THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2017-CP-26-02564

Marcus Dwain Wright, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Marcus Dwain Wright appeals the Order of the Honorable William H. Seals, Jr. dated August 13, 2020 denying the appellant post-conviction relief. The appellant received written notice of this Order on August 26, 2020.

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Dated this 21st day of September, 2020
Greenville, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Marcus Dwain Wright, S.C.D.C. No. 289646,	)	Case No.: 2017-CP-26-02564
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Marcus Dwain Wright ("Applicant"), by and through attorney Beattie B. Ashmore, Esq., on April 24, 2017. Respondent made its return on or about August 7, 2017. The Court convened an evidentiary hearing into the matter on December 14, 2018, at the Georgetown County Judicial Center in Georgetown, South Carolina. Applicant was present at the hearing and represented by attorney Ashmore. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsels, L. Morgan Martin, Esq. ("Martin") and Edward M. Brown, Esq. ("Brown") (collectively "Counsels"), and the prosecuting solicitor, Donna E. Elder, Esq. ("Elder") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the pleadings, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the June 2012 term of the Horry County Grand Jury for murder (2012-GS-26-02551). Attorneys Martin and Brown represented Applicant, and solicitor Elder, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On June 17, 2013, Applicant proceeded to trial before the Honorable John C. Hayes, III and a jury. The jury found Applicant guilty as indicted on June 20, 2013. Judge Hayes sentenced Applicant to imprisonment for a term of life for murder. Consecutive to the life sentence, but concurrent to each other, Judge Hayes sentenced Applicant to 25 years for trafficking, 15 years for PWID cocaine base, and 5 years for the weapons charge.

Applicant filed a timely notice of appeal and a direct appeal was perfected by J. Falkner Wilkes, Esq., who raised the following thirteen issues (verbatim):

1. Did the court err in admitting evidence from the search of residence?
2. Did the defendant have a reasonable expectation in the residence searched?
3. Did the court apply the proper analysis?
4. Was the search warrant affidavit was sufficient?
5. Could the affidavit be supplemented by oral evidence where the affidavit contained false information?
6. Did the court err in admission of SCDMV records?
7. Did the court err in admission of evidence which was the result of illegal search of the defendant's hotel room?
8. Did the court err in excluding evidence of witness's prior inconsistent statement?
9. Did the court err in denying defendant's request to testify?
10. Does the court have to make specific findings as to prior convictions before it can sentence under LWOP?
11. Does the record support sentencing under LWOP?
12. If life is imposed and it is not clear whether or not it is under LWOP, should this Court remand for re-sentencing?
13. Did the trial court err in refusing to charge the jury on the law of self-defense and manslaughter?

The parties proceeded to oral arguments before the Court of Appeals on November 10, 2015. Attorney Wilkes represented Applicant, and J. Anthony Mabry, Esq., of the South Carolina

Attorney General's Office, represented the State. By opinion decided April 27, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Wright, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016). The Remittitur was issued on May 13, 2016.

Present Application

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

1. "Ineffective assistance of counsel"
    a. "Failure to timely produce letter(s) and/or statement(s) from Lanard Powell to the State;"
    b. "losing and/or misplacing evidence;"
    c. "failing to question Powell regarding letter(s) and/or statement(s);"
    d. "failing to question Powell if he told McCray that he saw a gun and/or failing to give Powell an opportunity to admit or deny statement(s);"
    e. "failing to enter letter(s) and/or statement(s) into evidence;"
    f. "failing to proffer evidence and/or make an offer of proof, including an offer of proof of Powell's testimony;"
    g. "indicating that counsel was satisfied with his cross-examination of Powell;"
    h. "acquiescing to court's ruling(s), including the court's rulings regarding Powell and the letter(s) and/or statement(s);"
    i. "failing to refute objection(s) made by the State and/or requesting that the Court and/or the State make a complete record and give reasons for their objection(s) and/or rulings;"
    j. "failing to object when the State articulated no basis for its objection(s) and the Court articulated no reasons for its ruling(s);"
    k. "failure to adequately investigate the case;"
    l. "failing to elicit and/or introduce favorable evidence during motions, trial, and/or sentencing;"
    m. "failing to object to misstatements during motions;"
    n. "failure to lay the proper foundation to introduce evidence;"
    o. "failing to object to the Court's instruction(s) (including curative instruction(s)) and/or charge(s) when proposed, when given to jury, and/or after given to jury;"
    p. "failure to timely inform the trial court that the petitioner wanted to testify;"
    q. "failing to discuss with the petitioner regarding his right to testify;"
    r. "failing to consult with petitioner regarding his right to testify prior to resting;"
    s. "failing to introduce prior inconsistent statement(s) of Veronica Chandler;"

t. "failing to use prior inconsistent statement(s) of Chandler to support self-defense charge;"
u. "failure to make adequate argument for leniency at sentencing;"
v. "failure to prepare the petitioner for sentencing;"
w. "seating a former assistant solicitor on the jury;"
x. "failing to be prepared for and introduce evidence to establish the petitioner's reasonable expectation of privacy in the Kate's Bay residence;"
y. "failing to object to life without parole or require that certified copies of convictions be admitted into the record;"
z. "in failing to elicit, follow up on, and/or clarify testimony to establish jury charges for self-defense and/or voluntary manslaughter;"
aa. "failing to subpoena and/or call witness(es) to testify during motions, trial, and/or sentencing, including Kelly Phoenix;"
bb. "failure to cross examine witness(es) on prior conviction(s);"
cc. "failing to investigate, follows up on, or bring to the court's attention Brady violations;
dd. "failure to object to Ms. Eichenmiller's qualifications as an expert and/or further question her qualifications;"
ee. "failure to object to Ms. Eichenmiller's methodology and/or lack of methodology;"
ff. "failure to object to State's failure to lay an adequate foundation for Ms. Eichenmiller's testimony;"
gg. "failure to object to Ms. Eichenmiller's testimony and opinions;"
hh. "failure to object due to the lack of testing and/or error rate in Ms. Eichenmiller's identification;"
ii. "failure to move to strike Ms. Eichenmiller's testimony and opinions;"
jj. "and other such issues that may be determined through the discovery process."

2. "Due Process violations"
   a. "State's failure to make disclosures of material and/or preserve material pursuant to Brady v. Maryland, Kyles v. Whitley, and related case law;"
   b. "prosecutorial misconduct in failing to make disclosures of material and/or preserve material pursuant to Brady v. Maryland, Kyles v. Whitley, and related case law;"
   c. "upon information and belief, prosecutorial misconduct in failing to correct false evidence;"
   d. "the petitioner's attorneys' actions and inactions, as more specifically described above, so infected the case with unfairness resulting in a denial of due process;"
   e. "the State's actions and inactions, including the actions and inactions of the prosecutor, along with the actions and inactions of the petitioner's attorneys, as more specifically described above, so infected the case with unfairness resulting in a denial of due process;"
   f. "and other such issues that may be determined through the discovery process."

3. "Other such issues that may be determined through the discovery process"

Applicant requests relief as follows:

- "A new trial and resentencing"

Applicant's great preponderance of claims in many instances overlap, in part or in whole. The Court finds the more general claims for relief restated above as 1.i. through 1.o. are wholly subsumed by the other claims for relief. Furthermore, in light of their closely related character and the evidence provided at the hearing, the Court addresses the following claims together:

1. Ineffective assistance of trial counsels, in that:
    a. Counsels failed to question witness Lanard Powell or otherwise introduce evidence of his prior statements tending to exculpate Applicant (Claims 1.a. through 1.h., above);
    b. Counsels failed to consult with Applicant regarding his right to testify prior to resting their case, and failed to timely inform the trial court of his desire to testify (Claims 1.p. through 1.r., above);
    c. Counsels failed to introduce the prior inconsistent statements of witness Veronica Chandler and use the statements to support Applicant's claim of self-defense (Claims 1.s. & 1.t, above);
    d. Counsels failed to prepare or present an adequate case in mitigation (Claims 1.u. & 1.v., above);
    e. Counsels failed to object to the testimony of witness Michelle Eichenmiller (Claims 1.dd. through 1.ii., above); and.
    f. Counsels failed to cross-examine witnesses regarding their prior convictions, or otherwise investigate, follow up upon, or bring to the trial court's attention alleged violations of Brady v. Maryland regarding prior convictions (Claims 1.bb and 1.cc., above).
2. Prosecutorial misconduct in failing to turn over materials pursuant to Brady v. Maryland (Claims 2.a. through 2.f., above).

All other allegations are addressed independently (Claims 1.w. through 1.cc, above).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the

legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

As an overarching finding, the Court broadly finds the testimony provided by Morgan, Brown, and Elder to be credible. As to Applicant, the Court finds his testimony to be wholly lacking in credibility. Although broadly negative credibility findings should be rendered with caution, the Court is satisfied that it should give no credence to Applicant's testimony, based upon (both individually and together) the Court's close observation of Applicant's testimony, the evidence in the record tending to show his efforts at witness tampering, and based upon his admitted efforts to frustrate the pursuit of justice in favor of his own self-interest. (PCR Tr. 106-09).

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at

625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466

U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Introduce, Confront Lanard Powell with Prior Statements

Applicant contends Counsels were ineffective in failing to confront and impeach witness Lanard Powell with a letter he purportedly wrote tending to exculpate Applicant, in failing to introduce the letter in question, and in failing to question him regarding statements he allegedly made to one Christopher McCray. "The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding, and in judging prejudice and the likelihood of a different outcome, a defendant has no entitlement to the luck of a lawless decisionmaker." Lockhart v. Fretwell, 506 U.S. 364, 370 (1993). "Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." Nix v. Whiteside, 475 U.S. 157, 166 (1986). "[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence." Id. at 168; see also Preamble, RPC, Rule 407, SCACR ("A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process."); Rule 3.3(a)(3), RPC, Rule 407, SCACR ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity,

the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."); but see Rule 3.3 cmt. 5, RPC, Rule 407, SCACR ("A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity."). "[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at the risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment." Nix at 173.

Trial

At trial, Lanard Powell, a/k/a "Capone," testified at length to his drug-selling relationship with Applicant and the events occurring the night of Green's shooting. On cross-examination, attorney Brown questioned Powell about letters he wrote to Applicant while both were in jail awaiting trial. (Tr. 286-87). Powell admitted to writing Applicant fifteen letters in the hope that Applicant would help him get out of jail. (Tr. 286-87; Tr. 294, ll. 12-16). Brown tied the letters back to Powell's testimony at trial, and Powell admitted he was in court testifying against Applicant in order to help get himself out of jail. (Tr. 287, ll. 13-21).

After a series of questions unrelated to the letters, Brown returned to them and introduced an envelope dated May 21, but did not introduce the letter therein mailed. (Tr. 291-93). Brown elicited testimony from Powell that he had been trying to get Applicant to help him make bond, and Brown implied that Powell was angered by Applicant's failure to help him get out and pay pond. (Tr. 293-95). Brown further questioned Powell regarding statements he made to a jail roommate Christopher McCray, challenging Powell that he had expressed to McCray that he was "disturbed" by Applicant's failure to keep his promises. (Tr. 295-96).

After a detour into other statements, Brown again returned to the letters, and specifically asked Powell:

Q. Did you write a statement exonerating Mr. Wright at one point?

A. Well, actually, he forced me to write that?

Q. Oh, so now he forced you to write that?

A. He asked me to.

(Tr. 304-05). Powell thereafter admitted that Applicant could not put his hands on Powell while both were incarcerated, but that they communicated through a go-between, and that Applicant told Powell that if he wrote the statement, Applicant would get him out of jail. (Tr. 305-07). Powell testified he copied in his own handwriting a letter of what to say that was provided by Applicant. (Tr. 307-08). Brown began to drill into the contents of the letter and asked Applicant if he stated in the letter that a person named "Two Guns" shot Green, to which the State objected; the jury was thereafter excused. (Tr. 308, ll. 3-17). Despite the State's demand and the trial court's insistence, Brown was unable to produce the letter, stating he could not locate it. (Tr. 308-13). The Court instructed Brown to stay away from questions regarding the contents of the written statement that he could not produce, and thereafter instructed the jury to disregard the question regarding "Two Guns." (Tr. 313-14).

Powell also testified on cross-examination that he never saw Applicant shoot Green. (Tr. 288, ll. 23-25; Tr. 289-90). Brown also questioned Powell regarding his statements to law enforcement that the other witnesses present at the scene had been up all night smoking crack cocaine, and that Powell had been carrying a gun for his own protection. (Tr. 299-301).

Later, Brown proffered the testimony of Christopher McCray, who shared a cell with Powell on two occasions. (Tr. 445, ll. 10-24). McCray testified that Powell discussed the case

with him, explaining that Powell had seen Applicant's car at a McDonald's parking lot after sneaking off with his girlfriend, and when Powell returned to the trailer, he saw a man known as both "Big Money" and "Two Guns" run out with a gun in hand and get into a black Dodge Charger and leave with the headlights turned off; Powell then found Green's corpse. (Tr. 445-48). McCray continued that Powell told him he found a pistol on the floor, which he picked up and took with him from the scene. (Tr. 448-50). McCray denied any relationship with Applicant, and that he only incidentally met Applicant in jail, where he reported what Powell had told him. (Tr. 451-53).

The State objected to McCray's testimony, arguing it was inadmissible extrinsic evidence of a prior inconsistent statement. (Tr. 458-59). Brown admitted he had not asked Powell about statements made to McCray, but rather had asked him questions about the substantive facts at issue in the statements. (Tr. 459-60). The trial court refused to permit McCray to testify, ruling his testimony was hearsay and did not fall within any exceptions to the rule prohibiting hearsay. (Tr. 460-61).

Appeal

On appeal, Applicant raised the issue of the trial court's refusal to admit evidence of the contents of Powell's "Two Guns" letter. The South Carolina Court of Appeals found the issue unpreserved for appellate review because Counsel (1) failed to proffer Powell's testimony regarding the letter and (2) failed to object to the subsequent curative instruction. Wright, 416 S.C. at 371, 785 S.E.2d at 488.

Evidentiary Hearing

At the evidentiary hearing, Martin acknowledged Brown's effort regarding the "Two Guns" letter from Powell. (PCR Tr. 28-29). Martin recalled that "Powell had supposedly

written a letter in which he said Marcus Wright did not do this, that somebody else had done it." (PCR Tr. 29, ll. 9-16). Martin testified it was perhaps part of the theory of the case, but largely deferred to the record, testifying his memory on the subject was limited. (PCR Tr. 29-30). Martin could not recall ever actually seeing or possessing the letter in question. (PCR Tr. 42, ll. 10-14). As to McCray's testimony, Martin testified he had no memory of the issue, explaining that Brown had handled the witness. (PCR Tr. 19-20).

Brown confirmed the events at trial and testified that even if he had not misplaced the letter, he would not have introduced it at trial. (PCR Tr. 60-61). Brown denied Applicant ever told him that he shot Green out of fear for his own life. (PCR Tr. 63, ll. 3-5). On cross-examination, Brown testified Applicant admitted shooting Green to him, and that he never saw a weapon. (PCR Tr. 63-64). Brown recalled possessing the letter purportedly drafted by Powell indicating that Green had been shot by "Two Guns," but explained he knew the letter was not true because Applicant had already privately admitted to shooting Green. (PCR Tr. 64-65). Brown testified that "to introduce the letter, as an officer of the court, would have put me in the position of perjury and I was not gonna do that." (PCR Tr. 65, ll. 10-12). Brown recalled the letter was delivered to him by Mrs. Wright, and that he subsequently misplaced the letter amid stacks of papers and files in his office, and did not find it until after Applicant's trial. (PCR Tr. 65-67; State's Exhibit #2). Brown, reviewing the handwriting of the letter, initially recalled that it appeared to be "almost identical to Mr. Wright's handwriting." (PCR Tr. 66, ll. 7-17). However, Brown later corrected his testimony, and testified he had been leery of the letter because there was no similarity between the handwriting of the "Two Guns" letter and the other statements and letters Powell had written. (PCR Tr. 71, ll. 1-15). On cross-examination, Brown

dismissed Applicant's suggestion that the letter introduced as State's Exhibit #2 was *not* the letter in question. (PCR Tr. 75-76).

Applicant testified that State's Exhibit #2 was not the letter missing at the time of trial. (PCR Tr. 99-101). Applicant further denied that any of Powell's letters exonerated him. (PCR Tr. 100, ll. 4-7). Applicant testified that "Two Guns was [Green's] accomplice and I told law enforcement that when they were interviewing me. I told them two or more individuals entered the home. So, the Two Gun guy that they seen run from around the building wasn't me." (PCR Tr. 100, ll. 7-11). Applicant testified at some length to providing statements to law enforcement, and that he had been "beating around in circles trying to see exactly what they knew[.]" (PCR Tr. 106-09). Applicant explained that he "didn't actually live a life that was, you know, like how you would, how you would cooperate with the law." (PCR Tr. 108, ll. 1-3).

Findings

The Court finds no ineffectiveness on the part of Counsels. To the extent Morgan and Brown could remember the proceedings, the Court finds their testimony to be credible. The Court finds that State's Exhibit #2 is, in fact, the letter that was missing at the time of trial. Applicant told Brown that he shot Green, such that Brown had good reason to be believe Powell's statements tending to exculpate his client at the expense of "Two Guns" were entirely false. As such, Brown could not ethically introduce the letter for the truth of the matter asserted. Brown *could* introduce evidence of Powell's statements for the purpose of demonstrating their falsity and Powell's falsity, but doing so would not have been entirely consistent with Brown and Martin's trial strategy. Where Counsels sought to challenge the adequacy of the identification of their client as the perpetrator, taking the detour of deconstructing a witness' prior statements implicating a third party would not have been clearly helpful, as a strategy focused on attacking

the identification of their client as the perpetrator implicitly relies upon a theory that somebody else committed the shooting. In that context, discrediting evidence tending to inculpate a third party would be potentially self-defeating. Considering the evidence in the light of Applicant's now-preferred theory of defense that he shot Green in self-defense, evidence tending to inculpate third-parties would not be helpful there either. And in either case, introduction of the letter would have exposed Applicant, through Powell and potentially McCray, to further testimony regarding Powell's motivations for writing it—namely that he did so at Applicant's behest.

The Court also sits with discomfort at the prospect of any finding of ineffectiveness of counsel for an issue that was generated by the Applicant's own malfeasance. The trial record, in combination with the testimony provided at the evidentiary hearing, tends to show that Applicant repeatedly engaged in witness tampering, thus producing the false letter written by Powell and the purported extrinsic statements he made to McCray. Applicant now seeks to prevail upon an application for post-conviction relief based in part on allegations that his attorneys did not navigate to his satisfaction the ethical minefield *he* created. The interests of justice would not be served, and the judiciary would undermine the fundamental fairness of the justice system, by granting any relief to an applicant on grounds that his or her attorney did not fully utilize false statements made by a witness which were induced by the applicant.

Assuming for the sake of argument that the letter introduced as State's Exhibit #2 was not the letter in question, no other letter was introduced as representative of that which was missing at the time of trial. Thus, if State's Exhibit #2 were not the letter that was missing, Applicant would have failed to present the evidence necessary (i.e. the letter) to meet his burden of proof, and his claim would fail as merely speculative.

Finally, even if Counsels were constitutionally deficient in failing to introduce the fraudulent letter, the letter could have only served the purpose of impeaching Powell. Brown had already impeached Powell for his (1) prior record, (2) pending charges, (3) role in peddling drugs, (4) role in the flight from the scene after the killing, (5) statements to law enforcement, and (6) unjustified fear of Applicant while both were in jail. Brown had made substantial efforts to impeach Powell such that introduction of the letter and/or the introduction of McCray as a witness would have been merely cumulative impeachment evidence.

For all of these reasons, the Court finds no deficiency on the part of Counsels, nor any prejudice from the deficiencies alleged. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

2. Failure to Consult Applicant Regarding Right to Testify, Inform Court of Desire to Testify

Applicant contends Counsels were ineffective in failing to adequately and timely consult with him regarding his decision on whether or not to testify, and in failing to timely communicate his desire to testify to the trial court. "The right to testify on one's own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments." State v. Wright, 416 S.C. 353, 372, 785 S.E.2d 479, 489 (Ct. App. 2016) (citing Rock v. Arkansas, 483 U.S. 44, 51-52 (1987)).

"A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial court, and the trial court's ruling will not be reversed absent an abuse of discretion." Wright, 416 S.C. at 371, 785 S.E.2d at 489 (quoting State v. Wren, 470 S.E.2d 111, 112 (Ct. App. 1996)). However, the right may be waived, and all that is necessary for a defendant to waive the right is to know that a right to testify exists. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991).

Trial

After the State rested at trial, the trial court engaged Applicant in a colloquy regarding his right to testify. (Tr. 438-39). The trial court explained to Applicant he had the right to present a defense, but that he did not have to present any defense or any evidence whatsoever. (Tr. 439, ll. 23-25). The trial court reminded Applicant that the burden of proof was on the State to prove his guilt beyond a reasonable doubt, and that he was still presumed innocent. (Tr. 440, ll. 1-3). The trial court then advised Applicant that he had the right to testify, if he so desired, and that he had the right to remain silent. (Tr. 440, ll. 6-7). The State noted Applicant's prior convictions for receiving stolen goods and assault and battery of a high and aggravated nature. (Tr. 440, ll. 11-12). The trial court explained that though the State could ask Applicant about his prior offenses, it could only do so for the purposes of attacking Applicant's credibility, and that he would instruct the jury to that effect. (Tr. 440-41). The trial court also explained how if Applicant exercised his right to remain silent, he would instruct the jury that they could not hold that decision against him. (Tr. 441, ll. 3-15).

Applicant confirmed he understood. (Tr. 441, ll. 16-17). When asked if he had any questions, Applicant initially replied "not exactly," but then reaffirmed he understood everything when pressed upon by the trial court. (Tr. 441-42). Counsels confirmed they had also already explained the rights and choices available to Applicant. (Tr. 442, ll. 1-3). The trial court then asked Applicant whether he wished to testify or exercise his right to remain silent, qualified with the admonition that Applicant was "not bound at this point[.]" (Tr. 442, 4-12). Applicant replied: "Exercise my right to remain silent." (Tr. 442, line 13). After the defense proffered the testimony of Christopher McCray, which was excluded by the trial court, the defense rested its case without presenting any witnesses to the jury. (Tr. 444-62; Rests at Tr. 462, ll. 10-11).

The parties then proceeded with a partial charge conference regarding Applicant's requests to charge the jury on voluntary manslaughter and self-defense. (Tr. 465, ll. 7-11). The trial court encouraged the parties to conduct further research overnight, but noted the only testimony he could recall to support the charges was "a self-serving . . . comment by the Defendant as he fled. My recollection is that the comment was something to the effect is the [epithet] tried to pull a jack." (Tr. 465, ll. 9-23). Martin noted testimony from Lanard Powell that Applicant reported the victim "tried a jack move," but the trial court noted the ambiguity of precisely what constituted "a jack move" and that it did not necessarily mean a gun was pulled. (Tr. 466, ll. 9-22). Martin also emphasized the numerous instances of testimony to show Green was generally hostile when he came in the house, and that he "reached for something" immediately prior to being shot. (Tr. 466-68). Upon a review of the testimony by the court reporter, the trial court cited to State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010), and explained:

> . . . it talks about there having to be fear, and if he wasn't afraid, under Starnes it does not look like he would be entitled to voluntary manslaughter. And under the general self-defense, he's got to be in reasonable fear of imminent harm, imminent danger. He must be either actually – was actually in imminent danger of death or bodily injury or believed he was, and if he testified he was not, then that might end the inquiry[.]

(Tr. 469, ll. 1-23). Martin testified Applicant did not testify he was not in fear, and that Powell's testimony that Applicant never said he was afraid of Green was not dispositive. (Tr. 469-72). The trial court again noted that all involved could look at the issue overnight, and the court took recess for the evening. (Tr. 742, ll. 1-16)

When court reconvened on the morning of June 20, 2013, the trial court promptly returned to the jury charge argument and invited a resumption of the argument. (Tr. 472-73). Martin again argued that even under Starnes, given the totality of the circumstances, there was

evidence to support the charges requested. (Tr. 473-74). The State replied that Starnes established there had to be not only fear for voluntary manslaughter, but that the fear had to be the "result of sufficient legal provocation and cause the defendant to lose control and create an uncontrollable impulse to do violence." (Tr. 474-75). Speaking practically, the State argued:

> If we listen to and we go along with the fact that somebody merely has to lift up their shirt and somebody can put ten rounds in them because they lifted up their shirt, we're in a very dangerous position, Your Honor. That is the only thing in the record is that he lifted his shirt. No one saw a gun. Absolutely no witness said there was a gun. No witness said that they heard J.J. make any kind of threat and Lanard Powell actually said that Marcus never said he threatened him.

(Tr. 475-76). The State asserted there was nothing to support either charge, and the Court agreed, ruling that there was "no evidence whatsoever of the crucial element required for both voluntary manslaughter and self-defense, of any fear of imminent danger on behalf of the Defendant at the time the shots were allegedly fired[.]" (Tr. 476-77).

Martin then reported to the Court that Applicant had changed his mind and now wished to testify. (Tr. 477, ll. 20-24). Martin reported that he had told Applicant the opportunity passed when he exercised his right to remain silent, and Applicant confirmed their conversation. (Tr. 477-78). The trial court curtly denied the request, and opined that Applicant only wished to testify in light of the ruling on the jury charges. (Tr. 478, ll. 7-15). Martin noted the trial court had previously told Applicant he was not bound by his prior decision, which the court acknowledged, but rejected on grounds that "any reasonable person would believe that that right to testify was extinguished after the Defense rests." (Tr. 478-79). Martin explained Applicant never told him or Brown that he wished to testify prior to resting. (Tr. 479, ll. 6-11). The trial court reaffirmed its refusal to permit Applicant to testify and ruled the record was closed. (Tr. 479, ll. 12-19).

Martin nonetheless continued by reporting Applicant's complaint that Counsels never had a specific conversation with him about testifying after McCray was not permitted to testify, but again acknowledged Applicant did not indicate prior to that morning that he wished to testify. (Tr. 480, ll. 5-19). The trial court asked Brown, who explained Applicant indicated his desire to testify when they met prior to proceedings resuming that morning. (Tr. 480-81). The trial court chastised Applicant and Counsels for not bringing the issue to his attention before he ruled on the requested jury charges, and reaffirmed its belief that Applicant waited until the court ruled to express his desire to testify. (Tr. 481-82). The trial court refused to permit Applicant to testify. (Tr. 482, ll. 3-5).

After the jury returned its verdict, and during mitigation, Applicant briefly addressed the Court:

> The family want to know what happened to him. They heard what happened. Maybe the jury didn't because you dismissed the witness, but the family heard what happened to him. **It wasn't me.**

(Tr. 552, ll. 10-13) (emphasis added).

Appeal

The issue of the trial court's refusal was thereafter raised on direct appeal. Wright, 416 S.C. at 371-74, 785 S.E.2d at 489-90. In rejecting Applicant's argument, the South Carolina Court of Appeals noted the trial court's concern that Applicant was seeking to craft his testimony to fit the parameters of the trial court's rulings, and held that the concern was a legitimate ground to refuse to reopen the record. Id., 416 S.C. at 374, 785 S.E.2d at 490.

Evidentiary Hearing

At the evidentiary hearing, Martin testified he did not speak with Applicant in the holding area after the court took overnight recess on June 19, 2013. (PCR Tr. 9, ll. 17-19; PCR Tr. 31, ll. 10-22). Martin recalled that when Applicant was brought out from the holding cell that morning

and seated at the defense table, there was a discussion that he *possibly* wanted to testify. (PCR Tr. 9, ll. 21-25). Martin recalled explaining to Applicant that their "position had been all along and with Marcus, and Marcus agreed, that it was better that he not testify for multiple reasons." (PCR Tr. 10, ll. 2-5). Martin told Applicant that his advised position had not changed, and Martin believed Applicant "had reconciled himself with the fact that it was in his better interest not to testify." (PCR Tr. 10, ll. 5-11). Nonetheless, after the trial court ruled on the jury charges, Martin testified Applicant raised his hand to get the trial court's attention. (PCR Tr. 10-11).

Both Counsels testified that their theory of the case was *not* self-defense, but rather to attack the strength of the State's case as built on a foundation of witnesses who were all heavily inebriated at the time of the shooting. (PCR Tr. 13-15; PCR Tr. 17, ll. 24-25; PCR Tr. 18, ll. 23-24; PCR Tr. 21, ll. 19-20; PCR Tr. 36, ll. 5-6; PCR Tr. 57, ll. 3-13; PCR Tr. 58, ll. 3-10; PCR Tr. 62, ll. 14-24; PCR Tr. 68, ll. 13-15). Martin testified at some length about why, despite requesting the charge, structuring the theory of defense around self-defense was problematic: Applicant gave statements to law enforcement without ever mentioning he acted in self-defense, or that he was the shooter; Green was shot ten times; no gun was found at the scene; Applicant was not in his own home; and Applicant would have had to testify, which Martin believed would have been fatal to an already difficult case. (PCR Tr. 14-15). Nonetheless, Martin asked for the self-defense charge and argued for it "because we're looking for whatever we could find." (PCR Tr. 17-18). Martin testified he had multiple conversations with Applicant regarding the decision to testify, though he could not say specifically how many. (PCR Tr. 31, ll. 5-9; PCR Tr. 33, ll. 10-14).

On cross-examination, Martin testified he had no recollection of Applicant ever telling him he wanted to testify, or that Applicant felt that he needed to testify, but that they had

multiple conversations regarding whether Applicant would testify and that they all agreed to a trial strategy that would not involve him testifying. (PCR Tr. 33, ll. 15-23). Martin testified he could not recall Applicant ever indicating his desire to testify prior to the morning of June 20, 2013, but cautioned that he did not mean to say there was never an instance in their many conversations in which Applicant may have said "maybe I ought to testify and say this or that." (PCR Tr. 33-34). As noted in the previous section, Martin also acknowledged the allegations of witness tampering against his client. (PCR Tr. 42, ll. 2-9)."

Brown testified he got to the courthouse before Martin on the last day of trial and spoke with Applicant early that morning, at which time Applicant indicated he had changed his mind and wanted to testify. (PCR Tr. 54, ll. 13-22). Brown testified he informed Martin immediately after "he came up." (PCR Tr. 54-55). Brown could not independently recall precisely when it was that the trial court was informed of Applicant's newfound desire to testify. (PCR Tr. 55-56).

Questioned regarding the viability of self-defense as a theory of defense, Brown opined that it was not viable based on what Applicant had told him. (PCR Tr. 54, ll. 8-13). Brown recalled meeting at his office with Applicant, where Brown questioned how he could advance a self-defense strategy when Applicant shot Green ten times, including a couple of times in the back. (PCR Tr. 57-58). Brown in particular recalled asking Applicant why he kept shooting Green, to which Applicant replied "well he kept moving." (PCR Tr. 58, ll. 8-10). Brown further noted the victim was on the floor while Applicant continued shooting him. (PCR Tr. 58, ll. 11-14). Brown denied Applicant ever told him he shot Green because he was in fear for his own life. (PCR Tr. 63, ll. 3-5).

On cross-examination, Brown confirmed that Applicant told him he was present in the house that evening, that he shot Green, and that he never indicated seeing Green with a weapon.

(PCR Tr. 63-64). Brown explained that "there's an ebb and flow in trials," such that they did not have an ironclad position as to whether Applicant would testify, but ultimately Applicant told Judge Hayes that he would remain silent. (PCR Tr. 68, ll. 4-12). Brown and Applicant discussed the question of whether to testify "a number of times[,]" but not every single meeting. (PCR Tr. 70, ll. 16-24). As explored in greater detail in Section II.A.1., above, Brown also testified he received a letter from Mrs. Wright purportedly written by Lanard Powell, which he concluded was not written by Powell and constituted a false writing. (PCR Tr. 64-68; PCR Tr. 71, ll. 1-12).

Applicant testified at the evidentiary hearing that when the trial court first asked him about testifying, Applicant replied that he was not sure, but that he did not exactly have any questions. (PCR Tr. 82, ll. 13-15). When pressed by the trial court for a yes or no answer, Applicant answered "no," reasoning it was better for his other potential witnesses to testify to what happened. (PCR Tr. 82-83). The following morning, while discussing the possibility of changing his plea to guilty, Applicant told Brown that he wished to testify. (PCR Tr. 83, ll. 3-15). Applicant testified Brown left, then returned and told him "they said they're not gonna allow you to testify." (PCR Tr. 83, ll. 16-18). Applicant claimed that when he went out and listened to the trial court's language and mannerisms, he could tell that nobody had informed the judge, so Applicant raised his hand and informed the trial court of his desire to testify. (PCR Tr. 83, ll. 18-22). The exchange with the trial court thereafter proceeded as reflected in the trial transcript. Applicant recalled that his testimony was never proffered. (PCR Tr. 84, ll. 11-16).

Applicant proffered at the evidentiary hearing the testimony he would have given at trial. Applicant testified he shot Green in self-defense. (PCR Tr. 84, ll. 19-20). Applicant testified Roy Sinclair "came flying around in his wheelchair to the front door[,]" but Applicant stopped

him from opening the door and the two "went back and forth a little bit[,]" as Applicant did not want to let people in while "Capone" was away. (PCR Tr. 84-85). Sinclair managed to open the door, declaring it was his cousin, and let Green into the house. (PCR Tr. 85, ll. 9-17). Applicant testified Green focused on Sinclair as he came in and said "you've got these little [ephitet] running this spot," and "I'm about to put the squeeze on me a [ephitet]." (PCR Tr. 85-86). Applicant understood Green to mean he was going to shoot somebody. (PCR Tr. 86, ll. 4-5). Applicant testified Green then pulled out and brandished a weapon; Applicant recalled he screamed that Green had a gun, and when Green turned towards him, Applicant opened fire. (PCR Tr. 86, ll. 5-10). Applicant testified the first shots hit Green in the leg and the arm, such that the victim "spun around." (PCR Tr. 86, ll. 10-11). Applicant kept firing, but denied continuing to shoot Green after he hit the floor, and offered that any bullets in the floor must have come from Green discharging his gun into the floor. (PCR Tr. 86-87). Applicant testified he shot Green because he was scared, and in order to defend himself. (PCR Tr. 87, ll. 2-4).

Applicant asserted he told his story to his attorneys, and that the whole trial was about self-defense. (PCR Tr. 87, ll. 4-13). Applicant further asserted that Martin had previously asserted during a bond hearing that the case was one of self-defense, and offered a transcript of the bond hearing. (PCR Tr. 87-88; Applicant's Exhibit #2). Applicant expressed his bafflement that Counsels denied the case was one of self-defense, and again reaffirmed he shot Green in self-defense and feared for his life. (PCR Tr. 97-98). Applicant denied coercing Powell into writing any letters, and denied Powell ever wrote a letter saying Applicant did not shoot Green. (PCR Tr. 99-100).

On cross-examination, the State elicited further testimony from Applicant regarding the events occurring after the shooting. Applicant testified Green looked like he was going to get up,

so Applicant took cover behind a countertop. (PCR Tr. 101, ll. 9-15). Kelly Pinnix was unresponsive, while Mildred Small calmly told Applicant "baby, he ain't moving no more." (PCR Tr. 101, ll. 15-18). All present then fled. (PCR Tr. 101, ll. 18-20). Applicant recalled his panicked flight, and testified he got lost because he did not know the area. (PCR Tr. 101-02). Applicant met Qwanda Caldwell-Brown at the home of Daisy Marthena Menendez; there he recovered a bag of unknown contents from Brown, placed it in the BMW, got in her car, and rode away. (PCR Tr. 102-03). Brown drove Applicant around, retracing steps, until they found Lanard Powell, who explained he had taken Green's truck at the behest of Kelly Pinnix. (PCR Tr. 103, ll. 1-16). Applicant testified Powell inquired about the bag, and when Applicant replied that he had placed it in his BMW, Powell gave him a funny look that gave Applicant concern. (PCR Tr. 103, ll. 16-19). Applicant asserted he "come to find out, what he had done was taken the deceased's gun and that was in the bag." (PCR Tr. 103, ll. 19-21). Applicant testified Powell told him he took the gun. (PCR Tr. 103-04). Applicant testified that after they sheltered in a hotel room, he directed Jacinda Wright to retrieve the bag; she did so, and Applicant found a chrome handgun. (PCR Tr. 104, ll. 6-13). Applicant testified he then obtained the rental car, and further directed Wright to call "Attorney Whetstone in Columbia" to let him know what was happening. (PCR Tr. 104, ll. 14-19). Applicant claimed that he was gathering "anything dealing with any firearms" to turn over to the police, but was apprehended at the hotel and was unable to "get the guns." (PCR Tr. 104, ll. 19-24). Applicant then testified he told Martin that Powell buried the guns, and that he worried that with every night that passed, any DNA evidence on the guns was more likely to be lost. (PCR Tr. 104-05). Applicant recalled he "kept trying to get Lanard out" in order to locate the gun and deliver "them" to it. (PCR Tr. 105, ll. 6-18). Applicant denied ever attempting to burn Green's truck, and opined that it would have been easy

to successfully burn a truck, but that it would not provide to cover up the crime. (PCR Tr. 105-06).

As to his statement to law enforcement, Applicant testified he was deliberately "beating around in circles trying to see exactly what they knew, because I already knew the situation was pretty bad." (PCR Tr. 106-07). Applicant admitted he told law enforcement he had heard "a jack move went wrong," but explained he was trying to elicit information from law enforcement, and that he had a bad prior history of law enforcement. (PCR Tr. 107-08). Applicant explained he did not tell law enforcement that he acted in self-defense, despite explicit invitation from investigators to do so, because "in the life that I live, you don't talk to the police, you talk to an attorney." (PCR Tr. 108-09). Applicant asserted that a "cop is just trying to make an arrest[,]" and again recalled that his prior interaction with the police involved law enforcement beating him and his mother. (PCR Tr. 109, ll. 13-19).

Findings

The Court finds Applicant has failed to meet his burden of showing deficiency on the part of Counsels, nor that the deficiencies alleged prejudiced him under Strickland. As previously noted, the Court finds Counsels' testimony addressing this allegation to be credible and Applicant's testimony to be extremely self-serving and not credible.

As to deficiency, first, Applicant was afforded an opportunity to testify and declined to do so. The Court finds Applicant was fully aware of his right to testify, the advantages and disadvantages of doing so, and reasonably concluded that he should not do so at the time the trial court asked him. The trial record reflects that the trial court fully appraised him of the right, and Counsels testified to spending substantial time discussing the subject with Applicant.

Second, the Court finds Counsels reasonably and accurately informed Applicant the following morning after he asserted his desire to testify that it was too late to go back and try to reopen the record that had been closed the previous day. By the time Applicant told them that he wanted to testify, the record was closed, and the trial court had already initiated the conference on whether to charge self-defense and voluntary manslaughter, where it opined on what testimony would have been necessary to support the charges.

Third, the Court finds Counsels reasonably concluded Applicant did not wish to testify at the time they rested their case, based Applicant's statement to the trial court, the time spent in preparation and consultation, and based upon the nature of the agreed upon strategy to attack the credibility of the drug-addled witnesses, only one of whom could specifically identify Applicant as the shooter. The Court finds that self-defense was *not* the strategy Counsels employed at trial, even if they had considered it earlier in the course of the representation. The facts and evidence before Counsels more than justified making the strategic decision to not make self-defense their core strategy: no witness could credibly testify that Green was ever armed with anything, Green's broken finger substantially diminished the likelihood a jury would believe he was even capable of wielding a pistol, and any realistic self-defense strategy would all but require them to concede that Applicant was in fact the shooter when the identity of the perpetrator was the weakest element of the State's case. In light of those facts and Counsels strategic decisions, they would have had no reason to doubt Applicant's declination to testify during trial or at the time they rested their case.

As to prejudice, first, the Court finds that even if Counsels had immediately confronted the trial court with Applicant's newfound desire to testify, there is not a reasonable probability the outcome would have been different. As noted above, the trial court had already explained at

the end of the previous day what testimony would have been necessary to support instructions on voluntary manslaughter and/or self-defense, such that there is little to no possibility the trial court would have ruled differently had it been more promptly informed of Applicant's desire to testify on the following morning. Second, as noted above, the Court finds that Applicant's testimony would have been devastatingly harmful to his own case. The testimony Applicant offered at the evidentiary hearing (1) admitted Applicant was the shooter, (2) admitted to much of the sequence of events which followed after Applicant shot Green, (3) admitted his duplicitous and dishonest interactions with law enforcement, (4) was crucially based in part on hearsay from Powell that was inconsistent with Powell's trial testimony (that he took the gun), (5) lacked evidentiary support outside of his own testimony, and (6) broadly did not make any sense. This Court enjoyed the opportunity to closely observe and listen to Applicant during his testimony, and cannot conceive of how a reasonable jury could have credibly believed Applicant and thereupon conclude that he acted in self-defense in shooting Green, or that he shot Green without malice aforethought. Applicant's testimony would have only served to scuttle Counsels very reasonable trial strategy and more surely secure his own conviction.

For all of these reasons, the Court finds that Applicant has failed to meet his burden of showing any deficiency on the part of Counsels, or that there is any reasonable probability that but for the deficiencies alleged, the outcome at trial would have been different. Accordingly, Applicant's request for relief by way of these allegations is **DENIED.**

3. Failure to Introduce, Confront Veronica Chandler with Prior Statements

Applicant alleges Counsels were ineffective for failing to introduce into evidence statements made by witness Veronica Chandler to law enforcement that she saw the victim had a gun. Rule 612(b) of the South Carolina Rules of Evidence provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence that the prior statement was made is inadmissible.

"A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." State v. Stokes, 381 S.C. 390, 398-99, 673 S.E.2d 434, 438 (2009) (citing State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982)).

"When the issue is whether the witness admitted making the prior inconsistent statement, the admission must be unequivocal." State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010) (citing State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 635 (Ct. App. 2003)). "Generally, where the witness has responded with anything less than an unequivocal admission, trial [courts] have been granted wide latitude to allow extrinsic evidence proving the statement." Id., 388 S.C. at 201, 694 S.E.2d at 229-230.

"As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent." United States v. Hale, 422 U.S. 171, 176 (1975). If the party seeking to impeach a witness with a prior statement fails to establish a threshold inconsistency between the trial testimony and the prior statement, proof of the prior statement lacks any significant probative value and must therefore be excluded. Id. However, there is no requirement that the two statements be diametrically opposite. Firemen's Fund Ins. Co. v. Thien, 8 F.3d 1307, 1312 (8th Cir. 1993); see e.g. United States v. Tory, 52 F.3d 207, 210 (9th Cir. 1995) (where a witness told an investigator that the perpetrator was wearing sweatpants, trial testimony by the same witness "that she did not remember describing them in that particular way but did remember describing them 'as a white type of pant' was inconsistent).

Trial

Chandler testified at trial that she was at Roy James Sinclair's house on April 30, 2012, to buy crack from "Capone" (Powell). (Tr. 200-01). Chandler arrived at the house and learned from Sinclair that Powell had just left. (Tr. 201, ll. 11-16). Sinclair invited Chandler into the house, and so she entered and took a seat in the den "in the little La-Z-Boy right beside the T.V." (Tr. 201-02). Green arrived afterward, entered the house, and "made a statement because somebody opened the door and he was like that's how you got your house run. You got people opening your doors and what-not." (Tr. 202, ll. 12-23). Green spoke to everybody in the house in turn, reaching Chandler last because she was a known family friend. (Tr. 202-03). While Chandler spoke to Green, "[t]he guy in the kitchen said something, and [Green] say, yeah, yeah, yeah, and the next thing I know, all I heard was boom, boom, boom boom. It was no arguments, no fussing, or anything." (Tr. 203, ll. 5-9). Chandler was so close to Green when he was shot, that blood splattered on her clothes, which were later taken by law enforcement as evidence. (Tr. 206-07). Chandler never heard Green threaten the man in the kitchen in any way; Green had been talking to her when the man in the standing at the bar in the kitchen opened fire. (Tr. 203-05). Chandler saw the man in the kitchen, and the gun in his hand. (Tr. 205, ll. 2-5). Chandler testified she did not see any gun in Green's hand. (Tr. 205, ll. 6-7). Chandler fled the house, and saw Powell return as she left. (Tr. 205-06; Tr. 207-08).

On cross-examination, Martin asked Chandler about statements she made to law enforcement:

> Q. And you gave a statement to the police after this occurred?
>
> A. Yes sir, I did.
>
> Q. And you told them at that time that J.J. reached to pull for what you thought was a gun?

A. I didn't see a gun.

Q. And that's what I want to ask you about.

A. Okay.

Q. Because when you gave a statement to the police -- do you remember giving a statement to the police?

A. Yes sir, I do.

Q. Okay. And do you – and I've got the statement here and I can give it to you if that's necessary.

A. I know the whole complete statement. I gave it.

Q. All right. But you told the police at that time, you said I don't know if he had a gun or everything happened so fast, but he lift up his shirt?

A. Yes sir.

Q. Do you remember saying that?

A. Yes, I did say that.

Q. And that's true?

A. Yes sir, but he – I did not see a gun present.

. . .

Q. And then they keep talking to you about that **and you say I'm quite convinced I saw a gun.**

A. I don't remember saying that.

. . .

Q. Again, you gave a statement, correct?

A. Okay, and like I said, I don't recall saying that.

Q. All right, but you don't recall saying that. You do recall saying that you thought he had a gun, as we talked about earlier, but you're not sure?

A. I mean, like I say, I don't recall saying that, so I'm not going to answer to that. If they got it in the paper, then I evidently say it, but I don't recall saying it.

. . .

Q. I just asked you about one statement that you made and you said that you did say that?

A. I saw when he did lift his shirt a little bit, but I did not see a gun present.

(Tr. 209-11) (emphasis added). Martin again attempted to confront Chandler with the statement "I'm convinced I saw a gun, but I don't know[,]" which elicited a sustained objection from the State. (Tr. 211, ll. 8-12). Martin again asked Chandler if she told the police she thought she saw a gun, to which she again replied she did not recall saying so. (Tr. 211, ll. 13-20). On redirect examination, Chandler asserted that she did not give a written statement, but a recorded oral statement, which she had reviewed and did not include the statement insisted upon by Martin. (Tr. 211-12).

Evidentiary Hearing

At the evidentiary hearing, Martin could not recall cross-examining her, and did not believe he had done so, but explained that he reviewed her statements to law enforcement prior to the hearing. (PCR Tr. 16-17). Martin explained that whether or not the victim had a gun was not the primary factor in their defense because the theory of the case was not self-defense. (PCR Tr. 17-18). Indeed, as previously noted, both Counsels testified that their theory of the case was *not* self-defense, but rather to attack the strength of the State's case as built on a foundation of witnesses who were all heavily inebriated at the time of the shooting. (PCR Tr. 13-15; PCR Tr. 17, ll. 24-25; PCR Tr. 18, ll. 23-24; PCR Tr. 21, ll. 19-20; PCR Tr. 36, ll. 5-6; PCR Tr. 57, ll. 3-13; PCR Tr. 58, ll. 3-10; PCR Tr. 62, ll. 14-24; PCR Tr. 68, ll. 13-15).

On cross-examination, Respondent moved a transcription of Chandler's statement into evidence and reviewed it with Martin. (PCR Tr. 42-46; State's Exhibit #1). In her statement, Chandler told law enforcement that there was an exchange between "the Dude in the kitchen" and Green, and then Green lifted his shirt. (PCR Tr. 43-44; State's Exhibit #1). Chandler told

law enforcement she was "quite convinced I saw a gun, but I don't know" and persisted in her self-doubt and could not describe any gun. (PCR Tr. 44-45; State's Exhibit #1). Martin agreed with the State's assertion that Chandler's statement "provides something less than she firmly saw a gun." (PCR Tr. 45, ll. 3-8). Chandler's statement continues by explaining that "when [Green] did that I remember [Green] turning around and that's when I heard POW, POW, POW . . ." (State's Exhibit #1).

Findings

The Court finds Applicant has failed to meet his burden of showing Martin was ineffective. First, to the extent Applicant argues that Martin's failure was such that he failed to elicit testimony from Chandler to show that it appeared Green was reaching for a gun, Applicant is simply incorrect. While Martin was unable to elicit testimony from Chandler that she saw a gun or previously believed (however tenuously) that she saw a gun, he did elicit testimony that Green had lifted his shirt and did not know if he had a gun. In that light, it was reasonable for Martin to simply accept what he was given by Chandler and move on without introducing the statement.

In any event, because the theory of defense was to deny Applicant committed the shooting, and because self-defense was affirmatively not the theory (and not a practical option absent Applicant's testimony), litigating the motivations of the shooter were secondary. Because the defense theory of the case was not self-defense, the actual strategic value of introducing Chandler's prior statements was limited, as Martin noted. To that end, Chandler never clearly indicates that she saw a gun, but rather describes her self-reflection and doubt that she had convinced herself of as much despite being unable to recall actually seeing one. Reading State's

Exhibit #1 in its totality, Chandler's statements are not so clearly inconsistent as to lead this Court to conclude their introduction would have substantially impeached Chandler.

Furthermore, the statement as a whole does not present facts favorable to Applicant. Notwithstanding Chandler's refusal to admit to previously thinking she saw a gun on Green's person, the overwhelming majority of the statement corroborates her trial testimony and the testimony of the other witnesses. The State would have been within its right to require Applicant to introduce very substantial corroborative portions of the statement to clarify the inconsistent statement. See Rule 106, SCRE (rule of completeness); State v. Taylor, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998) ("Only that portion of the remainder of a statement which explains or clarifies the previously admitted portion should be introduced."). It does not appear to this Court that the impeachment value of whether she saw a gun would outweigh the damaging corroborative value of the other admissible portions of the statement, especially in a case where Counsels' trial strategy depended upon the jury agreeing that the State's witnesses were all heavily inebriated and not to be believed. The Court cannot conclude that the introduction of Chandler's statement would have changed the outcome of trial.

For all of these reasons, the Court finds Applicant has failed to meet his burden of establishing deficient performance of counsel, or that he was prejudiced by the deficiency alleged, and his request for relief by way of this allegation is **DENIED.**

4. Failure to Prepare, Present Case in Mitigation

Applicant alleges Counsels were ineffective in failing to prepare and present an adequate case in mitigation for him after he was convicted.

At trial, Martin said very little in mitigation, but only offered that a sentence of thirty to thirty-five years "would be sufficient to protect the community and to punish him for his

wrongs." (Tr. 551, ll. 5-14). Brown offered without specificity that "perhaps there is some socially redeeming qualities that Mr. Wright possess." (Tr. 551-52). Applicant, as previously noted, addressed the Court:

> The family want to know what happened to him. They heard what happened. Maybe the jury didn't because you dismissed the witness, but the family heard what happened to him. It wasn't me.

(Tr. 552, ll. 10-13). The trial court sentenced Applicant to more than life in prison. (Tr. 552, ll. 14-21).

At the evidentiary hearing, Martin testified he did not have any mitigation prepared. (PCR Tr. 47, line 17). Martin explained that he "knew that if [Applicant] were convicted, what the sentence was going to be. I'm not sure what I could've had in mitigation in this particular case." (PCR Tr. 47-48). Morgan continued that he was not aware of anything that could have mitigated the sentence, and that he had previously advised Applicant to take an offer to plead to a lesser-included offense for a sentence of 25 years because of his firm belief that any sentence imposed upon conviction would be long. (PCR Tr. 48, ll. 7-16).

The Court finds Applicant has failed to meet his burden. No evidence or additional arguments were offered at the evidentiary hearing in mitigation of Applicant's crime, only that he killed Green in self-defense, after denying that he had anything to do with the killing in mitigation at the original trial. Applicant cannot prevail by way of this allegation, and his request for relief is **DENIED**.

5. Failure to Object to Testimony, Qualification of Michelle Eichenmiller

Applicant alleges Counsels were ineffective in failing to object to the qualification and testimony of Michelle Eichenmiller as an expert in forensic testing of firearms and ammunition. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. "All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise." Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (citing State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)). "In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether 'the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.'" Id. (citing Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)). "Second, the expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,' although he 'need not be a specialist in the particular branch of the field.'" Id. "Finally, the substance of the testimony must be reliable." Id.

"There is no exact requirement concerning how knowledge or skill must be acquired." State v. Rose, 423 S.C. 382, 392-93, 814 S.E.2d 529, 534 (Ct. App. 2018) (quoting State v. Henry, 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1997)). There is no abuse of discretion in qualifying a witness as an expert "as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury." Id.

Eichenmiller testified she worked for the South Carolina State Law Enforcement Division as a forensic firearms examiner. (Tr. 410, ll. 9-16). Eichenmiller explained she possessed a bachelor's degree as well as a master's degree, though she did not indicate for what fields of study, and substantial training for SLED, including "a three to five year internship, apprenticeship program, where I learned under trained firearms examiners." (Tr. 410, ll. 17-21). Eichenmiller further explained she performed practice cases as part of the apprenticeship, then

worked alongside other experienced examiners who reviewed her performance. (Tr. 411, ll. 1-5). Eichenmiller had seven years of experience working in her position with SLED and indicated she had testified as an expert in state courts on approximately fifteen prior occasions. (Tr. 411, ll. 6-22). The trial court qualified Eichenmiller as an expert in forensic testing of firearms and ammunition without objection from Martin. (Tr. 411-12).

Eichenmiller testified that she compared six "items"—bullets and a casing—recovered from the scene and concluded they were consistent with a type of weapon "rifled with six grooves or right twists," and then produced a list of possible manufacturers who make guns with such rifling. (Tr. 415-16). Eichenmiller concluded that:

> . . . the fired bullets could have been forty S&W caliber or a ten millimeter automatic caliber. Firearms that are made in forty S&W caliber with that rifling is Glock, Heckler & Koch, IMI, Kahr Arms, and Vector, and then Glock also makes a ten millimeter auto with that rifling.

(Tr. 416, ll. 3-7). She had no weapon to which to compare the projectiles. (Tr. 416, ll. 14-19). Analyzing other spent casings recovered from the top of the stove in the kitchen, from the living room, and from a couch, Eichenmiller concluded they were all "forty S&W caliber cartridge cases" which could have been the same caliber as the bullets. (Tr. 417, ll. 2-23). Eichenmiller compared two spent casings for a "caliber forty Model G23, Serial Number MAF699" recovered from the Kate's Bay residence to five items recovered from the crime scene and concluded that all were fired from the same weapon. (Tr. 396, ll. 16-22; Tr. 417-19).

Applicant asked no questions and offered no evidence or arguments with respect to Eichenmiller at the evidentiary hearing. On cross-examination, Martin was unable to recall Eichenmiller's testimony. (PCR Tr. 50-51). Martin asserted that he must not have had any basis to object to her expert qualification, and that if he had known of any such basis, he would have so objected. (PCR Tr. 51, ll. 5-18).

The Court finds Applicant has failed to meet his burden of showing ineffectiveness. The trial record reflects Eichenmiller was qualified to testify to the field in which she was qualified, and was qualified in a commonly accepted and reliable field of forensic science. Eichenmiller possessed years of experience and had testified as an expert numerous times before. See, e.g. State v. Brockmeyer, 406 S.C. 324, 349, 751 S.E.2d 645, 658 (2013); State v. King, 424 S.C. 188, 197, 818 S.E.2d 204, 209 (2018). Applicant offers no evidence or argument against Eichenmiller's qualifications or conclusions. The Court finds no ineffectiveness from Martin's treatment of Eichenmiller's testimony, and Applicant's request for relief by way of this allegation is **DENIED.**

6. Failure to Strike Former Prosecutor from Jury

Applicant alleges Counsels were ineffective in failing to object to the seating of juror Barbara Blain-Olds. "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (citing State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)). "The selection of a jury is inevitably a call upon experience and intuition. The *trial lawyer* must call upon his own insights and empathetic abilities." Id. (quoting Romero v. Lynaugh, 884 F.2d 871, 878 (5th Cir. 1989)) (emphasis original). "In PCR proceedings, a defendant must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." Id.

Trial

During voir dire at trial, the trial court asked if any members of the jury panel had been involved with the solicitor's office, to which "Juror Number 27," Barbara Blain-Olds, responded that she "was once employed by the Solicitor's Office as an Assistant Solicitor." (Tr. 30-31). Blain-Olds indicated she had last worked for the office "[c]lose to ten years" prior, and affirmed

that her prior employment did not affect her ability to be fair and impartial, and base her verdict on the law and evidence of the trial. (Tr. 31, ll. 4-16). The trial court thanked Blain-Olds for her responses and asked her to remain. (Tr. 31, ll. 17-18).

Later during the voir dire, the trial court announced the long list of possible witnesses, in response to which Blain-Olds again stood and indicated that "Martha Menendez" was her "former sister-in-law." (Tr. 36-37). The trial court asked Blain-Olds and five other responsive potential jurors to raise their hands if "the fact that they are witnesses in this trial affect your ability to be fair and impartial in the trial of this case[;]" nobody raised their hand and all of the potential jurors sat back down. (Tr. 38, ll. 2-6).

The State immediately advised the trial court that there were two additional potential witnesses: Russell Dean and Jacinda Wright. (Tr. 38, ll. 8-10). The trial court pronounced the names and Blain-Olds again stood. (Tr. 38, ll. 11-19). Blain-Olds informed the trial court that Wright was her "niece by marriage, my former marriage." (Tr. 38, ll. 19-20). Blain-Olds denied that the relationship would affect her ability to be fair and impartial. (Tr. 38, ll. 21-23).

When Blain-Olds appeared during jury selection and Applicant was prompted as to whether to exercise a peremptory strike, Counsel Brown asked for "a minute," which the Court granted. (Tr. 40-41). Brown then asked to seat Blain-Olds on the jury. (Tr. 41, line 4).

Evidentiary Hearing

On direct examination at the evidentiary hearing, Martin did not initially recall that a former solicitor was seated as a juror during Applicant's trial. (PCR Tr. 24, ll. 3-13). Applicant did not refresh Martin's recollection but rather moved on to a different series of questions. On cross-examination, Martin was directed to the trial transcript and testified he did recall Blain-Olds and that she told the court she was previously employed with the solicitor's office. (PCR

Tr. 48, ll. 17-24). Martin confirmed Blain-Olds was, at the time of the evidentiary hearing, the Mayor of Conway, South Carolina. (PCR Tr. 48-49). Martin testified that Jacinda Wright, Blain Olds' niece by marriage, was Applicant's significant other at the time, and that he would have put her on his list of potential witnesses. (PCR Tr. 49-50). Martin asserted that he would not have agreed to seat her as a juror unless Applicant wanted to do so. (PCR Tr. 50, ll. 11-13, ll. 19-21). Additionally, Martin explained that he had known Blain-Olds for years, that her time with the solicitor's office had been short, and that he believed she would have been a good juror. (PCR Tr. 50, ll. 13-19).

Findings

The Court finds Applicant has failed to meet his burden of proof as to either prong of Strickland. Applicant has failed to present any evidence to show Blain-Olds' presence on the jury, or service as foreperson of the jury, prejudiced his defense in any way. Additionally, Applicant has failed to present any evidence to show Counsels were deficient in seating Blain-Olds. To the contrary, Martin's testimony reflects the capable exercise of his judgment based on his experience in and knowledge of the community in determining whether Blain-Olds would be a favorable juror. The Court finds no ineffectiveness from Counsels' decision to not exercise a peremptory strike on Blain-Olds, and Applicant's request for relief by way of this allegation is **DENIED.**

7. Failure to Establish Expectation of Privacy in Kate's Bay Residence

Applicant alleges Counsels were ineffective in failing to establish that he had a reasonable expectation of privacy in the residence at 3635 Kates Bay Highway. The Court will not long belabor this issue, because the validity of search of the Kate's Bay Highway was raised

to and ruled upon by the South Carolina Court of Appeals without regard as to whether Applicant possessed a reasonable expectation of privacy, and concluded:

> . . . the magistrate had a substantial basis for determining that, under the totality of the circumstances, there was probable cause to search 3635 Kate's Bay Highway. The information in Detective Weaver's affidavit and supplemental oral testimony, which was relayed to him by the lead investigator, created a fair probability that evidence of the shooting would be found at 3635 Kate's Bay Highway.

State v. Wright, 416 S.C. 353, 366, 785 S.E.2d 479, 486 (Ct. App. 2016). As such, Applicant cannot show any prejudice from the deficiency alleged, and his request for relief by way of this allegation is **DENIED.**

8. Failure to Object, Require Certified Copies of Convictions for S.C. Code Ann. § 17-25-45

Applicant alleges Counsels were ineffective in failing to require the prosecution to introduce certified copies of his prior convictions relied upon for the purposes of sentencing him to life without parole pursuant to S.C. Code Ann. § 17-27-45. As with the prior allegation, the Court will not long belabor this issue, because it was raised to and disposed of by the South Carolina Court of Appeals in a footnote:

> Wright asserts on appeal that the trial court erred in sentencing him to LWOP under South Carolina's recidivist statute. [. . .] We note the trial court did not state it was sentencing Wright to LWOP. Rather, on the sentencing sheet, the trial court wrote "life imprisonment"; noted Wright was convicted of murder in violation of sections 16-3-10 and 16-3-20 of the South Carolina Code [. . .]; and did not mark the box labeled "§ 17-25-45," which would have indicated it was sentencing Wright to LWOP under the recidivist statute. The trial court had authority to sentencing Wright to life imprisonment under the murder statute.

Wright, 416 S.C. at 364 n. 1, 785 S.E.2d at 485 n.1. As such, Applicant cannot show any prejudice from the deficiency alleged, and his request for relief by way of this allegation is **DENIED.**

9. Failure to Obtain Jury Instructions on Self-Defense and/or Voluntary Manslaughter

Applicant alleges Counsels were ineffective in failing to elicit or otherwise introduce evidence necessary to obtain jury instructions on self-defense and voluntary manslaughter. This allegation is resolved by much of the same summary and analysis as set forth in Section II.A.2., above, as the only additional evidence properly before this Court to further support Applicant's claims to voluntary manslaughter and self-defense instructions is his own testimony. As such, this Court here incorporates without restating the entirety of Section II.A.2.

The Court finds Applicant has failed to establish Counsels were deficient in failing to introduce enough evidence to support jury instructions on self-defense or voluntary manslaughter, or that he was prejudiced by their effort. Counsels' trial strategy was to deny Applicant's involvement at all, not argue for self-defense or that he shot the victim in the heat of passion. Applicant refused to testify until it was too late to do so. Applicant's testimony he offered in support of his self-defense and voluntary manslaughter theories was more harmful than helpful and would have foreclosed the strongest trial strategy available to him. For all of these reasons, and those more thoroughly set forth in the prior section, the Court finds Applicant has failed to show Counsels were ineffective, and his request for relief by way of this allegation is **DENIED**.

10. Failure to Subpoena, Call Witness Kelly Pinnix

Applicant alleges Counsels were ineffective in failing to subpoena and call as a witness in his defense one Kelly Pinnix.[1] In order to establish prejudice from an attorney's failure to call a witness, the applicant must call that witness at the post-conviction relief evidentiary hearing or otherwise offer the witness' testimony within the rules of evidence. Dempsey v. State, 363 S.C.

[1] Presented in the pleadings as "Phoenix," and pronounced as such throughout the evidentiary hearing.

365, 369, 610 S.E.2d 812, 814 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

Pinnix, was indicated by other witnesses at trial as a white female[2] who was present, albeit drunk and/or high on crack cocaine, at the time Applicant shot and killed Green. (Tr. 177, ll. 5-14; Tr. 216-18; Tr. 224-27; Tr. 230, ll. 11-20; Tr. 232, ll. 5-8; Tr. 245-46; Tr. 247, ll. 2-9; Tr. 270-71; Tr. 299-300). Powell testified that Pinnix collected "a whole bunch of shells" after the shooting and attempted to attempted to give them to him. (Tr. 270-71). Pinnix did not testify at trial. In closing arguments, Martin focused on the credibility of the State's witnesses, and the fact that only one witness—Roy Sinclair—actually identified Marcus Wright as the shooter. (Tr. 489-95).

Nor did Pinnix testify at the evidentiary hearing. As previously noted, both Counsels testified that their theory of the case was *not* self-defense, but rather to attack the strength of the State's case as built on a foundation of witnesses who were all heavily inebriated at the time of the shooting. (PCR Tr. 13-15; PCR Tr. 17, ll. 24-25; PCR Tr. 18, ll. 23-24; PCR Tr. 21, ll. 19-20; PCR Tr. 36, ll. 5-6; PCR Tr. 57, ll. 3-13; PCR Tr. 58, ll. 3-10; PCR Tr. 62, ll. 14-24; PCR Tr. 68, ll. 13-15). Martin testified that Pinnix identified Applicant as the shooter and otherwise gave statements "that made her testimony inconsistent with any thoughts of self-defense in addition to the fact that she identified him as the killer." (PCR Tr. 21-23; Applicant's Exhibit #1). On cross-examination, Martin read a portion of Pinnix' statement which provided that an indeterminate "they" said that the Victim "pulled a gun out and he never did." (PCR Tr. 38-39; Applicant's Exhibit #1). After reviewing various excerpts from Pinnix' statement, Martin agreed her statement was "highly damaging," and that he was not about to call her as a witness. (PCR Tr. 38-41; Applicant's Exhibit #1).

[2] Multiple witnesses only identify her as "the white girl."

Applicant testified that although Pinnix told law enforcement that she did not see a gun, she also told law enforcement that the shooter screamed gun, so as to establish the shooter's state of mind, and that they were locked in the home. (PCR Tr. 99, ll. 9-20; Applicant's Exhibit #1).

The Court finds Applicant has failed to meet his burden of showing any deficiency on the part of Counsels, or that the deficiency alleged prejudiced him. Applicant narrowly insists upon two portions of Pinnix' statement: Applicant's own declaration that the Victim was armed, and that she saw Powell run into the house without a gun, then run out with a gun. However, Counsels both testified that self-defense was not the trial strategy they settled upon, and the record reflects a defense theory which denied that Applicant was present at all. Introducing a witness who would have established Applicant as the shooter would have run entirely to the contrary of Counsels' theory of the case. The statement as a whole is highly damaging and inculpatory—Pinnix affirmatively rejects the claims that Green ever had a gun, and further asserts he had a broken finger. Pinnix identifies Applicant as "Big Money," and compellingly tells law enforcement about Applicant's eerie calm as he unloaded his gun into Green. Martin's determination that he could not call Pinnix is (1) entitled to deference and (2) amply supported by the record. Moreover, calling Pinnix would have been so damaging to Applicant's case, doing so could have itself constituted a colorable claim of ineffective assistance of counsel.

Finally, the Court is limited to consider only Pinnix' statement as it was provided to law enforcement, as Pinnix did not testify at the evidentiary hearing. Though the Court can rely upon that statement in weighing whether Applicant has met his burden of showing prejudice, Pinnix' absence from the hearing denies this Court an opportunity to pass upon which parts of her testimony would have been credible, which parts would not be credible, and whether she would be able to remember anything at all given her evidently heavy drug use at the time of the

shooting. This Court is left with something more than mere speculation, but the inability to observe the witness must invariably weigh against Applicant's burden. For all of these reasons, the Court finds Applicant has failed to establish any deficiency on the part of Counsels by way of this allegation, nor any prejudice from the deficiency alleged, and his associated request for relief is **DENIED.**

11. Failure to Impeach Witnesses on Prior Convictions; Investigate, Raise Brady Violations

Applicant alleges Counsels were ineffective in failing to impeach witness Daisy Marthena Menendez, also known as Marthena Jackson (hereafter "Menendez"), with a prior conviction. Applicant additionally and in the alternative alleges Counsels were ineffective in failing to investigate and thereafter raise to the trial court alleged Brady[3] violations insofar as the State did not disclose Menedez's alleged prior convictions.

"Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment." Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993). "A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). The mandate of Brady extends to evidence "that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police." State v. Kennerly, 331 S.C. 442, 452-53, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Kyles v. Whitley, 514 U.S. 419 (1995)). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark, 315 S.C. at 388, 434

[3] Brady v. Maryland, 373 U.S. 83 (1963).

S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)); see also State v. McCray, 413 S.C. 76, 95-97, 773 S.E.2d 914, 924-25 (Ct. App. 2015) (finding the prior convictions related to dishonesty of two witnesses were favorable to the defendant, in the State's possession, and were withheld by the State, but were immaterial where the witness' testimony was corroborated by numerous other witnesses).

For the purpose of attacking the credibility of a witness,

> (1) evidence that a witness other than an accused ahs been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Rule 609(a), SCRE. Convictions for which a person is pardoned or which have been expunged may not be used for impeachment purposes. Rule 609(c), SCRE.

At trial, Menendez testified that her niece Jacinda Wright called her in the early morning hours of May 1, 2012, and reported that Applicant wanted to park a car in her garage at 3651 Kate's Bay Highway; Applicant thereafter parked a black BMW in her garage. (Tr. 256-58). Applicant returned to the vehicle the next day and retrieved something, but Menendez did not know what, if anything, he actually took. (Tr. 258, ll. 14-24). Applicant left the car, and the BMW remained in Menendez' garage until law enforcement later retrieved it. (Tr. 258-59). Menendez noted that Jacinda lived just "two houses over." (Tr. 259, ll. 8-15).

On cross-examination, Menendez established that Applicant lived with Jacinda in her 3635 Kate's Bay Highway home for more than three years, and that she saw him there on a regular basis. (Tr. 260-61). Menendez knew nothing about Applicant shooting anybody until

law enforcement told her as much, and perceived nothing sinister or criminal in Applicant's request to park his car in her garage. (Tr. 260-61).

At the evidentiary hearing, Applicant asserted that Menendez had a criminal background, and that the solicitor had prosecuted Menendez previously for perjury, misconduct in office, and forgery. (PCR Tr. 93-94). The prosecutor, Elder, testified she could not recall if she disclosed any prior convictions for Menendez, but noted that the documents provided by PCR counsel to refresh her recollection reflected charges which were dismissed *nolle prosequi*. (PCR Tr. 117-18). Elder recalled that the charges were expunged from Menendez' record, and testified that to the best of her recollection, Menendez did not have any convictions at the time of her trial testimony. (PCR Tr. 118, ll. 16-21). Elder explained:

> If, if – what I would've done at trial is when I prepare for trial, I get a – run a certified criminal record for witnesses and I present that to the Court. So, if I did not present it to the Court, then it would've not – it was not appearing on her criminal convictions.

(PCR Tr. 119, ll. 4-8). Elder could not recall prosecuting Menendez, nor could she recall whether she handled a Family Court proceeding to which only she obliquely referred. (PCR Tr. 119, ll. 9-18).

The Court finds Applicant has failed to meet his burden of showing any deficiency on the part of Counsels, or any prejudice from the deficiencies alleged. First, for reasons that have already been set forth in prior sections, this Court finds Applicant's testimony to be wholly lacking in credibility, and puts no weigh in it. Applicant did not introduce any exhibits to establish Menendez had prior convictions, let alone any with which she could be impeached. Thus, this Court is left only with Elder's testimony, which despite some haziness due to the passage of time, did clearly provide (1) that Elder did not possess any records of convictions for Menendez at the time of trial, and (2) that Menendez had no convictions at the time of trial. This

Court does give weight to Elder's testimony and, accordingly, this Court finds Menendez was not subject to any convictions at the time of her testimony at Applicant's trial. The absence of an impeachable prior conviction is dispositive of Applicant's claim.

Furthermore, and notwithstanding this Court's affirmative finding that there was no prior conviction and assuming for the sake of argument that *some* conviction exists, Applicant has not presented enough evidence or argument to meet his burden of showing he could have impeached Menendez under Rule 609, SCRE. This Court is without sufficient information to deem any prior theoretical convictions as within the time limits of Rule 609(b), SCRE, or for a crime of dishonesty under Rule 609(a)(2), SCRE, or for a felony under Rule 609(a)(1), SCRE, subject to Rule 403, SCRE.

As to both materiality under Brady and prejudice under Strickland, this Court is not convinced any such theoretical impeachment of Menendez would have been all that helpful to Applicant. While Menendez did establish Applicant stashed the BMW and may have obtained something from the vehicle, multiple other witnesses testified that Applicant left the scene in the black BMW, and the car's keyless entry device was recovered from the Camaro rented by Jacinda Wright. (Tr. 221, ll. 7-13; 233, ll. 1-6; Tr. 236, ll. 21-25; Tr. 268, ll. 16-18; Tr. 271-72; Tr. 338, ll. 14-17). Additionally, she provided testimony on cross-examination vital to Applicant to support a reasonable expectation of privacy in the residence at 3635 Kate's Bay Highway. Where the witness testified to a secondary detail and otherwise provided testimony beneficial to Applicant, it cannot be said that her generalized impeachment would have changed the outcome at trial.

As to Strickland deficiency, and again notwithstanding this Court's affirmative finding that there was no prior conviction and assuming for the sake of argument that *some* conviction

exists, Applicant has not presented any evidence to show that Counsels could or should have discovered Menendez' theoretical prior by the exercise of reasonable diligence. Applicant has presented no evidence to rebut the presumption of effective assistance of counsel—Applicant never questioned Counsels on the subject.

Applicant has failed to meet his burden under either prong of Strickland, has failed to establish a claim for relief under Brady that they could have or should have found and raised, and for all these reasons above, his request for relief by way of this allegation is **DENIED**.

B. Prosecutorial Misconduct under Brady v. Maryland

As addressed in the context of ineffective assistance of trial counsel in Section II.A.11, above, Applicant alleges that the State failed to disclose evidence in its possession in violation of Brady v. Maryland, 373 U.S. 83 (1963). The summation and reasoning of Section II.A.11 is here incorporated in full without restatement. As explained above, Applicant has failed to present evidence sufficient to show that impeachment of Menendez would have been favorable to him, that the State knew of the prior conviction alleged, that the State withheld information about the prior conviction alleged, that the prior conviction exists, or that the impeachment based upon the prior conviction was material to his own conviction. Applicant has failed to meet any of the requirements of Brady, and as such his request for relief by way of this due process claim is **DENIED**.

[*Conclusion and signature on following page*]

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 13 **day of** August **, 20**12.

WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina