsley explained, "I thought that there may be video. He was telling us the truth." (ROA p. 31).

Captain Reed testified that he was present for the second interview. He confirmed that

--- Applicant was not promised anything or threatened when he gave his second statement. Captain Reed testified that Applicant appeared to understand what was going on and was in his right frame of mind. (ROA pp. 37-39). On cross-examination, Captain Reed testified that he and Sergeant Tinsley informed Applicant that he did not do well on his polygraph test. (ROA p. 41).

Applicant testified on his own behalf during the hearing. He claimed that Patrice instructed him to draft a statement and that he would then go home. Applicant testified that he did not feel free to leave. Applicant claimed that he thought they could use the polygraph examination in court. Applicant testified that the polygraph examiner told him that the results showed that Applicant was lying. (ROA pp. 44-46).

On cross-examination, Applicant testified that he remembered Sergeant Tinsley going over his rights with him. He agreed that he had initialed the form after she went through it line by line with him. (ROA pp. 48-49). Applicant testified that he can read and write. He confirmed that he knew what Sergeant Tinsley was asking him, and he understood his rights. He admitted to signing the waiver form. (ROA p. 49).

Applicant agreed that Sergeant Tinsley did not threaten him or promise him anything. (ROA p. 49). Applicant agreed that he came to the station of his own free will. (ROA p. 50). Applicant agreed that he gave his first statement freely and voluntarily, and that he was not promised anything or threatened in connection with its provision. (ROA pp. 50-51).

Applicant testified that he agreed to take the polygraph examination. He admitted that the examiner was nice to him. (ROA p. 52). Applicant testified that he agreed to speak with law enforcement a second time. He claimed that he was tired, but previously agreed that he woke up around lunchtime that day. (ROA pp. 49-50; 52-53).

Applicant testified as follows about the second statement:

Q: Do you remember telling her and her taking down notes?

A: I remember her taking down notes, yes, sir.

Q: Now, you changed your story quite a bit the second go-round. You kind of told what really happened, didn't you?

A: Yes, sir.

Q: And then at the end, did she ever promise you anything, did she ever threaten you in any manner to make you talk to her the second time?

A: No, sir.

Q: Did Captain Reed? They were nice to you, weren't they?

A: Yes, sir.

(ROA p. 53).

The prosecution asked Applicant, "Do you remember Sergeant Tinsley reading that back to you and saying, 'Was that what happened?' and you signed it?" Applicant answered, "I can honestly say yes, sir." (ROA p. 54).

Yashica was at work when her sister called her and said the house was surrounded by police, and she needed to get out of work. Yashica asked why she needed to leave work, and her sister told her that the police were looking for her son. Yashica testified that Applicant was supposed to be on house arrest. Yashica signed a consent form authorizing Applicant to take a polygraph examination. Yashica testified that Applicant was sixteen years old at the time of the stabbing. She explained that Applicant had average grades, ranging from A's to C's. (ROA pp. 55–59). Although the testimony is not entirely clear, Yashica appears to have agreed that she spoke with an investigator and consented to the investigator's discussion with Applicant. (ROA p. 61).

Defense counsel argued that the statement should be suppressed. (ROA pp. 64–75). He agreed that law enforcement did not tell Applicant that the results of the polygraph examination could be used against him in court. (ROA p. 75).

Jury Trial

Cindy Blackwell (Blackwell) operates a produce stand adjacent to a tire shop and is also a

certified nursing assistant. On July 8, 2013, Blackwell went out the front door of the produce shop and found Victim, whose white shirt was soaked with blood. Blood was squirting out of his head. The flesh in the back of his ears was hanging off. Blackwell assisted while someone called 911. She testified that she needed five gallons of Clorox and a hose to clean the front of the store afterwards. (ROA pp. 83–90). Although he was initially able to talk, Victim was no longer able to do so by the time the ambulance arrived. (ROA p. 92).

Victim testified that he was twenty-two years old. Applicant was his second cousin. Applicant's street name is Quay. The State admitted exhibits 35–42 into evidence, which were text messages between Applicant and Victim arranging for Victim to sell Applicant a gun and some marijuana. (ROA pp. 99–100). The exchange started with Applicant asking, "You got sum [sic] 380 shells you wanna sell?" (ROA p. 102). The agreement was to sell the gun, shells, and marijuana for \$150. (ROA pp. 103–05).

Victim met Applicant at Applicant's house. He permitted Applicant to take the gun and test it behind the house. Applicant returned with the gun. Victim took it back when Applicant was playing with it. Applicant went back into the house, came outside, and said "All right, Cuzzo" before he started stabbing Victim. (ROA pp. 106–07). Victim was stabbed eleven times. Applicant ran away. (ROA pp. 107–08).

Victim testified that he was stabbed with a long knife. Victim did not know why Applicant stabbed him. Applicant did not take the gun or the marijuana. Victim explained that he rolled out of the car to get away, and that is when Applicant ran away. Victim jumped back in his car and drove away; he called 911, although he was hesitant to do so because Applicant was family. He ultimately drove to Seneca Tires, where he received assistance. (ROA pp. 108–10). Victim needed to stay in the hospital for four days. (ROA p. 114).

Victim-verified on cross-examination that he had sold guns and marijuana to Applicant before. Victim agreed that he wanted to cover up for the gun and the marijuana, but testified that he also initially did not want to get his cousin in trouble. (ROA pp. 115–16). Victim testified that Applicant never owed him \$200. (ROA p. 120).

Joseph Anderson (Anderson), a paramedic, responded to the scene and found Victim, who had stab wounds. Anderson explained that Victim needed to go to the trauma center in Greenville; Oconee was not equipped to provide sufficient medical attention. (ROA pp. 123–26). Anderson explained that Victim's injuries were life-threatening. (ROA p. 127).

Investigator David McMahan (Investigator McMahan) responded to the shop where Victim was found. Victim was no longer there; he was already transported for medical attention. There was a lot of blood on the front steps. Investigator McMahan went to Greenville Memorial and interviewed Victim. Victim identified the perpetrator but was reluctant to say what happened because of the gun and marijuana. Investigator McMahan identified the photographs for the jury that showed the stab wounds on the arms, chest, and back. One of the injuries was a knife wound where the knife went entirely through the arm. (ROA pp. 130–39).

Sergeant Tinsley testified that when Applicant was brought to the sheriff's office, she administered the Miranda warnings to Applicant; he initialed and signed the waiver form. Applicant was not under the influence of alcohol, he was not denied any comforts, and he was not promised anything or threatened. Applicant agreed to waive his rights and speak with Sergeant Tinsley. (ROA pp. 145–50).

In his first statement, Applicant claimed that Victim demanded \$200 that Applicant owed him and pulled out a gun. Applicant claimed that he stabbed Victim with a pocket knife two times and ran – Victim fired a shot as Applicant ran. After Applicant provided Sergeant Tinsley with

...this statement, they watched television while they waited for more information. Applicant was offered food, but he declined. Sergeant Tinsley and Applicant drank sweet tea together. (ROA pp. 151-54).

Sergeant Tinsley testified that she did not know the extent of Victim's injuries at the time. However, Sergeant Tinsley found out there were eleven stab wounds, not two. Further, she was shown pictures of Victim's injuries, and the stab wounds were too large to be made by a pocket knife. She was also advised about the texts arranging a transaction for a gun and marijuana. So, Sergeant Tinsley interviewed Applicant again. (ROA pp. 154-56).

Sergeant Tinsley and Captain Reed interviewed Applicant for the second time from 1:15 A.M. until 1:58 A.M. Although it was a late hour, Sergeant Tinsley testified that Applicant indicated he had slept until noon that day. After Applicant confessed, she asked him to prepare a written statement, but Applicant said that he did not want to because he was tired. Applicant agreed to sign her notes from the conversation instead. Applicant gave the second statement after he was confronted with the new information law enforcement had learned since he gave his initial statement. (ROA pp. 156-60).

Sergeant Tinsley published the notes for the jury. Applicant told the investigators that he had bought guns from Victim before. Applicant contacted Victim about purchasing a gun and marijuana. Applicant intended to take the gun and marijuana and run without paying Victim. Victim gave Applicant the gun so that Applicant could go behind the house and fire it. Applicant brought the gun back to Victim and told him he was going back inside the house to get the money. Applicant fetched the knife from the kitchen "because a gun can do all kinds of damage." Applicant returned and, while Victim was looking away, began to lean into the car for the gun and marijuana when Victim looked at him with a "what the fuck" look. Applicant stabbed Victim

twice because he thought he was caught, but Applicant maintained he did not intend to hurt Victim badly, just enough to run away. Applicant told the investigators that at this point, he was in an adrenaline rush: he thought he had only stabbed Victim twice. Applicant ran into the woods. Applicant claimed that he did not use the full force of his strength because he did not mean for the blade to penetrate too deeply. Applicant indicated that he was regretful. (ROA pp. 160–62).

Sergeant Tinsley asked Applicant to write a statement, but Applicant stated he was tired and did not wish to do so. (ROA pp. 167–68). Sergeant Tinsley noted that Applicant did not have any injuries. (ROA p. 171).

Captain Reed testified that they did not use threats or coercion during the second interview. He testified that the first interview lasted around an hour to an hour and a half, and the second interview lasted almost forty-five minutes. In between, everyone was simply waiting for information. Captain Reed testified that Applicant was free to leave between interviews. (ROA pp. 176–78).

The only defense witness was Yashica. She claimed that she was never told that Applicant was taken to the law enforcement center in Oconee. She found out that Applicant was under arrest around 2:00 A.M. to 3:00 A.M. She admitted that law enforcement brought her papers to sign to consent to the polygraph examination. She said until that time she was calling around to find Applicant because at the time he was under house arrest and she was in charge of him. (ROA pp. 186–91).

CURRENT ACTION BEFORE THIS COURT

On June 5, 2017, Applicant filed his PCR application alleging he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
2. Ineffective Assistance of Appellate Counsel

On September 19, 2019, Applicant amended his application by filing his Petitioner's Response to Respondent's Motion to Make More Definite and Certain:

1. Ineffective Assistance of Trial Counsel
 - a. "First, trial counsel never attempted to talk with victim in case."
 - b. "Trial Counsel has only been involved in case for a week or two prior to trial and only met with Petitioner 2 or 3 times."
 - c. "Trial counsel should have sought immediate appeal from denial of motion to continue trial which trial judge denied."
 - d. "Trial counsel failed to object to general intent jury instruction and failed to request specific intent charge by trial judge on page 59 of Transcript of Record. SEE: State v. Coleman, 422 S.C. 47, 810 S.E.2d 18 (S.Ct. 2018)³ and State v. Sutton, 340 S.C. 493, 532 S.E.2d 283 (S.Ct. 2000)."
 - e. "Trial counsel failed to object to and/or request curative instruction when "house arrest" was mentioned during State's cross-examination of Petitioner's mother on page 12 of Transcript of Record."
2. Ineffective Assistance of Appellate Counsel
 - a. "Appellant Counsel was ineffective for failure to preserve on appeal trial counsel's object to photographs on pages 23, 163 and 171 of trial transcript because prejudice of photographs outweighed any probative value of the photographs."

At the evidentiary hearing, Applicant raised additional allegations:

1. Ineffective Assistance of Trial Counsel
 - f. Trial Counsel failed to explain any plea offers.
 - g. Trial Counsel failed to preserve objections for appellate review.

³ Because the citation is for State v. King despite stating the case name as State v. Coleman, this Court interprets this citation as referencing State v. King.

----- Applicant requested relief in the form of "[s]entence modified on indictment number 2013-GS-37-1044 and sentence affirmed on indictment number 2013-GS-37-1043 as sentenced July 24, 2014."

Before this Court are the Oconee County Clerk of Court records from the underlying conviction and sentence, Applicant's records from SCDC, the trial transcript, the appellate records, and the records of this PCR action.

STANDARD OF REVIEW

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013).

⁴ S.C. Code Ann. §§ 17-27-10 to -160.

- 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), SCRCP; 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 a 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 and a claim of ineffective assistance of appellate 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 witnesses, which allowed the Court to evaluate and scrutinize their 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(e), SCRCP (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 facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court finds applicable the strong presumption that at all stages of Trial Counsel's and Appellate Counsel's representation of Applicant, they both rendered adequate assistance and exercised reasonable professional judgment in both of their representations. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland,

—*supra*).—The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689; see *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

Allegation 1a: Trial Counsel failed to investigate.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to investigate. Applicant avers that due to his retaining Trial Counsel just before trial, Trial Counsel did not have enough time to complete any critical investigation. Specifically, Applicant avers Trial Counsel never attempted to talk with Victim. This Court finds this allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* "In particular, what investigation decisions are reasonable depends critically on such information." *Id.*

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)). 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 not sufficient to support a grant of relief. 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)).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he did not think that Trial Counsel ever asked for a continuance to give himself more time to prepare. (PCR Tr. p. 14).

On cross-examination, Applicant testified that Trial Counsel should have talked with Victim to possibly "get an understanding" and hear Victim's side of the story. (PCR Tr. p. 17). Applicant testified that Victim testified at trial. (PCR Tr. p. 17). When questioned whether the outcome of his trial would have been different but for Trial Counsel not talking with Victim, Applicant testified that he was not going to say that. (PCR Tr. p. 17).

On direct examination, Trial Counsel testified that he filed a motion to continue and met with Judge Macaulay in his chambers, where he was given the file. (PCR Tr. pp. 23; 24). Trial Counsel testified that the motion for continuance was denied in chambers. (PCR Tr. p. 25). Trial Counsel testified that there was no record of the motion and that he did not want to make Judge

—Macaulay angry by "making him go in the room." (PCR Tr. p. 25). Trial Counsel testified that Judge Macaulay gave him a couple of extra days to prepare for trial because the trial was scheduled to be heard on Monday. (PCR Tr. p. 28). Trial Counsel testified that he was retained to represent Applicant around a week before trial. (PCR Tr. p. 23). Trial Counsel testified that he received discovery for Applicant's case. (PCR Tr. p. 23). Trial Counsel testified that he reviewed the file that he was given, which contained discrepancies about Victim's age, *inter alia*. (PCR Tr. p. 23).

Trial Counsel testified that he had no reason to contact Victim. (PCR Tr. p. 25). Trial Counsel testified that he spoke with Applicant regarding certain issues involving Victim. (PCR Tr. p. 27). When questioned whether he had any reason to contact Victim, Trial Counsel testified that he "had been through some issues about it. The victim spent three-year Odyssey through the disciplinary process with the Supreme Court on stuff like that, so I really tried to stay away from trying to do that." (PCR Tr. p. 25). Trial Counsel testified that he had a death penalty case from the late 1980s and that talking with victims is "fraught with peril" because they lie. (PCR Tr. pp. 25–26). Trial Counsel testified that an attorney talks with an adverse party at their own peril, which is "not a wise thing to do at times." (PCR Tr. p. 26). When questioned whether he recalled the testimony being helpful to Applicant, Trial Counsel testified that he recalled Victim testifying at trial about getting into an altercation with Applicant, almost bleeding to death, and Applicant having a knife. (PCR Tr. p. 26). Trial Counsel testified that he thought he had Victim's statements and that they said that Victim had gone to Applicant's house to sell marijuana or a gun, but Trial Counsel was not certain because of the length of time since the trial. (PCR Tr. p. 26). Trial Counsel testified that Applicant was convicted based on other evidence and not because Trial Counsel did not talk with Victim. (PCR Tr. p. 26). Trial Counsel testified that Victim's statements were in the file. (PCR TR. p. 26).

During cross-examination, Trial Counsel testified that he had requested a continuance because he was not prepared at that time. (PCR Tr. p. 32).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Trial Counsel *credibly* testified that he had no reason to speak with Victim in Applicant's case. Trial Counsel's decision not to talk with Victim was reasonable, as Trial Counsel had Victim's statements and was able to review them before trial. This Court cannot find Trial Counsel was deficient for not speaking with Victim.

To the extent Applicant relies on the trial judge not granting a continuance to support his allegation, Trial Counsel *credibly* testified that he was given two extra days to work on the trial. Trial Counsel cannot be held as deficient for failing to secure a continuance when that decision rested solely with the trial judge.

Importantly, Applicant presented no evidence of what matters Trial Counsel should have investigated more, and how those matters would have resulted in a different outcome of his trial. Applicant did not present any testimony or affidavit from Victim at the evidentiary hearing. Applicant did not show how Trial Counsel obtaining Victim's side of the story from speaking with him would have resulted in a different outcome in Applicant's trial. Applicant himself testified that he could not say that, but for Trial Counsel's failure to speak with Victim, the result of his trial would have been different. Notably, the burden of proof is with Applicant, and with no evidence

being presented to this Court, this Court finds that Applicant has not met his burden of proof.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 with PREJUDICE**.

Allegation 1b: Trial Counsel failed to meet with Applicant a sufficient number of times.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to meet with Applicant a sufficient number of times. Specifically, Applicant avers Trial Counsel was constitutionally ineffective for accepting his case one week prior to trial, for only being involved in his case for a week or two prior to trial, and for only meeting with Applicant two or three times. This Court finds this allegation is without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609

F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to ensure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared).

South Carolina case law has established that even if Trial Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) ("First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."). An applicant must present evidence demonstrating that additional time spent in consultation would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced the applicant is insufficient to support a grant of relief. Smith v. State, 404 S.C. 493, 500–01, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997)).

PCR Evidentiary Hearing

On direct examination, Applicant testified that his original attorney before Trial Counsel was a public defender, Danny Day (Counsel Day). (PCR Tr. p. 8). Applicant testified that Trial Counsel was hired to replace Counsel Day around two weeks before trial. (PCR Tr. p. 9). Applicant testified that he probably had two or three opportunities to meet with Trial Counsel before trial. (PCR Tr. p. 9). Applicant testified that he met with Trial Counsel for no more than an hour and thirty minutes.⁵ (PCR Tr. p. 9). Applicant testified that Trial Counsel did not discuss

⁵ The record is unclear whether the time testified to was for each meeting or for the total time that they met.

anything with him, including trial strategy and what was going to happen at trial. (PCR Tr. p. 9). Applicant testified that, when the trial started, Trial Counsel did not explain what was going to happen at trial. (PCR Tr. p. 9). Applicant testified that Trial Counsel only told him that he was just representing him and that he was going to trial. (PCR Tr. p. 9). Applicant testified that he did not think that Trial Counsel ever asked for a continuance to give himself more time to prepare. (PCR Tr. p. 14). Applicant testified that he never had sufficient time to talk with Trial Counsel and plan a trial strategy. (PCR Tr. p. 14).

On cross-examination, Applicant testified that he was represented by Counsel Day for over a year and seven months. (PCR Tr. p. 18). Applicant testified that his family decided to hire Trial Counsel and that he could not recall whether his case was docketed at that time. (PCR Tr. p. 18).

On direct examination, Trial Counsel testified that he was a criminal law attorney with more than 30 years of experience. (PCR Tr. p. 23). Trial Counsel testified that he was retained to represent Applicant approximately 1 week before trial. (PCR Tr. p. 23). Trial Counsel testified that he filed a motion for continuance and met with Judge Macaulay in his chambers on Monday, where he was given the file. (PCR Tr. pp. 23; 24; 25). Trial Counsel testified that the motion for continuance was denied in chambers. (PCR Tr. p. 25). Trial Counsel testified that there was no record of the motion and that he did not want to make Judge Macaulay angry by "making him go in the room." (PCR Tr. p. 25). Trial Counsel testified that the trial was scheduled on Monday, but Judge Macaulay moved the trial to Wednesday to give him a couple of extra days to prepare. (PCR Tr. pp. 24–25; 28). Trial Counsel testified that the trial lasted two days and that he believed Applicant was convicted on Friday.⁶ (PCR Tr. p. 25). Trial Counsel testified that a family member

⁶ Jury qualifications were held on Monday, July 21, 2014. The trial itself was held on July 23–24, 2014. Applicant was convicted and sentenced on Thursday, July 24, 2014.

of Applicant spoke with him on Thursday before trial; on Friday, he went to Oconee to file a motion to speak with Applicant, and that he probably spoke with Applicant every time he went to Oconee. (PCR Tr. pp. 28–29). Trial Counsel testified that he met with Applicant about two or three times prior to trial and that he met with Applicant when he went to Oconee. (PCR Tr. p. 27). Trial Counsel testified that he "had some other stuff going on" during the time of Applicant's trial and that he met with Applicant as often as he could. (PCR Tr. p. 27). Trial Counsel testified that he spoke with Applicant regarding certain issues involving Victim. (PCR Tr. p. 27). Trial Counsel testified that he was as prepared as possible to try the case. (PCR Tr. p. 24).

On direct examination, Simmons testified that Counsel Day represented Applicant and that the case was on the docket. (PCR Tr. p. 44). Simmons testified that Applicant's family retained Trial Counsel at the "eleventh hour" when the trial was already set. (PCR Tr. p. 44).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving that Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Trial Counsel *credibly* testified that he made a motion for continuance that the trial court denied, but the trial court also gave him two extra days to prepare. Trial Counsel *credibly* testified that he met with Applicant two or three times prior to trial. Applicant testified that his family retained Trial Counsel approximately two weeks before trial to replace his prior attorney, Counsel Day, who had represented Applicant for more than one year and seven months. Despite having such limited time to prepare for Applicant's

trial, and despite Applicant's testimony that he never had sufficient time to speak with Trial Counsel and plan a trial strategy, Trial Counsel *credibly* testified that he was as prepared as he could be to try the case.

This Court cannot find Trial Counsel's representation deficient for several reasons: (1) after reviewing this record before this Court, this Court finds this case was not complex; (2) Trial Counsel *credibly* testified to multiple meetings with Applicant, and Trial Counsel was given two extra days to prepare; (3) the record shows the Applicant was found to be indigent and was provided a public defender who represented him for nearly sixteen months; however, Applicant chose to assert his right to retain Trial Counsel, and he has the right to be represented by his preferred attorney if he has the funds; (4) Trial Counsel's representation was competent—something the Applicant is entitled to—not perfect representation; and (5) Applicant presented no competent evidence to this Court demonstrating how additional time for preparation or consultation would have changed the outcome of the trial. Notably, the burden of proof is with Applicant, and this Court finds Applicant has failed in his burden of proving any deficiency in Trial Counsel's representation, nor has he shown any prejudice flowing therefrom.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 with PREJUDICE**.

Allegation 1c: Trial Counsel should have sought immediate appeal from denial of motion to continue trial which the trial judge denied.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to immediately appeal the trial court's denial of the motion for continuance. This Court finds this allegation to be without merit.

South Carolina Code § 14-3-330 states that the South Carolina Supreme Court "shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330.

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that he filed a motion to continue and met with Judge Macaulay in his chambers on Monday. (PCR Tr. pp. 23; 24). Trial Counsel testified that the motion for continuance was denied in chambers. (PCR Tr. p. 25). Trial Counsel testified

that there was no record of the motion and that he did not want to make Judge Macaulay angry by "making him go in the room." (PCR Tr. p. 25). Trial Counsel testified that the trial court did not issue a written order, which creates a problem with appealing an order. (PCR Tr. p. 28). Trial Counsel testified that, at the time of the trial, he was not aware of any court procedure that allowed him to file an interlocutory appeal on a motion to continue. (PCR Tr. p. 28). Trial Counsel testified that Judge Macaulay gave him a couple of extra days to prepare for trial because the trial was scheduled to be heard on Monday. (PCR Tr. p. 28).

On cross-examination, Trial Counsel testified that Applicant was not present in chambers when Trial Counsel made the motion for continuance and that Applicant had a right to be at every hearing on the issues. (PCR Tr. p. 31). Trial Counsel testified that he asked for a continuance because he was not prepared at that time. (PCR Tr. p. 32). Trial Counsel testified that when he made the motion for continuance, Judge Macaulay wanted to have it done in his chambers and that Applicant was not present. (PCR Tr. p. 33).

Findings

As an initial matter, this Court finds this issue fails as a matter of law. An interlocutory appeal cannot be made for a denial of a motion for continuance, and Trial Counsel *credibly* testified that he was not aware of any procedure that allowed him to file an interlocutory appeal on a motion for continuance at the time the motion was denied. This Court cannot find Trial Counsel deficient for not filing an interlocutory appeal when he had no procedure that would allow him to do so.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 object to the general intent jury instruction and failed to request a specific intent charge.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to object to the jury charge that attempted murder was a general intent crime and for failing to request a specific intent jury charge. Applicant also alleges that Trial Counsel was constitutionally ineffective for failing to preserve objections for appellate review, specifically for failing to object to the jury charge on general intent. This Court finds these allegations to be without merit.

An attorney is not required to anticipate or discover changes in the law or facts that did not exist at the time of trial to render effective assistance of counsel. Thornes v. State, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993). In State v. King, the Court of Appeals held for the first time that "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder." 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015). Thereafter, our Supreme Court, in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), agreed that attempted murder was a specific intent crime. However, our Supreme Court recognized the confusion, stating, "While it may seem counterintuitive for the attempt of a crime to require a higher level of *mens rea* than that of the completed crime, this is the majority rule and a rule that our appellate courts and General Assembly have followed." King, 422 S.C. at 56, 810 S.E.2d at 22.

- - -The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge must charge only the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

To show prejudice where counsel fails to preserve an issue, an applicant must show the trial court would have sustained an objection, and the unpreserved issue would have been successful on appeal. Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018). A PCR court must view the trial court's ruling on an issue through the same lens applied on appeal, giving appropriate deference to the trial court's findings. Milledge, 422 S.C. at 380, 811 S.E.2d 804. The Supreme Court of South Carolina has stated that it "review[s] a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—under an abuse of discretion standard. State v. Wallace, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023).

Jury Trial

At trial, the trial court charged the jury on the intent required for attempted murder: "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." (ROA p. 224). When the trial court asked the defense whether

they had any exceptions to the charge or any requests for additional charges, Trial Counsel indicated they did not. (ROA p. 234).

On direct examination, Sergeant Tinsley testified that Applicant told her that he did not use his "full force of strength" when he stabbed Victim because "he didn't want the blade to penetrate deep." (ROA p. 162). Sergeant Tinsley testified that Applicant told her he chose a knife from the kitchen over a gun because of the damage a weapon can do. (ROA p. 161). Furthermore, Sergeant Tinsley testified that Applicant stabbed Victim eleven times, that she told Applicant that his story "just didn't seem to add up," and that Applicant admitted that he was not initially telling the truth. (ROA pp. 155; 160). Sergeant Tinsey also testified that Applicant told her the knife he used was similar to the one Michael Myers used in the movie, *Halloween*. (ROA p. 162).

Victim testified that the knife Applicant used was long and was "like a kitchen knife." (ROA p. 108).

Sergeant McMahan testified on Victim's injuries, including a defensive wound that went completely through Victim's arm, creating an exit wound, a chest wound that entered Victim's body and cut into his "liver area," and several wounds that had to be held together with staples. (ROA pp. 135-37; 139).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel was ineffective for failing to object to the trial court's jury charge on the intent required for attempted murder. (PCR Tr. pp. 11-12). Applicant testified to the following:

Trial Counsel failed to object when Trial Court instructed the jury that specific intent to kill was not an element of attempted murder, but that would be a general intent to commit serious bodily injury. You'll find the same exact error in State v. King, 422 S.C. 47, 810 S.E.2d 18. It was well settled by the Court of Appeals the proper legislative history of Section 16-3-29, appellate decision holding that intent of crime required the State to prove intent as specific intent to complete the

attempted crime. Also, in State v. Williams, 427 S.C. 148, 829 S.E.2d 702, states that attempted murder is a specific intent crime in South Carolina. State v. Williams also states that if the petitioner did not argue a trial court error when instructing the jury that attempted murder was a general intent crime, that the petitioner was entitled to a new trial based on that error alone.

(PCR Tr. pp. 13–14).

Applicant testified that Trial Counsel never objected to the charge or preserved the issue for appeal. (PCR Tr. p. 14). Applicant testified that he did not want to kill Victim. (PCR Tr. p. 14). Applicant testified that Sergeant Tinsley testified that he did not use his "full force strength" when he stabbed Victim because he did not want the knife to deeply penetrate Victim. (PCR Tr. pp. 14–15). Applicant testified that the outcome of his trial would have been different because he would not have been convicted of an erroneous charge. (PCR Tr. p. 15). Applicant also testified that if the jury had been properly instructed on the law, then the burden of proof would not have shifted and the State would not have had evidence that he had the specific intent to kill Victim. (PCR Tr. p. 15).

On cross-examination, Applicant testified that he cited State v. King, decided on October 25, 2017, as the controlling authority on this matter. (PCR Tr. pp. 18–19). Applicant testified that his trial was in July 2014 and that State v. King had not been decided at that time and therefore was not controlling law. (PCR Tr. p. 19). Applicant testified that Sutton was the controlling law at the time of his trial. (PCR Tr. p. 19). Applicant testified that Sutton was well-cited and backed up the King case, that specific intent to kill is an element of attempted murder. (PCR Tr. p. 19). Applicant testified that Sutton was concerned about assault and battery with intent to kill, and that South Carolina did not have attempted murder at that time in that case. (PCR Tr. p. 20). When questioned on whether he understood that it was decided in Sutton that the charge of general intent for assault and battery with intent to kill encompassed the attempted murder, even though South

Carolina did not have attempted murder at that time, Applicant testified that he only saw that the case said that attempted murder required specific intent to kill. (PCR Tr. p. 20).

On direct examination, Trial Counsel testified that he was not familiar with State v. King "at this point. Not about the instructions going on." (PCR Tr. p. 30). Trial Counsel testified that he did not recall the jury instruction because it was ten years ago. (PCR Tr. p. 30). Trial Counsel testified that the trial court gave a lot of instructions and that his primary focus was on "a juvenile issue about . . . his statements" and trying to make a record of that so if Applicant got in the Federal system, then he could possibly get some relief there. (PCR Tr. p. 31). Trial Counsel testified that he knew the difference between specific intent and general intent but that he was trying to concentrate on "getting statements and preserving that for appeal." (PCR Tr. p. 31). Trial Counsel testified that, as far as the intent issue, he was not really thinking about it at the time. (PCR Tr. p. 31).

Findings

This Court finds Applicant's claim fails as a matter of law. The attempted murder statute created an ambiguity as to whether attempted murder was a specific or general intent crime, and it was not until 2015 that the appellate court decided the issue. Ultimately, in 2017, our Supreme Court clarified that attempted murder is a specific intent crime. As for the cases that Applicant relied on in his allegations and in his testimony at the evidentiary hearing that hold that attempted murder is a specific intent crime, most of them were decided after Applicant's trial, which concluded with his conviction and sentencing on July 24, 2014, so they were not controlling law at that time: State v. King, 422 S.C. 47, 810 S.E.2d 18, was filed on October 25, 2017; and State v. Williams, 427 S.C. 148, 829 S.E.2d 702, was filed on June 12, 2019.

- - - - - To the extent Applicant relied on State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), the statement in Sutton constitutes *dicta*. Id. at 409, 772 S.E.2d at 192. It was not until the King decision in 2017 that the Supreme Court held that, although the statement in Sutton is *dicta*, "it is still an accurate statement of law." King, 422 S.C. at 55–56, 810 S.E.2d at 22. Thus, providing clarification on this matter for the Bar in South Carolina. Applicant further relied on State v. Williams, 427 S.C. 148, 829 S.E.2d 702 (2019), which was decided five years after Applicant's trial and was neither controlling nor could it be controlling case law in this case.

"For an ineffective assistance claim, the PCR court must 'determine whether counsel was ineffective *at the time of the alleged error*.' Thus, the court must consider the law as it existed at the time of trial and 'not as it has evolved today. . . .' Accordingly, trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes in the law. . . ." Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501–02 (Ct. App. 2019) (emphasis in original). To have required Trial Counsel to correctly assess the level of intent required by the statute at the time of Applicant's trial, before our appellate courts settled the matter in King, would be to hold Trial Counsel, wrongly, to the standard of a clairvoyant. Trial Counsel cannot be deficient for failing to anticipate a change in the law.

Turning to prejudice, "[i]n assessing prejudice under Strickland, the question is *not* whether a court can be certain counsel's performance had no effect on the outcome . . ." Harrington v. Richter, 562 U.S. 86, 111 (2011) (emphasis added). "Instead, Strickland asks whether it is 'reasonably likely' the result would have been different." Id. (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. Assuming, *arguendo*, Trial Counsel should have objected to the general intent jury charge, the Court finds the likelihood of the jury reaching a different verdict had the trial court given a specific

intent jury instruction is not substantial. Although in Applicant's statement to police, he told them that he chose a knife because a gun would do more damage, the knife Applicant chose was one that Victim described as "long" and one that Applicant himself described as similar to the murder weapon used by a killer in a horror movie. Most notably, Applicant did not stab Victim once—he stabbed the Victim *eleven* times and only stopped because Victim was able to get out of the car on the other side opposite Applicant. Applicant then took off running.

Additionally, contrary to what Applicant testified to at the evidentiary hearing, Sergeant Tinsley did not testify at trial that Applicant did not stab Victim with his "full force strength;" instead, Sergeant Tinsley testified that *Applicant told her* he did not stab Victim with his "full force of strength." Furthermore, Applicant's claim that he did not stab Victim with his "full force strength" is contradicted by the nature and extent of Victim's injuries, as Sergeant McMahan testified to at trial. Thus, this Court finds that Applicant has failed to meet his burden of proving that Trial Counsel's performance was deficient and any prejudice flowing therefrom.

As for Applicant's allegation that Trial Counsel failed to preserve the issue for appeal, the jury charge at the time was not improper and was the law at the time of Applicant's trial. Therefore, this Court finds that Applicant has failed in proving that Trial Counsel's performance was deficient and any prejudice flowing therefrom.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

-- --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 with PREJUDICE**.

Allegation 1e: Trial Counsel failed to object to and/or request curative instruction when "house arrest" was mentioned during State's cross-examination of Applicant's mother on page 12 of trial transcript.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to object to and/or request a curative instruction when "house arrest" was mentioned during the State's cross-examination of Yashica. This Court finds this allegation to be without merit.

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.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that

failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

To avoid a finding of ineffectiveness, and where counsel articulates a strategy, counsel must also articulate a valid reason for employing a particular strategy. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Thereafter, that strategy is measured under an objective standard of reasonableness. Id.; see also Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges."). When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010).

---Trial

During the trial, when questioned by A.S. Wagner on cross-examination on whether she remembered talking to people from the sheriff's office, Yashica testified that Applicant "was under house arrest bracelet" at the time. (ROA p. 191). Trial Counsel did not object to Yashica's testimony.

PCR Evidentiary Hearing

On direct examination, Applicant testified that he believed that Yashica testified at trial that Applicant was on house arrest when the crime occurred. (PCR Tr. p. 15). Applicant testified that Trial Counsel did not object to Yashica's testimony or ask for a curative charge. (PCR Tr. p. 15).

On cross-examination, Applicant testified that he could not recall who questioned Yashica when she testified that he was under house arrest. (PCR Tr. p. 20).

On direct examination, Trial Counsel testified that he recalled Yashica's testimony regarding Applicant's house arrest, which she gave on cross-examination. (PCR Tr. pp. 29–30). Trial Counsel testified that he met with Yashica, spoke with her "at length" regarding her testimony, and advised her not to volunteer any information. (PCR Tr. p. 29). Trial Counsel testified that the reason why he did not object was that if he had objected, then he would have brought more attention to Yashica's testimony than it should have gotten. (PCR Tr. p. 29). Trial Counsel testified that he did not want to draw undue attention to her testimony. (PCR Tr. p. 30). Trial Counsel testified that Yashica was his witness and that he did not want to impeach his own witness. (PCR Tr. p. 29). Trial Counsel testified that objecting would have lessened her credibility in front of the jury and would have caused the jury to key in on her testimony. (PCR Tr. pp. 29–30). Trial Counsel testified that there was ambiguity regarding the charges for which the house

arrest was imposed. (PCR Tr. p. 30). Trial Counsel testified that he believed Applicant was denied bond on "this charge" and was in jail "a good while" when Trial Counsel met Applicant. (PCR Tr. p. 30). Trial Counsel testified that he did not believe that the single reference to Applicant being on house arrest was what convicted him or had any bearing on the outcome of the trial. (PCR Tr. p. 30).

Findings

This Court finds that Trial Counsel *credibly* testified that he advised Yashica and spoke with her at length about her testimony, telling her not to volunteer any information. However, Yashica testified on cross-examination that Applicant was under house arrest, despite A.S. Wagner not having asked a question that would elicit such information. Trial Counsel *credibly* testified that his reasoning for not objecting to Yashica's testimony was strategic for several reasons – (1) if he had objected, then he would have brought more attention to her testimony, and Trial Counsel did not want to bring any more attention than necessary to her testimony because the jury would have keyed in on that testimony; (2) Yashica was the defense's witness and Trial Counsel did not want to impeach his own witness; and (3) objecting to Yashica's testimony would have lessened her credibility in front of the jury. Furthermore, Trial Counsel *credibly* testified that there was some ambiguity as to what the house arrest testimony referred to. Trial Counsel *credibly* testified that he did not believe that the single reference to Applicant's being on house arrest had anything to do with the outcome of the trial and was not what led to his conviction. This Court agrees with Trial Counsel and finds that Trial Counsel offered a valid and objectively reasonable reason for not objecting to the single reference made by Yashica. Additionally, this Court finds that even if Trial Counsel had objected, the result of Applicant's trial would not have been different.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 1f: Trial Counsel failed to explain any plea offers.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to convey or explain any plea offers. This Court finds this allegation to be without merit.

A defendant has the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). "The United States Supreme Court has held that 'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.'" Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018) (quoting Missouri v. Frye, 566 U.S. 134, 145 (2012)); see also Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) (rejecting proposition that a fair trial wipes clean any deficient performance by defense counsel during plea bargaining). Generally, defense counsel provides deficient performance when he or she does not communicate such an offer to the defendant. Frye, 566 U.S. at 145.

To show prejudice, an applicant for post-conviction relief "must demonstrate a reasonable probability that: (1) he [or she] 'would have accepted the earlier plea offer had [he or she] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.' " Collins, 422 S.C. at 262, 810 S.E.2d at 877 (quoting Frye, 566 U.S. at 147; citing Lafler, 566 U.S. at 164). An applicant must show actual prejudice, but depending on the facts of the case, an applicant's self-serving statement *may* be sufficient to establish actual prejudice. Davie, 381 S.C. at 613, 675 S.E.2d at 422.

PCR Evidentiary Hearing

On direct examination, Applicant testified that, prior to trial, Trial Counsel did not give Applicant any written offers that the State had made to him, nor did Trial Counsel ever ask Applicant to sign any alleged offers. (PCR Tr. pp. 9–10).

On direct examination, Trial Counsel testified that he was never given any offers or "anything like that," but Counsel Day may have received offers. (PCR Tr. p. 27). Trial Counsel testified that he did not recall any offers in the defense file he received, but Counsel Day told him that the State offered Applicant 10 years. (PCR Tr. pp. 27–28).

On cross-examination, Trial Counsel testified that the State never presented a plea offer to him and that Counsel Day was the one who was given plea offers. (PCR Tr. p. 32). Trial Counsel testified that he was going to try to make an offer of around seven years, but Applicant did not want to do that. (PCR Tr. p. 32).

On direct examination, Simmons testified that she believed they made a plea offer of ten years or less in Applicant's case and that the number seven stood out in her mind. (PCR Tr. p. 44).

Simmons testified that she could not recall Trial Counsel making any offers. (PCR Tr. p. 44). Simmons testified that, as she remembered it, Counsel Day represented Applicant; the case was on the trial docket; Applicant's family retained Trial Counsel immediately before trial; and the case was already set when he was retained. (PCR Tr. p. 44). Simmons testified that she made a plea offer to either Counsel Day or Trial Counsel. (PCR Tr. p. 44).

On cross-examination, Simmons testified that she could not recall which attorney received her plea offer. (PCR Tr. p. 45). Simmons testified that Yashica went to the Solicitor's Office after court and told Simmons that the plea offer was not communicated to Applicant. (PCR Tr. p. 45). Simmons testified that, in her experience as a solicitor, it was uncommon for defendants to fire their public defender and hire counsel a week or two before trial if the defendant intended to plead. (PCR Tr. p. 45).

Findings

As an initial matter, this Court finds Trial Counsel's and Simmons's testimony *credible* on this issue and Applicant's testimony *not credible*. Trial Counsel *credibly* testified that the State never gave him any plea offers and that he did not remember any plea offers in the defense file. Furthermore, Trial Counsel *credibly* testified that any plea offers the State made were to Applicant's prior attorney, Counsel Day. Although Simmons testified that she was unsure to whom she made the plea offer, Trial Counsel *credibly* testified that Counsel Day received any and all offers, and that Trial Counsel received none. Trial Counsel *credibly* testified that Counsel Day informed him of a ten-year plea offer and that Trial Counsel intended to seek seven years; however, Applicant did not want to do so. Furthermore, at no point at the evidentiary hearing did Applicant indicate that he would have accepted a plea offer and not gone to trial if one had been offered to him. This Court finds that Applicant has failed in his burden of proof.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 with PREJUDICE**.

Allegation 1g: Trial Counsel failed to preserve objections for appellate review.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to preserve objections for appellate review. Specifically, Applicant avers that Trial Counsel failed to object to testimony regarding Applicant's statements to police. This Court finds this allegation is without merit.

An issue that was raised on direct appeal but was disposed of on the ground that it was not preserved for appeal may be raised in a post-conviction relief proceeding. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999). To show prejudice where counsel fails to preserve an issue, an applicant must show the trial court would have sustained an objection, and the unpreserved issue would have been successful on appeal. Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018). A PCR court must view the trial court's ruling on an issue through the same lens applied on appeal, giving appropriate deference to the trial court's findings. Id., 422 S.C. at 380, 811 S.E.2d at 804. The Supreme Court of South Carolina has stated that it "review[s] a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of

Evidence—under an abuse of discretion standard. State v. Wallace, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023).

"Whenever evidence is introduced that was allegedly obtained by conduct violative of a defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing outside of the presence of the jury at the threshold point to establish the circumstances under which it was gained. In Jackson v. Denno . . . the United States Supreme Court declared it axiomatic that a defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury. Thus, where there is conflicting evidence about a statement, the court must first make a finding as to the validity of the statement. In making the determination, the trial judge should examine the totality of circumstances surrounding the utterance to determine whether the state has met its burden of proof so as to warrant admission of the confession. Part of the State's burden during this hearing is to prove that the statement was voluntary and taken in compliance with Miranda. The trial judge's resolution of the issue of voluntariness of a statement will not be disturbed on appeal absent an error of law." State v. Creech, 314 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct. App. 1993).

Trial

At the Jackson v. Denno hearing, the trial court found that Applicant could read and write and that Applicant made "exemplary grades" and was of above-average intelligence.⁷ (ROA p. 76). Considering the totality of the circumstances, the trial court found by a preponderance of the evidence that Applicant was fully advised of his rights under the Fifth, Sixth, and Fourteenth

⁷ In making this finding, the trial court cited State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (2008); State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007); and Fare v. Michael C., 442 U.S. 707 (1979).

Amendments; that Applicant knowingly and intelligently waived those rights under the Fifth and Sixth Amendments of the Constitution; and that Applicant's statements were freely and voluntarily given without duress, coercion, undue influence, reward, promise of hope for reward, promise of leniency, threat of injury, or coercion or inducement of any kind. (ROA pp. 76–77). The trial court concluded its findings with the following statements:

The statement or confession was a voluntary product of the free and unconstrained will of the defendant. I find all of these foregoing conclusions actually beyond a reasonable doubt, but I am only concerned with whether or not by the preponderance of the evidence. Of course it will be up to the jury to determine, if it's submitted to the jury, the statement is submitted to the jury, was in fact made and the voluntariness was beyond a reasonable doubt.

(ROA p. 77).

During the trial, Trial Counsel did not object to any testimony regarding Applicant's statements to police.

PCR Evidentiary Hearing

On direct examination, Applicant testified that there was a Jackson v. Denno hearing on Applicant's statements to the police and that Trial Counsel objected to the statements throughout the trial to try and preserve the issue for appeal. (PCR Tr. p. 10).

On cross-examination, Appellate Counsel testified that the Court of Appeals held that the issue raised was not preserved for appellate review. (PCR Tr. p. 41). Appellate Counsel testified that it would be an error by Trial Counsel not to have preserved that issue. (PCR Tr. pp. 41–42). Appellate Counsel testified that the "(inaudible)"⁸ should have granted the objection." (PCR Tr. p. 42). Appellate Counsel testified that the issue she raised on appeal was the voluntariness of Applicant's statement. (PCR Tr. p. 42).

⁸ The transcript does not include what Appellate Counsel said, but based on context this Court interprets her testimony as saying "the trial court."

Findings

Before trial, a Jackson v. Denno hearing was held on Applicant's statements, and the trial court found them voluntary and admitted them into evidence. Applicant did not present any evidence showing that the trial court would have sustained an objection if Trial Counsel had objected to Applicant's statements during the trial. After a review of the record, this Court is unable to find any testimony that differed from that offered to the trial court during the Denno hearing. Thus, there is not a reasonable probability that the trial court would have sustained an objection to Applicant's statements being entered into evidence. Furthermore, Applicant did not demonstrate that the trial court abused its discretion in admitting his statements to the police. Therefore, this Court cannot find that Trial Counsel was deficient for failing to object to Applicant's statements that were already found by the trial court to be admissible.

Assuming, *arguendo*, that Trial Counsel had preserved this issue for appeal, this Court cannot find that the issue would have been successful on appeal. A trial court's ruling on the voluntariness and admissibility of a statement to police will be upheld when it is supported by any evidence. State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008). Here, the trial court's findings are amply supported by evidence. Thus, even if this issue were preserved for appellate review, it would not have been successful on appeal, and Applicant's sentence and conviction would have been affirmed.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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**.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ALLEGATION

Allegation 2a: Appellate Counsel was ineffective for failing to raise on appeal Trial Counsel's objection to photographs on pages 23, 163, and 171 of trial transcript because the photographs' prejudice outweighed any probative value of the photographs.

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to raise on appeal Trial Counsel's objection. Specifically, Applicant avers that Appellate Counsel was ineffective for failing to preserve Trial Counsel's objection to photographs on pages 23, 163, and 171 of the trial transcript⁹ because the prejudice from the photographs outweighed any probative value the photographs had. This Court finds this allegation to be without merit.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396–97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather, appellate

⁹ The introduction of and testimony regarding the photographs in State's Exhibits nos. 4–9 were on pages 88–92 of the ROA, which are pages 163–67 in the trial transcript, and the trial court's reasoning for admitting the photographs was on pages 169–71 of the trial transcript, which was not included in the ROA. Page 23 in both the ROA and the trial transcript do not contain anything relating to State's Exhibits nos. 4–9.

counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752–53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The burden of proof is upon applicant to show counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. The applicant must then prove that because of appellate counsel's deficient performance, there is a reasonable probability that, but for appellate counsel's unprofessional errors, the result of the proceeding (*appeal, not trial*) would have been different. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).

The Supreme Court of South Carolina has stated that it "review[s] a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—under an abuse of discretion standard." State v. Wallace, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023).

Trial

On direct examination of Blackwell, Simmons had Blackwell identify State's Exhibits nos. 4–9, which were photographs of Victim when he arrived at her produce shop. (ROA pp. 88–92). Trial Counsel objected on the ground that the State failed to lay a proper foundation and that the photographs were unduly prejudicial and highly inflammatory. (ROA p. 89). Following a bench conference that was held off the record in the presence of—but out of the hearing of—the jury, the trial court admitted State's Exhibits nos. 4–9 over Trial Counsel's objection. (ROA p. 89). Out of the presence of the jury, the trial court declared that its ruling was based on the fact that State's Exhibits nos. 4–9 were altered to black and white, reflected the testimony that the trial court heard up to that point, reflected the testimony of the exact condition of Victim at the time the photographs were taken, and were "more evidentiary than offensive." (Tr. pp. 169–70). The trial court noted that Trial Counsel's objection was subject to its ruling that the photographs were admissible. (Tr. p. 171).

PCR Evidentiary Hearing

On direct examination, Applicant testified that an appeal was filed in his case following his conviction and the filing of a post-trial motion. (PCR Tr. p. 10). Applicant testified that Appellate Counsel never spoke with him about what grounds he wanted to raise in his appeal. (PCR Tr. p. 11). Applicant testified that Appellate Counsel never asked him to review the brief that she was submitting on his behalf. (PCR Tr. p. 11). Applicant testified that he never had any communications with Appellate Counsel. (PCR Tr. p. 11).

On cross-examination, Applicant testified that he did not speak with Appellate Counsel, but that if he had, she could have properly represented him by reviewing the case and determining that the jury instruction warranted automatic reversal. (PCR Tr. p. 21). Applicant testified that he

never heard that appellate defense is not required to contact the appellant in South Carolina, and that appellate defense has the ultimate say on what allegations are raised and does not have to raise the allegations that the appellant wants raised. (PCR Tr. p. 21).

On cross-examination, Trial Counsel testified that Appellate Counsel never contacted him on what issues to raise on appeal. (PCR Tr. p. 32).

On redirect examination, Trial Counsel testified that, in his thirty-plus years as a criminal defense attorney, the appellate defense never contacted him to ask what objections he raised. (PCR Tr. p. 34).

On direct examination, Appellate Counsel testified that she reviewed the allegation of ineffective assistance of appellate counsel and discovered that the objection to State's Exhibits nos. 4–9 was related to Rule 403, which concerns whether any unfair prejudice outweighs the probative value of evidence. (PCR Tr. p. 38). Appellate Counsel testified that she did not raise the issue on appeal because she did not think it had any merit. (PCR Tr. pp. 38; 39). Appellate Counsel testified that the Supreme Court case State v. Collins¹⁰ was decided a year after Applicant's trial and before she wrote the appellate brief. (PCR Tr. pp. 38–39). Appellate Counsel testified that the court in Collins affirmed the trial court's admission of photographs of a dog-bite victim because of their probative value despite them being "extremely prejudicial." (PCR Tr. p. 39). Appellate Counsel testified that, based on State v. Collins, she did not raise Trial Counsel's objection on appeal. (PCR Tr. p. 39). Appellate Counsel testified that she thought that the photographs corroborated the witness's testimony of what the witness saw when Victim arrived at her store. (PCR Tr. p. 39).

Appellate Counsel testified that she has a duty to communicate with an appellant, but the decision of what issues to raise on appeal is solely hers. (PCR Tr. pp. 39–40). Appellate Counsel

¹⁰ 409 S.C. 524, 763 S.E.2d 22 (2014).

testified that she does not need to seek any permission or consent from an appellant as to what issues to raise. (PCR Tr. p. 40). Appellate Counsel testified that per procedure, she sent Applicant the trial transcript, the briefs, the State's briefs, *et cetera*, and communicated with him throughout the appellate process. (PCR Tr. p. 40). Appellate Counsel testified that she communicates with an appellant by letter and would therefore have sent all correspondence in writing. (PCR Tr. p. 40). Appellate Counsel testified that their clients, including Applicant, could call them collect at any time during business hours, and that it was much more challenging to contact their clients at the Department of Corrections. (PCR Tr. p. 40). Appellate Counsel testified that she briefly reviewed the file in Applicant's case and found the communications she sent to Applicant. (PCR Tr. p. 40).

Findings

This Court finds Appellate Counsel *credibly* testified that she decided not to raise the issue of the objection to State's Exhibits no. 4–9 because she determined that the issue had no merit. Furthermore, Appellate Counsel reasonably based her decision on a South Carolina Supreme Court decision where the admittance of "extremely prejudicial" photos of a dog-bite victim was upheld because of their probative value, which is the same reason that the trial court admitted State's Exhibits nos. 4–9. Appellate Counsel herself thought that the photos of Victim had probative value because they corroborated the testimony presented at trial. Furthermore, the photographs in State's Exhibits nos. 4–9 were converted to black-and-white, thereby reducing their prejudicial effect. Therefore, Appellate Counsel was not deficient for failing to raise this issue. Because her decision to exclude certain issues on appeal was based on her reasonable professional judgment and because the issue likely would not have been successful on appeal, this Court cannot find Appellate Counsel's performance to be deficient or any prejudice flowing therefrom.

Although Applicant testified that Appellate Counsel never spoke with him about what grounds he wanted to raise in his appeal and never asked him to review the brief, Appellate Counsel *credibly* testified that the decision of what issues to raise was solely hers.¹¹ Although Applicant testified that he had no communications with Appellate Counsel, Appellate Counsel *credibly* testified that she communicates with her clients through written correspondence and provides them with all necessary documents, which she did in Applicant's case. Appellate Counsel *credibly* testified that she found the communications she sent to Applicant in Applicant's file.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove that Appellate Counsel's performance was deficient as measured by the standard of reasonableness under professional norms. Furthermore, Applicant failed to prove that, because of Appellate Counsel's deficient performance, there is a reasonable probability that, but for Appellate Counsel's unprofessional errors, the result of the proceeding (*appeal, not trial*) would have been different. See Southerland, supra.

Accordingly, this Court finds that Applicant has failed to establish any deficiency by Appellate Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED WITH PREJUDICE**.

[CONCLUSION PAGE FOLLOWS]

¹¹ This Court notes how Trial Counsel testified that in his thirty-plus year career he was never contacted once by appellate counsel on which issues to raise on appeal or on what objections he raised.

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**.

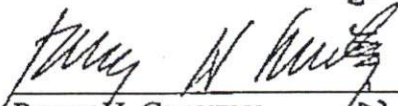
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry to judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the 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 Rule 243 for the 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 Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 27 day of December, 2025.

Pickens, South Carolina


PERRY H. GRAVELY
Presiding Judge
Tenth Judicial Circuit

FILED OCONEE COUNTY, SC
MELISSA C. BURTON
CLERK OF COURT
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