

RECEIVED

Jun 02 2026

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Daniel M. Coble, Circuit Court Judge

Case No.: 2021-CP-32-02421

Gregory Lamont Brooks,

Petitioner,

vs.

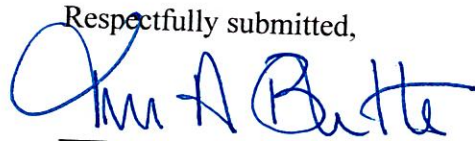
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Gregory Lamont Brooks, Petitioner, appeals the Order of Dismissal issued by the Honorable Daniel M. Coble on March 6, 2026, which was filed on March 23, 2026. Petitioner, through counsel timely filed a Rule 59, SCRCP, Motion, which was denied by an Order issued on April 23, 2026 and filed on May 4, 2026. Petitioner, through counsel, received notice of the entry of the Order Denying Plaintiff's Motion for Reconsideration Pursuant to Rule 59(e), SCRCP, via email on May 4, 2026.

Respectfully submitted,



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

June 2, 2026

FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Gregory Lamont Brooks, SCDC #342118

Case No. 2021-CP-32-²⁴²¹~~2427~~

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before this Court by an application for post-conviction relief by Gregory Lamont Brooks (Applicant) on July 26, 2021. The Respondent State of South Carolina made a Return and Motion for a More Definite Statement on November 8, 2021. On January 30, 2025, the Applicant, through retained counsel Tricia A. Blanchette made an Amended Application,

On March 6-7, 2025, an evidentiary hearing was held before this Court. The Applicant was present and represented by retained counsel Blanchette. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from Shalana Thornton, Shakira Hopkins, Susan Hackett, Brian Setree, Ralph Tressel, Aimec Zmroczek, Applicant Gregory Brooks and Rhonda Patterson.

The Court took the matter under advisement. The Court requested each side to submit proposed orders. This Court has reviewed the additional submissions and concluded that the Application should be dismissed. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of fact and conclusions of law.

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on April 4, 2014, following an investigation into the murder of Brandon Ratliff with a .22 caliber handgun. During its June 2015 term, the Lexington County Grand Jury indicted Applicant for murder (2015-GS-32-1349) and possession of a weapon during a violent crime (2015-GS-32-1347).

On October 31, 2016, Applicant proceeded to a jury trial before the Honorable Eugene C. Griffith, Jr. Aimee Zmroczek, Esquire represented Applicant. Assistant Solicitors Rhonda Patterson and Lester McGill Bell, Jr., prosecuted the case.

A. Summary of Evidence Adduced at Trial

During the early morning of February 2, 2014, Brandon Ratliff, along with his good friends Andre Bunch and Fred Moss, were having a guy's night out around the Richland and Lexington County areas. (R. p. 126, l. 20 – p. 127, l. 22; p. 157, l. 23 – p. 158, l. 12). The three had initially started their night in the Vista area of Columbia, but decided to make one last stop at the Cockpit Bar and Grill in Lexington. (R. p. 127, l. 23 – p. 128, l. 21; p. 158, ll. 11-14). Earlier that night, Eric Brown, Arnold Banks, and Applicant had also arrived at the Cockpit.¹ (R. p. 403, l. 18 - p. 404, l. 25; p. 417, ll. 12-14; p. 431, ll. 14-24). Shortly after Andre, Fred and Brandon arrived, Fred Moss began talking with a girl at the bar. Little did he know, this woman was an acquaintance of Applicant and his group, and the fact that Moss was speaking with her angered them. (R. p. 129, l. 6 – p. 130, l. 10; p. 160, ll. 15-18; p. 165, l. 16 – p. 166, l. 6; p. 359, l. 19 – p. 360, l. 17; p. 434, l. 9 – p. 435, l. 2).

¹ Applicant is referred to by the street name "Dink" throughout the trial transcript.

After being aggressively confronted by Applicant and his friends, Brandon, Andre, and Fred decided to leave the Cockpit Bar and Grill. (R. p. 131, l. 14 – p. 132, l. 24; p. 167, l. 8 – p. 168, l. 5). However, as Brandon, Fred, and Andre left the bar and proceeded to their car, Applicant and his friends followed. (R. p. 130, l. 11 – p. 131, l. 3; p. 167, l. 16 – p. 168, l. 15; p. 434, l. 11 – p. 435, l. 7). The altercation between the two parties escalated in the parking lot. (Tr. p. 273, l. 14 – p. 274, l. 17; p. 168, ll. 9-16; p. 362, l. 13 – p. 363, l. 2). At this point, Andre, who had driven separate from Brandon and Fred, parted from the group and went directly to his car that was parked a short distance away. (R. p. 128, l. 18 – p. 129, l. 5; p. 132, l. 18 – p. 133, l. 2). Brandon and Fred attempted to leave in Fred's nearby car. (R. p. 168, l. 16 – p. 169, l. 4). Brandon had the keys to Fred's car and was able to unlock the driver's side door. Fred, however, was unable to open the locked passenger door and was stuck outside. (R. p. 168, l. 8 – p. 169, l. 4). Fred believed that he was about to be assaulted by Applicant and his group. (R. p. 169, ll. 10-16). In a moment of fear he adjusted his belt in an attempt to trick the group into thinking he was armed. (R. p. 199, l. 15 – p. 200, l. 1). Fred testified that, from where Applicant and his acquaintance were standing, they did not see his attempt. (R. p. 199, ll. 19-25). He did not, in fact, have a firearm. (R. p. 170, ll. 17-22). However, when Fred turned away from the car toward Applicant and his friend, he discovered that they did have firearms and were brandishing them. (R. p. 169, ll. 10-22; p. 199, l. 19 – p. 200, l. 1). Fred immediately raised his hands in a passive manner to indicate that he was unarmed. (R. p. 170, 19-22; p. 199, l. 15 – p. 200, l. 1). Applicant and his friend continued to threaten Fred as he stood outside the car. (R. p. 169, l. 9 – p. 170, l. 22; p. 199, l. 19 – p. 200, l. 1). Then, despite Fred's passivity, Applicant unleashed a hail of gun fire at the car. (R. p. 170, l. 24 – p. 171, l. 6; p. 363, ll. 4-11). Fred was able to take cover and avoid being shot. (Tr. p. 313, ll. 5-6; tr. p. 314, ll. 13-15). Brandon, however, was hit in the torso by a bullet. Brandon got out of the car and stumbled

a short distance into the road where he collapsed. Applicant and his group quickly fled the scene. (R. p. 173, l. 22 – p. 174, l. 19; p. 175, ll. 8-16). Fred quickly found his wounded friend and began crying for help. (R. p. 175, l. 20 – p. 176, l. 3). Andre, who had heard the gun fire a short distance away, drove his car toward the sound to find his friends. (R. p. 132, l. 25 – p. 133, l. 12). He found Brandon collapsed on the road with Fred by his side. (R. p. 133, l. 12 – p. 135, l. 2). Andre and Fred loaded Brandon into Andre's car and sped to Lexington Medical. (R. p. 135, ll. 19-21; p. 176, ll. 5-7). However, Applicant's bullet had nicked Brandon's heart and he quickly bled out during the drive. (R. p. 137, ll. 12-20; p. 215, ll. 11-19).

Throughout the investigation, several witnesses were able to identify Applicant as the person who fired into the car, killing Brandon Ratliff. Fred Moss was able to pick out Applicant from a photo line-up. (R. p. 181, l. 14 – p. 185, l. 5; p. 327, l. 6 – p. 329, l. 9). In addition, Rickena Knighter, who knew Applicant and his friends and was present during the shooting, testified that she witnessed Applicant firing into the car. (R. p. 358, l. 22 – p. 359, l. 10; p. 363, ll. 4-11; p. 368, l. 10 – p. 370, l. 9). Ms. Knighter had called to 911 shortly after the shooting. (R. p. 365, ll. 7-23). She originally gave them a false name because she was scared and did not want to be further involved. (R. p. 365, l. 24 – p. 366, l. 90). However, she eventually met with investigators and provided her true name. (R. p. 248, l. 9 – p. 250, l. 21; p. 376, l. 24 – p. 377, l. 16). Law Enforcement also received anonymous phone calls implicating Applicant as the shooter. (R. p. 340, ll. 17-19).

At trial, Andre Bunch testified that he owned a handgun and that he had provided it to investigators when they arrived at the hospital after Brandon's death. (R. p. 129, ll. 2-5; p. 136, ll. 16-21; p. 142, ll. 1-22; p. 118, ll. 15-17; p. 119, ll. 2-6; p. 120, ll. 12-14; p. 228, ll. 14-20). Fred Moss also testified that Brandon owned a handgun which he had placed in Fred's car for safekeeping prior to their night out. (R. p. 197, ll. 2-8). A Crime scene investigator performed a

Gunshot Residue Test (GSR) on Andre, Fred, and Brandon's body soon after their arrival at the hospital. The results came back negative for all three men. (R. p. 223, l. 22 – p. 226, l. 25; p. 227, ll. 10-23; p. 243, ll. 9-16).

At the conclusion of the multi-day trial, the jury convicted Applicant as indicted. Judge Griffith sentenced Applicant to concurrent terms of thirty-five years' imprisonment for murder and five years for possession of a weapon during the commission of a violent crime.

Direct Appeal

Applicant filed a timely notice of appeal. Appellate Defender Susan B. Hackett perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issues:

- I. Did the trial judge err by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduced the state's burden of proving each element of the offense beyond a reasonable doubt?
- II. Did the trial judge err by excluding two photographs of a .22 caliber gun as irrelevant and confusing or misleading to the jury, because the photographs (1) were found by police on the phone of a patron of the bar, where the shooting occurred and who was present during the shooting, (2) showed a gun of the same caliber as the shell casings found at the scene, and (3) the owner of phone had been in communication with an official suspect in the shooting and the defense was presenting evidence of third party guilt?

Following briefing and oral argument, the Court of Appeals affirmed Applicant's convictions and sentences. *State v. Brooks*, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019), *reh'g denied* (Jan. 24, 2020), *cert. denied* (Aug. 10, 2020). Applicant's subsequent petitions for rehearing and for certiorari to the Supreme Court were denied. The remittitur was issued on August 11, 2020.

II. CURRENT APPLICATIONS

In his initial application for post-conviction relief, Applicant alleged he is being held in custody unlawfully based on the following:

1. Ineffective assistance of counsel
 - a. Failure to properly prepare and investigate prior to trial
 - b. Failure to make objections and arguments; and
 - c. Failure to present a proper third-party guilt defense

Applicant requested relief in the form of a new trial.

In his amended application, the Applicant made the following allegations:

- I. Trial counsel rendered ineffective assistance when she failed to conduct a complete independent investigation prior to trial and utilize an expert prior to and during trial to address investigative and evidentiary matters.
2. Trial counsel rendered ineffective assistance when she failed to request continuance and/or properly address, handle or preserve the following matters:
 - a. The need for additional time to prepare due to counsel's trial schedule and medical concerns.
 - b. The failure to receive discovery in a timely manner and/or receive complete discovery. Additionally, failure to properly handle the admission of hearsay testimony regarding information provided to law enforcement.
3. Trial counsel rendered ineffective assistance for failure to properly handle the testimony of Fred Moss, to include failure to address the matter of gang testimony prior to and during trial and failure to conduct an effective cross-examination.

Appellate counsel rendered ineffective assistance for the failure to raise the motion for mistrial on appeal.

4. Trial counsel rendered ineffective assistance for failure to properly address the matter of judicial actions affecting the defense and trial.
5. Trial counsel rendered ineffective assistance for failure to properly address pretrial and/or during trial the matter of identification, a tipster, and reward money. Alternately, newly discovered evidence if information and witnesses were unavailable prior to and during trial.

6. Trial counsel rendered ineffective assistance for failure to properly subpoena a necessary witness and to introduce the 911 call and/or evidence.
7. Trial counsel rendered ineffective assistance for failure to properly prepare, investigate and present a third-party guilty defense. Ineffective assistance of appellate counsel for failure to raise the court's denial of a third-party guilt instruction on appeal.
8. As also addressed in conjunction with other allegations, appellate counsel provided ineffective assistance that was prejudicial to Applicant when she failed to raise additional issues on appeal.

SUMMARY OF PCR TESTIMONY

PCR Testimony of Shalana Thornton

Shalana Thornton testified that she was not present at the incident. She said that she was friends with Brittainy Dilworth, Fred Moss, and Brandon Ratliff, the victim. Brittainy was Brandon's girlfriend at the time. She stated that Brittainy wanted justice. They felt that the investigation into the killer had been ineffective and her friends were looking for answers. She stated that Fred Moss was a friend of Brittainy and an associate of mine. She had learned that Moss was present when Brandon was shot. PCR 11-14.

Concerning the investigation, she stated that they asked questions with her friends to develop names of people who may know something, including a rap group and trying to learn better descriptions of the perpetrator because Moss could not remember who he saw at the time. She stated that the only thing he initially recalled was that the person had long dreadlocks and dark eyes. PCR 14-15. He described to her that there were two people that he felt the hair would have been the length of mine and dark eyes other than that he indicated could not remember anything else. Thornton stated that Moss had stated to her that he was so intoxicated that he could not remember anything. PCR 15.

Thornton testified that she had a friend, Shakira Hopkins. She stated that they spoke on the telephone and told her what was going on. She stated that on a phone call Brittainy told them that if she can figure out who did this is that Brittainy could give her \$10,000 reward out of her pocket. PCR 15-16.

Thornton testified that she later learned that Shakira's boyfriend, Da-Shun Curry, was feeding Shakira information in hopes of obtaining the reward money. She stated that all Brittainy was requiring for the reward was for someone to go to jail. PCR 16. Thornton stated that she, Brittainy, and Shakira, sat down and discussed the matter at one point and later learned that Brittainy had recorded their conversation. During her PCR testimony a portion of the recording was played. PCR 17-18.

Thornton testified that she was interviewed by law enforcement and gave a statement about their conversation during a meeting she had with them on April 14, 2014. She indicated that this was her first and last interaction was during meeting when she made statement with the investigators. She indicated that she would have been willing to speak to any law enforcement. She also indicated that she never heard or received subpoenas from anyone after giving statement.

Thornton was referred to Trial Tr. pp. 401-404; pp. 467-469. She described meeting with Investigator Marty Longshore and Sargeant Jessy Laintz. They indicated to her that they had received a voicemail from Brittainy Dilworth on April 14, 2014. During that meeting with the investigators, Brittainy let the officer listen to the recording of the earlier meeting. Thornton stated they asked her if she knew who Gregory Brooks was and she told him she knew him from when Brooks sold her a cellphone. The officers showed her a picture on their cellphone of Brooks which Salena confirmed. The officers then asked her to write a statement and told her to

write about the conversation between Brittainy, Shakira, and Thornton had which repeated earlier to them. PCR 19-20. The statement of Thornton, then called Shalana Weise, was introduced as Applicant's Exhibit 1. PCR 20-21. She stated that her statement was pretty much it and that she never heard anything from law enforcement again. PCR 21.

Thornton acknowledged that she was text messaging with the group. She stated that they sent each other pictures of people in the rap group. PCR 22-23. When they got names from Facebook of members, including "Dink" who is Gregory Brooks, she and Brittainy went to Fred Moss's house. She stated that they told him they had a name, and when they showed the pictures to him, he didn't initially recognize him. Thornton said Brittainy told him this was the person who they're saying did it and that he needed to remember. She said Moss then agreed that that was him. PCR 23.

Thornton reviewed her April 14 statement and indicated that she could not remember if she showed her pictures to law enforcement but had showed them to Brittainy on the 8th and then to Fred on the 10th. PCR 24.

PCR Counsel shows Thornton the pictures of Da-Shun Curry and the Applicant (Dink) recovered from Facebook. (photos were entered under seal as Applicant No. 2). PCR 25-26. Thornton testified that Shakira Hopkins was paid by Brittainy. Thornton speculated that Da-Shun pushed Shakira to get in touch with Brittainy and when an arrest was made gave it to her. PCR 27.

Thornton stated that no one from law enforcement, the solicitor's office or Brooks's defense team contacted her up to the trial in October 2016 after she gave the statement in April 2014. PCR 27.

Thornton stated that after Applicant's conviction she ran into Fred Moss on Parklane Road. She stated that she asked him how he felt, and he claimed he had not recognized the guy and said but as long as "one of them n----s goes to jail, I don't care." PCR 29. According to Thornton, Moss basically stated that if he hung with them, he knows who did it and he would tell them. Thornton stated that this gave her some concerns about her involvement because when she got with Brittainy was to help her find who killed Brandon. She stated that her intention was for the family and Brittainy to have peace and for it to be justice and done fairly. However, she asserted that when Moss made the statement, she felt that was not why she got involved. She acknowledged that there was a lot of pressure on Fred to remember. She stated that his comment stuck with her for years. PCR 29-30.

Thornton stated that her first interaction was with PCR private investigator Bryan Setrec years later. PCR 30. She stated that she gave him the same information that she testified about today.

Thornton indicated Fred Moss had indicated at one point that the shooter had "long dreads. She stated that she was then told that Brooks had cut his dreads off. Thornton stated that this her gave her the impression that he cut his dreads to hide his identity based upon the picture she was shown by the police when his dreads appeared shorter. PCR 31. She claimed that she was never aware that his dreads weren't long. "I thought his dreads were long, so again when I spoke on recording about his hair being cut off, if I had known I would have not thought he did it." ² PCR 31.

² The Court notes that this is confusing because it appears that the recording was done before the police showed Thornton the picture on April 14.

Thornton also stated that a few years ago, she met Fred Moss again at Mobays restaurant and confronted him about how bothered she was about what had happened. She recalled discussing with him why justice was not served with Brandon She said that and agreed with me in summer 2020 or 2021, that we were supposed to meet up and talk to someone to look into the fact he did not recognize who he called on stand. When I called days leading up to the meeting, Moss said to her he said "f--k you and that n-----r." She said Moss hung up the phone and that they have not talked since. PCR 32-33.

On cross-examination, Thornton went over her statement and stated that in the statement "Dink" would be Gregory Brooks. Thornton stated that everything she knew about the case was what people were telling her. She stated that from information Shakira got from her ex-boyfriend Da-shun Curry. PCR 35. She stated that she did not go to the trial. She stated that Brittainy distanced herself and I didn't really hear anything. PCR 36.

She clarified that she spoke with Fred Moss shortly after Mr. Brooks was convicted and also spoke to him years later in 2021 about situation. She said he came to her house, long conversation about what took place. She claimed that she recorded that conversation. PCR 37. She clarified that she and Moss were supposed to go to some authoritative figure about him giving the truth of the identification situation. He said he would do it and they communicated over a few weeks at a time. She said however that a few days prior to when he would pick her up, Moss cursed her and hung up. PCR 37-38. They never spoke again. Thornton stated she speculated that it was because she started to question where Brandon's gun was. PCR 39.

PCR Testimony of Shakira Hopkins

SHAKIRA HOPKINS testified that she was in the Lexington County Detention Center serving 21 days when she spoke to her friend Shalana and was made aware of incident. She had a conversation with her about incident which happened before she was incarcerated. PCR 40. We knew about situation but did not know that any of their friends or the guy she was dealing with was involved. PCR 40. She stated that it was like putting two and two together. She stated she got out that same week that they talked. PCR 40.

Hopkins stated she did not immediately meet with Brittainy Dilworth. She stated that she spoke with Shalana for a couple of days before she got introduced to Brittney. PCR 41. She stated that it was her voice on the recording. She was unaware that she was being recorded. PCR 41. She stated that she became aware of the recording when she met with Lexington County a couple of days later after the recorded discussion came to her house surrounding it with investigators. PCR 41-42. She stated that they took her into questioning. She said the interview lasted about five minutes. She denied that she gave a written statement that day. She said they told her about the recording. She said it was "he said or she said." She was then released without writing a statement. PCR 42.

She stated that she had issues after the questioning at the apartment complex and received an eviction notice. PCR 42-44. She was upset that they had put her in this situation and called Shalana.

Hopkins stated that she learned about the reward money from Brittainy. PCR 42. She said it was her understanding there was \$10,000 if the person was convicted. Hopkins stated at that time she needed to move because of the conviction. She said the apartment was under her father's name. She said she wanted the money to move. PCR 44. She stated that Dilworth did not give her ten thousand (\$10,000) and recalled that it was six (\$6,000) to eight thousand (\$8,000)

and used it to move. PCR 44. She stated that she did not receive it at once because Brittainy had to receive it from different people. PCR 44. Brittainy was the person who gave her the money. It was Hopkins's understanding that the money was for the information she gave regarding Brooks and would help with moving expenses. PCR 44.

Shakira stated that she gave a statement to Brittainy, but not about the case. PCR 44-45. The statement, Applicant's Exhibit 3, was to agree to assist in making a statement to law enforcement but did not reference the money. It was dated May 2014. Hopkins stated that after she signed the statement to assist law enforcement, she did not hear from law enforcement or anyone else before the 2016 trial. PCR 46-47. **Hopkins stated that she had no interaction with Fred Moss.** PCR 47, 1, 19-23.

On cross-examination, Shakira Hopkins clarified that after the incident, she did twenty-one (21) days for a bench warrant for failure to pay a fine. PCR 48. She said that when she got an eviction notice from my apartment Dilworth spoke to me about a reward about a week or two later. PCR 49. She stated that after the eviction notice she needed the money to move. She said Brittny went back and forth about him needing to be convicted. However, Hopkins thought that he had not even been arrested when she received the money. PCR 50. Hopkins said to her that after she received the money, the case was over at that point for her. She said she had no time to wait for him to be convicted. She said it was too "he said, she said" and nobody knew who did it. "All I knew is I needed to move." PCR 50. She stated that she told law enforcement it was "he said she said" and no one knew who did it as well as the recording giving multiple names. PCR 51.

Hopkins stated that she had never met Fred Moss. PCR 51. However, she stated that she had known the Applicant since they were in middle school. She described the Applicant as a

mutual or common friend. PCR 51. She stated that they did not hang out in the same community; but they did have a lot of mutual friends. PCR 52-53. She stated the person she was dating at the time was a close friend of the Applicant. PCR 52.

Hopkins stated that she was aware of the trial when it was going on but did not come to the trial. She stated that everything she did in the matter was to help Brittainy Dilworth find who had killed her boyfriend. PCR 52

Testimony of Susan Hackett

Susan Hackett, currently chief staff attorney with the S.C. Court of Appeals, represented Brooks in the direct appeal. PCR 55. She stated that she reviewed the entire transcript, reviewed court exhibits, and determined any issues, researching, and followed appellate rules in submitting brief. She stated that she raised two issues to the court of appeals.³ She stated that one was the error in instructing that malice instruction that it could be inferred from the use of a deadly weapon and the second was exclusion of photos of a .22 caliber gun that was found on a phone that was seized from the Cockpit Bar on night of shooting. PCR 56.

³ In the Initial Brief of Appellant, counsel Hackett asserted the following statement of Issues:

- I. Did the trial judge err by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduced the state's burden of proving each element of the offense beyond a reasonable doubt?
- II. Did the trial judge err by excluding two photographs of a .22 caliber gun as irrelevant and confusing or misleading to the jury, because the photographs (1) were found by police on the phone of a patron of the bar, where the shooting occurred and who was present during the shooting, (2) showed a gun of the same caliber as the shell casings found at the scene, and (3) the owner of phone had been in communication with an official suspect in the shooting and the defense was presenting evidence of third party guilt?

Hackett identified the photographs of the weapons offered at the trial. (previously marked at Court's Exhibit 6 and 7, Defendant Exhibit 41 AND 42 at trial; remarked and entered as Applicant's PCR Exhibit 4). PCR 57-58.

Hackett described the malice instruction issue that she raised at trial that malice could be inferred by the use of a deadly weapon. This issue was based upon State v. Belcher. She later provided the Court of Appeals State v. Burdette which she opined changed the landscape in their favor as supplemental authority. She stated the appellate court followed Burdette opinion but held the Belcher-Burdette error was harmless and ruled the trial court did not abuse discretion. PCR 58-59.

She stated the second issue involved photographs of the weapons which the appellate court found that the trial judge did not abuse his discretion in excluding because they did not have a sufficient link to the crime. She understood the photographs were sought to be introduced to show Antonio "Bling" Williams could have been evidence of third party guilt. "She stated that Bling was described as having a prominent "L" tattoo on his forehead and the photographs were found on his (ex-)girlfriend's cellphone. PCR 59. She stated that this was an attempt to show there was another shooter and another gun and to show third party guilt on appeal. There were witnesses who had heard two different guns. PCR 59.

PCR counsel pointed out that the appellate court stated the following:

Appellant maintains that the probative value of the photographs was high because the police had not recovered a gun connected to the shooting and the photographs cast doubt on Appellant's guilt by showing "Bling was the shooter." Appellant also maintains that the jury would not have been confused or misled "into believing the photographs purported to be anything except what they were—evidence of a gun capable of shooting the same caliber of bullets as those shot at Brandon and of holding the same number of bullets as shell casings found at the scene." However, ten shell casings were found at the scene, and Appellant has

asserted the gun in the photographs could hold only nine bullets. Further, there is no evidence placing Bling at the scene before or during the shooting. The only testimony placing Bling at the Cockpit was from Sergeant Etheredge, who stated that Bling “showed up at the club where [Josie] was” without any indication of when this occurred. State v. Brooks, 428 S.C. 618, 636, 837 S.E.2d 236, 245–46 (Ct. App. 2019)

PCR 60-61. Hackett spoke about the strict preservation rules in S.C. and her description of them as archaic with the requirement of a timely objection and the need for a ruling by the trial judge to preserve the issue for appeal. PCR 61-62. She stated that an appellate attorney is restricted to arguing matters the same way they were argued at trial.

Concerning the photograph issue, Hackett was referred to the trial transcript pages 626-628 which was the argument where the state opposed the request for an instruction on third party guilt.⁴ PCR 63. Hackett stated that she did not see a proposed instruction on third party guilt in the text in the record or exhibits or in the pleadings. PCR 64. She stated that it would be difficult to raise an error in the instruction when you do not have the instruction in the record.

Hackett also noted that there was insufficient information about who was the other shooter in the record, but a lot of suspicion. The only agreement was that it was someone with

⁴ At trial after the Applicant waived his right to testify, counsel Zmroczek inquired of the judge whether he had decided to charge third party guilt. She stated it was based upon evidence that an extra person had a gun. Zmroczek relied upon Brown specifically stating the Brooks got into the car while gunshots were still being fired. She relied upon a case in the Supreme Court that where there is an inference that it should be charged. Tr.p. 626-627. The State opposed it because they asserted that there was no evidence presented inconsistent with Brooks guilt, noting that evidence which only casts a mere suspicion upon another is not admissible. The State noted that Williams had dreads and an “L” tattoo and he was at the club, claiming that there were other people with dreads at the club. The State urged that there was nothing testified that Williams committed the offense and that the only person identified as the shooter was Brooks. Tr.p. 627. The State noted that with Dashun Curry, they claimed the only thing testified about him was that he was at the club and had dreads. The solicitor noted that his dreads were longer and that two witnesses testified that Brooks was the shooter and that nothing had been raised but mere suspicion. Tr.p. 627-628.

The trial judge ruled that the defense had only presented evidence of a mere suspicion that there is a second shooter and denied the request to charge third party guilt. Tr.p. 628.

dreadlocks. PCR 64. A lot of people are at the bar and grill that night with dreadlocks. Hackett opined that the testimony was consistent and sometimes inconsistent. She felt that because no definitive third party to place guilt on existed in *Holmes v. South Carolina*. She stated that they did not have that, especially because the photos were excluded that she opined would place blame on Bling. PCR 65. She asserted there was no evidence to support instruction. Because there was no evidence in the record to support the instruction because of the lack of the evidence of the photographs, she did not argue an issue concerning third party guilt. PCR 66.

Counsel Hackett did not recall any motion for a continuance. PCR 66. She did recall some discussions in the beginning of trial transcript about problems with witnesses. However, she did not recall an actual motion to continue or compel discovery in light of discovery being made late. PCR 66. She stated that if a motion had been made previously but not argued at the trial or transcribed, appellate counsel would not have anything to review. PCR 67.

Concerning rewards, PCR counsel directed appellate counsel Hackett to Tr.p. 603-633 which was a back and forth discussion about potential reward money and its disclosure to the defense. PCR 67-68. Upon her review, since there was no motion, nothing was preserved to raise on appeal. She stated that testimony from the investigator was not proffered which made it hard to state the testimony was excluded. Instead, there was a stipulation entered without objection concerning social media exhibit that a reward was made.⁵ Hackett stated that the manner that this was handled that there was nothing to raise in the appeal and waived any objection

⁵ The reward stipulation read to the jury was as follows:

"Regarding the reward that was presented in some exhibit, it showed a social media screen shot about a reward offered by some person. The parties have agreed, the State and defense, that this reward was gathered up or raised by friends and family of the victim. It was paid to someone or some people. I don't know. Those people aren't available as witnesses but there was a reward raised by the family and friends. It was paid. Whether to one person or multiple people we don't know. But those witnesses are not available to either side, so you just know it was done. . . ." Tr.p. 633, l. 1-12. No objection was entered by either side.

regarding having the investigator testify, motion to continue or motion to recess in order to locate added witnesses. She felt that the stipulation created a waiver of those possibilities. PCR 69.

Concerning the Biggers photo lineup identification, Hackett confirmed that she reviewed it. However, she did not think it would be a meritorious issue on appeal. PCR 70.

PCR counsel referenced Tr.p. 302, l. 17 concerning the testimony of Fred Moss. PCR 70. In Moss's testimony, when asked if the atmosphere changed at the club, Moss stated: "Well, yeah, That's one of the reasons why - - It's a place where a lot of *gang members* and everything hang out and just people who don't have anything better to do." The record at trial showed that the jury was sent out, there was an argument by counsel and a request for a mistrial by counsel Zmroczek. Tr.p. 303-307. Hackett confirmed that she reviewed this section of the trial. She stated that she thought that it was preserved for an appeal. PCR 70. However, Hackett did not believe this issue was as strong as the two issues she raised. She opined that the one sentence Moss stated was general and referred to other people at the bar and was not specific to Mr. Brooks. She noted that this did not come up again. Hackett further pointed out that the defense counsel had earlier been successful in redacting any gang references from Brooks' statements and it was not discussed in the closing arguments. Counsel Hackett believed the other issues were stronger than this mistrial issue. PCR 71.

Counsel Hackett confirmed that she did not see in the record where the defense had moved to exclude the gang references in testimony at trial but was aware of the pretrial discussions redacting Brook's gang references, particularly to Folk Nation, in his statements to police. PCR 71. However, Hackett conceded there was a dispute as to how the references were removed and whether there was a violation of any pretrial order. PCR 72. However, counsel

Hackett could not locate where counsel Zmroczek made a formal motion to exclude the evidence or a ruling by the judge. PCR 72.

In cross-examination, counsel Hackett acknowledge that the appellate court relied upon the third party guilt decision in *State v. Gregory*, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) and *Holmes v. South Carolina*, 547 U.S. 319, 328, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Counsel conceded that she did not raise the photograph issue in a rehearing petition because she thought the better course was on the jury instruction issue and the error that occurred. PCR 74. She opined that the appellate court had flipped the burden of proof on them to show that the error was not harmless instead of being upon the State. PCR 72-73.

Hackett stated that instructions on third party guilt issue were a novel issue. She stated that she had a case she handled, *State v. Singleton (Tony)*, 438 S.C. 629, 885 S.E.2d 415 (Ct. App. 2023)(instruction on third-party guilt was not warranted) which came out after Mr. Brooks case. She stated in *Singleton*, she raised error in denying a third-party guilt instruction. She stated that although others may have had sex with the victim that was not inconsistent with her client's guilt according to the appellate court.

In response to a question about what a proper third party guilt instruction should be, she responded that she would want to be careful not to charge on the facts. She stated that she would track some language from *Holmes* and *Gregory* of evidence that is presented inconsistent to Applicant's guilt. PCR 76-77.

Hackett stressed the importance of preservation of issues in the trial record. She emphasized Rule 103 and that appellate courts can be stringent and want there to be a proffered

testimony as to what a witness would say. PCR 77-78. She noted that appellate courts frequently raise preservation of the issues *sua sponte*. PCR 78-79.

Testimony of Private Investigator Brian Setree

Brian Setree testified that he was previously an investigator for the Lexington County Sheriff's Department and retired in 2012. PCR 81. He stated that he reviewed records and case files. He briefly described the events of Feb 2, 2014 when Brandon Ratliff was killed. PCR 83-84. Through him the statements of Fred Moss were introduced from February 2, 2014 and April 14, 2014. Applicant's Exhibit 5 and 6. PCR 84-86. Setree stated these statements were important to him because Mr. Moss ended up picking Mr. Brooks from lineup. PCR 87. Setree stated that he looked for inconsistencies in the statements and compared them to the environment being late at night in a bar with alcohol and potentially drugs such as drug involvement in a drug situation, alcohol, with emphasis on statements that an eyewitness would have given. PCR 87.

Setree reviewed the second statement, Applicant's exhibit 6 made a reference to the person's eyes. In Applicant's Exhibit 6, relating to Moss's identifications from the two lineups, Setree noted that he was asked if he had ever seen the photos that he had picked out before and he responded to photo number 2 (in the second lineup) he pointed out on Facebook. PCR 88. Setree stated that trial exhibit State #3 was the photo lineup with six people dated 4-14-2014 and Fred Moss was identified No. 2 as present during the shooting by Moss. (Applicants' No. 7). PCR 88-89. Setree was shown trial State's Exhibit No. 4, which was another lineup which indicated that Moss chose photo number 3 as the person and he was the one with the gun. (Applicant's Exhibit 8). PCR 89.

Setree stated that he reviewed statements of the victim's girlfriend, Brittainy Dilworth from February 2, 2014 and April 14, 2014. (Applicant's No. 9 and 10). PCR 90-91. He also stated that he reviewed the statement of Shakira Hopkins and the Cellebrite extraction. He was also aware of an audio file that was obtained from Dilworth's cellphone. PCR 92. He stated that he met with Shalana Thornton and Shakira Hopkins. Who he reviewed the audio with. PCR 93. The audio file was introduced as Applicant's No. 11. PCR 94.

Setree stated that part of his PCR investigation strategy in reviewing the discovery and trial transcripts, he was looking for missed opportunities. PCR 96. He stated that based on that a review of Mr. Moss's statements there were some inconsistencies with how he described the events on paper. PCR 97. In one of his statements, he said the person with gun was 5-6 and 120 pounds and in the other statement he looked in the eyes of the person with the gun, and it looked like a family member. Moss stated in the direct examination during the *Biggers* hearing he had looked at Facebook. PCR 97.

He pointed out that in his interview with Shalena that she was forthcoming and stated what she said was almost verbatim compared to his interview. PCR 97. He pointed out that the cellphone data from Ms. Dillworth revealed the interactions between Shakira and Ms. Dillworth and suggested some manipulation behind the scenes with some potential witnesses and the group was not pleased with the state of the investigation. PCR 98. He stated that Dilworth stopped dealing with detective Black. He noted that Ms. Weise had given a statement on April 10th. PCR 98-99. Setree stated from that point there was contact made between Sgt. Lint and Ms. Dillworth and on the 14th, Moss was shown the photo lineups. PCR 99. However, Setree stated that Moss had already seen all these Facebook photos of Mr. Brooks. Setree found it important that those two witnesses were not called by the State and the Defense. Setree felt that they

needed to be heard from. PCR 99. Setree was of the opinion that he would have put major emphasis on that that needed to be done. PCR 99. Setree stated that Shalana had said she did not have any contact with anyone concerning this trial since her April 10, 2014 statement to law enforcement. PCR 100. Setree found her more than willing to testify. PCR 100.

Setree was referred to the testimony of Eric Brown, a defense witness at trial at Tr.p. 564, line 10 and trial Defendant's Exhibit 44. PCR 101.⁶ Applicant's Exhibit 12. This was described as the reward poster. PCR counsel also pointed out that this tip or reward and Shakira also was discussed at trial from Tr.p. 600-633.

Setree also reviewed an email chain from October 21, 2016 that was in Ms. Zmroczek's file made available as part of his PCR. Applicant's Exhibit's 13. PCR 101-102. Setree pointed out the email was a week or so before the trial started. He stated that it appeared that Ms. Zmroczek was diligently trying to figure out where the reward money had gone and they got information about Shakira Hopkins. PCR 103. In reviewing the discovery, Setree stated it appeared that Hopkins had tried to make contact but there was nothing in the discovery that he reviewed that indicated law enforcement had interviewed her. Setree stated when he interviewed Shalana, they went over the Dilworth recording and then learned about Shakira's interaction with law enforcement and how law enforcement came to her house disrupted things and she had to move. PCR 104. Setree learned from her that she received between \$7000 and \$8000 way before the trial. Setree also indicated that it was before Mr. Brooks was arrested that law enforcement had been in contact with her. PCR 105. Setree stated that Shakira admitted everything she told law enforcement, and accepting reward money. He stated that Shakira stated to him that she did

⁶ At trial, Brown testified that he had seen the reward poster on social media but had not provided any information and he knew he was there that night. Tr.p. 564.

not have a dog in the fight and if Brooks was guilty, then he was guilty, but if he wasn't guilty, she did not want any part of sending someone to prison. PCR 105.

Setree was referred to Tr.p. 603-633 about the discovery and Shakira. PCR 106. He noted that there were a lot of discussions between the solicitor's office and defense counsel , as well as a motion to compel on May 20, 2016. PCR 106. Setree stated that on May 25, 2016, defense counsel received 785 pages and 13 CDs of discovery. PCR 107. He confirmed that Shakira Hopkins had indicated to him that no one from the defense had contacted her prior to the trial. PCR 107.

On cross-examination, Setree stated that Shakira Hopkins told him that she received the reward but did not think she was relevant because everything she had to say would be hearsay. PCR 108. She stated to him that she was asked by Shalana to figure out who was at the Cockpit that night. She told Setree that she was paid by Ms. Dillworth somewhere between \$7,500 to \$8000, not the full \$10,000, but contended that it was not for the information but for the aggravation that resulted from law enforcement. PCR 109. Setree stated that he had not realized that the apartment had been in her father's name. PCR 110. However, Setree did not find an eviction record in the Public Index. Setree stated that she explained to him that the apartment management was upset because of the law enforcement presence. PCR 110-111.

Setree stated that he did not interview Fred Moss. PCR 111. Setree indicated that this was because his statements were already memorialized and that Setree considered him a victim because he was with his best friend and was apprehensive about making contact. PCR 111. I did hear that recording although I cannot testify as to the contents. Setree opined that if he did not come forward with Shalana, Setree did not think that his efforts would be fruitful. PCR 111. "I

felt like he would stick to his story” including the versions he gave the investigators and the one he gave in court under oath. PCR 112.

Testimony of Ralph Robert Tressell

Robert Tressell testified that he was an expert in forensic homicide investigation and currently a private consultant. PCR 113, 118. He testified about his prior law enforcement experience, training and teaching in Georgia with law enforcement, a medical examiner’s office and with the Cobb County District Attorney’s Office. PCR 114-118.

Tressell stated that he was provided with all the discovery and the trial transcript in 2023 or 2024 by PCR counsel which he had reviewed. PCR 119. Tressell described that looking at a homicide investigation is like putting a puzzle together and developing questions and answers about the scene, the exhibits and the witnesses to develop the scenario. PCR 120 -122.

The PCR counsel introduced trial State’s Exhibit 6 and photo, as Applicant’s Exhibit 15 (photo of rod with A on it), trial State’s Exhibit 7 as Applicant’s Exhibit 16 (photo), trial State’s Exhibit 18 as Applicant’s Exhibit 17 (photo), and trial State’s Exhibit 20 as Applicant’s Exhibit 18 (photo). PCR 122-124. Tressell described Applicant’s 18 as a photo of the parking lot with shell casings shown run over, stepped on or kicked. He described that when a shell casing hits a surface they bounce and go all sorts of different directions. PCR 125. He stated that you cannot say that this is a sign that the shooter was moving. PCR 125. He opined that most of these appear to have been run over. He stated that they estimated 50 to 60 people inside this bar who scattered when law enforcement arrived. PCR 125-126. The casings that had scattered were in the parking lot on the front side of business, but where it happened is hard to say. PCR 126. He stated that studies showed that shell casing from a semiautomatic will eject up to the right and mostly

rearward. PCR 126. He stated that out of a big testing study that majority always landed on the 12 to 3 o clock quadrant and took that into consideration. We have two on the side window glass, the window bedding the passenger door. PCR 126.

Tressel described Applicant Exhibit 17 which was of a blue Saturn which had 5 bullet strikes, one of which did not penetrate, and of which were in the side window glass behind the passenger door. Tessel described in the photo, investigator Shearer used a dowel rod to attempt to describe the direction of the bullets. PCR 127. Tressel pointed out in Applicant's Exhibit 16 it shows hit driver's seat where a bullet was found in the floorboard and if someone was sitting in that seat they would have suffered a gunshot wound. PCR 127.

Tessel took issue with this part of the investigation because it should have been done at the crime scene. PCR 127. He stated if the car hasn't moved, they could have followed the rod or a laser light back to direction it came from which would tell us position of where shooter was standing. PCR 127-128. However, this could not be done because the car had been moved. He reviewed Deputy Shearer's Investigative Report, which was entered as Applicant's Exhibit 19. PCR 1287-129.

Tressel noted that there were a number of .22 caliber cartridge casings (10) and .22 caliber projectiles (4), yet only two shell casings and two bullets were sent to the lab. PCR 129-130. He saw this as a concern when there was an issue as to whether there was a second gun fired. PCR 130.

In reviewing the autopsy report, it noted that the altercation began inside the Cockpit bar and carried over parking lot as a confrontation among groups of people. The report indicated that Moss and the victim in case were in the area of the blue Saturn at the time shots were fired. The

report indicated that the victim received a wound to the center of chest. He was found on the roadway to the south of the bar. PCR 130-131. Tressel described that there were various suspects identified through Facebook and social media who were at the bar or who were involved. He noted that Moss was shown a line-up and identified Brooks. PCR 131.

Tressel reviewed the statements Moss made and noted the initial statement he gave at the hospital was different than the one he gave later. In the first statement, he indicated that he and victim left bar together, then there was a confrontation, where the subject with dreads displayed a 9 mm handgun. Moss stated that he pretended to have a gun in his belt and as he turned around, Ratliff was gone. PCR 133.⁷ Tressel indicated an empty gun holster was later found in the floorboard of Moss's car. PCR 132. Tressel summarized at trial Moss testified that Brittainy grabbed him and pulled him to the parking lot. However, in Brittainy's February 2 statement she claimed Stacie Meares (Stacey Myers in PCR transcript) picked her up at her house and told her that Ratliff had been shot. PCR 132-133. Tressel opined "How could Moss have been at Cockpit when Brittney was home and her friend picked her up and took her to the hospital?" Tressel claimed that Stacie should have been interviewed by counsel over this possibility. PCR 133.

Tressel also reviewed the statements of Rickena Knightner. PCR 133. Applicant Exhibit 22. Tressel stated that in her Feb. 6, 2014 interview she indicated that she knew Brooks by the name "Dink." She claimed in her next statement that she did not give the information to law enforcement the night of the incident. However, on April 15, 2014, she identified Brooks in a lineup when shown by investigators. PCR 133-134. Tressel claimed that Knightner never indicated that she knew Brooks or that she was there until April 2014. PCR 133-134.

⁷ See Applicant's Exhibit #5 (Moss therein claimed that he later saw Ratliff laying facedown in the street).

Tressel commented on Deputy Shearer's use of the dowel rod. PCR 134. He was referred to Tr.p. 237 where Deputy Shearer indicated that he was not trained in the use of the dowel rod. Trial 237, line 12. Tressel opined that if he was not trained in that, that may explain why he did not use the dowel rodding or another device to determine the trajectory while he was at the crime scene. PCR 134.

As to the location of the shooter of the Saturn he indicated that they needed to get within a couple of feet based upon the two shots. He opined that when they hit the glass, they could get a general idea of where those shots are coming from. He opined looking at the photos and the dowel rods that the shots did not come from the front entrance and had to be further up the parking lot to create that directionality. PCR 135. He further claimed it would have been at a downward angle through the driver's side from above the vehicle and closer than other shots. PCR 135-136.

Tressel stated that he had reviewed the photographs of the guns related to the appellate issue but could not tell the brand of the weapons. He stated that it is a semi-automatic. He stated that it had 7 rounds in the magazine and stated that it appeared that if fully loaded would be nine. He recalled that there were 10 shell casings at the crime scene. PCR 136. He stated that there had to put a round physically in the chamber to fire the weapon and then the magazine. PCR 137. He described a policy he wrote for the District Attorney's Office which he described as "topping off." He stated that they carried " " carry the .40 caliber Glocks that carried 15 rounds in a magazine, but putting one in the chamber makes it 16. The Glock what I call 9 plus one semi-automatic pistol. This has a capability of firing ten rounds. PCR 137.

Tressel reviewed the appellate decision in the case where the court distinguished the fact of the 9 round magazine when there were ten rounds of ammo. He stated that he could have

aided the defense and allowed it to craft an argument that the weapon is capable of firing 10 rounds. PCR 138. He stated further that there are extended magazines that carry 15 and 20 rounds. He stated he had found a I found a 25 which is about the same in picture that can increase which can increase the load to 30 rounds. PCR 138.

As to whether there could have been two weapons, Tressel stated that the only way to determine it was to test the other 8 rounds and try to match them with the others tested. PCR 138.

Tressel stated that as a result of his investigation, he had a series of opinions. First, he opined that he cannot determine where exactly the shots were fired. He stated that shell casings bounced and moved unless they landed on grass, weed, something that allows them to stick. PCR 139.

Second, he opined that Brandon Ratliff was killed by a single gunshot wound. He stated the shot was front to back, slightly right to left, with no deviation up or down, almost direct inline shot. PCR 140.

Third, the gunshot defects in the Saturn all came from behind and to the right side of the vehicle. He noted that the exact location could have been generalized had the trajectory analysis been done while vehicle was on scene. PCR 140.

Fourth, only two fired shell casings and two projectiles were examined for ballistics. He opined if the others had been tested, it could have indicated whether a second weapon was involved. PCR 140-141.

Fifth, there were conflicting interviews statements that were not corroborated. Tressel stated that Brittainy's statement did not corroborate Moss's statements. He stated Rakina Knightner's statement that Dink or Brooks was at the Cockpit at the time of the incident. PCR

141. Tressel indicated the records were that she only told law enforcement after she was shown the lineup. PCR 141.

Sixth, Tressel opined that the photo lineup identification by Moss was flawed. Tressel stated that it was not the process, but because Moss had previously seen social media photos of this gentleman so when he looks at the lineup, he is drawn to the image he previously saw. Tressel stated that if he had been the investigator, he would not have shown this lineup. PCR 142.

Tressel declared that if he had been the investigator at trial, he could have pointed out these issues. The Applicant introduced a copy of his written report as Applicant's Exhibit 20. PCR 143-144.

On cross-examination, Tressel indicated that he had not gone to the crime scene and indicated it's no longer there, but the parking lot may still be there. PCR 145. He stated that he never interviewed the investigator or Ms. Zmroczek. PCR 145. He acknowledged that it would have been better to do the dowel rod experiment at the scene the night of the incident. PCR 145. As to his comment about Deputy Shearer's testimony that he was not qualified to give an opinion about the rods, Tressel stated then why do the rods. Tressel stated that the only use would have been to determine whether two bullets penetrated inside the vehicle. PCR 146. It was noted that many variables come into play including distance, height of the subject, and height of the person firing. Tressel stated that you can tell sometimes a range of heights, such as what he did with the back glass, opining those two shots were in rapid succession. PCR 146.

Tressel pointed out that he thought the variance in Moss's statements was significant and inconsistent. PCR 147. He noted in the first statement incident started inside and he was grabbed

by the arm by the victim whereas at trial he stated he was grabbed by the arm by Brittainy. PCR 147 He found this important because she said she was at home at the time of the incident in her statement.⁸ Tressel also thought it inconsistent with the information that there was an empty gun holster on the floorboard of his car. PCR 148.

Tressel was asked where in Moss's testimony before the jury that Moss had told the jury that he was grabbed by Brittainy. Tressel reviewed Moss's trial testimony and determined it was not there. He was referred also to the portion of Moss's jury testimony at Tr.p. 309 where Moss testified that he was grabbed by Ratliff when they ran out of the bar. PCR 148-149.

Tressel stated that his opinion about being unable to determine the location of the fired cartridges was consistent with the trial testimony. Further, he stated that his opinion that Ratliff succumbed to a single gunshot was consistent with the trial testimony. PCR 150. His opinion that the gunshot defects on the vehicle came from behind or on the right is consistent with the trial testimony because it is what Deputy Shearer testified. PCR 150. Tressel could not recall if testimony about the testing of the casings and cartridges was consistent with the testimony. PCR 151. Tressel stated that the jury received the information about Rickena Knighton statement at the scene and her later lineup identification and that she knew Dink but did not tell earlier when she indicated that she did not know the shooter was known by the jury. PCR 151. See Tr.p. 521 (told them no).

As to his opinion about a second weapon, he agreed that he did not know which is why he thinks that more testing was needed. PCR 151.

⁸ Brittainy Dilworth did not testify at the trial or in the PCR proceeding.

Tressel also acknowledged that the shooter Dink (Brooks) was identified the Rickena Knightner as well as Moss. PCR 152. Tressel said in the lineup because she already knew him, she was drawn to him. He complained that Knightner waited two months to identify him when she claimed to have known him prior to the incident. PCR 152. He admitted that this came out to the jury.

On redirect, Tressel was referred to Tr.p. 133 during the pretrial where Moss was cross-examined and described being grabbed by Brittainey and then left to the parking lot. PCR 153. Tressel also indicated that he reviewed the written statement of Knightner (Applicant's Exhibit 21 - Dated 2-6-2014) and Applicant's Exhibit 22 (Statement of Rickena Knightner (one page dated 2/15/2014). PCR 154-156. He stated that Knightner had given different names in the case which factored in his assessment. PCR 156-57.

Testimony of Aimee Zmroczek

Counsel Aimee Zmroczek was called by the Applicant and testified that she was the Applicant's counsel in the matter. She stated that she had practiced criminal law since 2008. She confirmed that she was appointed in this matter. PCR 160. She stated that she had an investigator, Chris Watkins, on contract. Counsel stated that this was an identification case. The Applicant claimed he did not shoot and that was her defense. PCR 160-161.

Counsel was asked about her investigation into third party guilt. PCR 161. She stated that the State dislikes third party guilt and seeks a name and specific identification and does not just accept a blanket identification. PCR 161.

Counsel testified that at the time of this trial she was involved in a series of high profile cases, including the bakery murder and the Five Points murder. She felt that the solicitors and

the court did not care about her schedule. PCR 161. She described seeking a day certain for trial and filing motions to compel to get discovery. PCR 162.

Counsel confirmed that she filed a motion for discovery on April 30, 2015 right after she was appointed. PCR 162-163. She confirmed on November 21, 2015, she filed a notice for dismissal for judicial supervision and a scheduling order under *Langford*. Further, she confirmed on December 10, 2015 that a hearing was held in front of Judge McMahon and he set a date for trial. In June 2016, counsel filed a second motion to compel.

Counsel testified that she always has concerns about discovery and typically files these motions. She stated that she has to lay eyes on every piece of discovery that exists or reasonably believes exists. She stated she filed a motion to compel because either saw something mentioned and didn't see it in the documents and it should absolutely be there. PCR 163-164.

Counsel stated that she went through her records on this case to get prepared for the PCR hearing. PCR 164. She noted that she had a document in her records that indicated that there was a list of thirty (31) items that she felt she still needed for trial. She noted her email chain with the solicitor's office regarding discovery, Applicant's Exhibit 23 (email chain dated July 18, 2016 between Assistant Solicitor Patterson and counsel) that reflected her attempts at getting the discovery. PCR 165-166.

Counsel was directed to Tr.p. 108 where counsel noted that she needed to put her *Langford* violation on the record. The record showed it was not placed on the record and argued until Tr.p. 139 after the trial court's *Biggers* ruling.⁹ Counsel testified that she was frustrated

⁹ In the motion argument related to *Langford*, counsel complained that there had just received some discovery the Thursday before of 44 additional pages after a speedy trial motion had been filed two and one half years earlier. Tr.p. 140. The Solicitor advised the court that the new records were the Applicant's employments records at Xaxby's that were given to the state from Xaxby's on Thursday and given to counsel on Friday. Counsel

that the State seems to be able to dictate which cases are called or at least given leeway since Langford and the defense does not get protection which makes it difficult for her as a single lawyer. PCR 165. She stated that she was asking for some for grace to work with her schedule. PCR 165-167. She stated that she got thirteen (13) disks of discovery that were dumped on her about a month earlier that included phone records which she felt was impossible for her to go through when she already had a day certain.¹⁰ Counsel opined that she felt she had not vocalized her frustration as clearly as she should have done then which was not limited to the 45 (44) pages of discovery she got the week before. PCR 168. When asked why she pursued the motion under *Langford*, she indicated, as reflected in the email, that she had been begging for court guidance and continuance requests, but she felt no one was interested. PCR 169. She noted that this was her third trial, back to back, and that she was probably exhausted and cited Langford rather than something else. PCR 169. She acknowledged that she did not make a formal motion for continuance or raise a discovery violation prior to the outset of the trial. PCR 169.

Counsel stated that she had the bakery murder, then immediately after the Five Points shooting, both which were livestreamed and receiving international attention. She felt that she was not able to focus on this case as she should have. As a result of this case, at the time *Langford* was being bounced around in the courts. PCR 170.

Counsel stated that she suffered from autoimmune disorder which she tries to keep under control. She stated that after this case she was able to get medical guidance and had to get a

acknowledged that the disclosure did not prejudice her but noted she had filed motions to compel to get the disclosures. At that point, the trial judge denied the request to dismiss on the length of the violation or discovery violation noting the Lexington County trial docket stays booked up and the jury is picked and ready. Tr.p. 141.

¹⁰ PCR investigator Brian Setree testified that in his review of counsel's records, it was determined that the 13 disks were actually received by counsel on May 25, 2016. PCR 280-281.

medical note that she can only try one felony trial a month. PCR 170-171. Counsel was directed to Tr.p. 681, l. 24. In that passage during the exceptions to the jury charges, counsel sought to renew an objection under *Belcher* and indicated “but also, and I may have missed something because, Judge, I try to pay attention, but I did not take my medication this morning...” Tr.p. 681, l. 24- 682, l. 1. Counsel stated that she also has ADHD. However, she stated that anyone who knows her can tell when she does not take her medication. She stated that this was a “tongue and cheek comment” because she believed that she argued the jury charges ad nauseum. PCR 171, l. 6-11.

Concerning the retention of other experts, counsel could not recall why they were not retained. PCR 171. She stated that she recalled the case very well because she was at the scene frequently, including with her investigator. PCR 171. She stated that she has begun to hire crime scene experts more recently. PCR 171-172. Counsel was directed to her argument related to seeking a voluntary manslaughter charge. Tr.p. 629. In that portion she was requesting whether a plea offer to manslaughter was still available and noted that under the facts, there was a gun, there is a holster with a missing gun, testimony that there were two different guns, shell casings including one that did not match the others, and “there’s no expert that’s needed...” Tr.p. 629-630, l. 5. Counsel testified that after listening to Tressel she felt that it would have been helpful evidence. PCR 172.

Concerning the trajectory evidence, it was pointed out that Deputy Shearer was not qualified to give an opinion in her cross-examination. In hindsight, when she learned this, she felt that she should have sought a break or at least hired an expert. PCR 173. It was further pointed out in her closing argument that she asked the jurors about the ballistics and gun

evidence at Tr.p. 638-641. She opined that it would have helped support the argument if she had an expert to support her arguments.

Concerning the photographs of the gun and the appellate opinion, counsel felt that Tressel opinion that the gun was capable of holding 10 cartridges rather than only 9 would have helped at the trial and in the appeal. PCR 174.

Counsel was referred to the discussion in the testimony about Sandra Kiete. Tr.p. 141. PCR 174-175. In that discussion, counsel argued that Investigator Dykes had indicated that he was provided with information from Sandra Kiete, but counsel claimed that she had never received a statement from her. She indicated that her information was the Kiete had indicated that Dink looked like the prepared sketch. Tr.p. 141. Counsel had complained that she could not locate her, had never been provided with contact information and claimed that a picture of her also resembles the sketch. Tr.p. 141. Counsel claimed that Sandra Kiete was the Applicant's initial accuser and should have been presented in court. Tr.p. 142. At that time, Solicitor Patterson advised the trial judge that they do not have a statement from Kiete, but that it was included in Investigator Dykes's report that she came to headquarters and talked to them about the information that they heard from her son, which would be hearsay and that her son heard it from someone else and that they did not intend to call her or her son. The State indicated this was not the only source of the Applicant's name. Tr.p. 142-143. At that time, counsel requested the name of others who the others were.¹¹

¹¹ During the pretrial proceeding, on cross-examination of Investigator Dykes, Dykes testified that Applicant's name came up from Sandra Kiete who has a son names James Kiete who knows Brooks and his family. Tr.p. 59, l. 4-10. Investigator Dykes indicated that they knew his nickname at the time. Tr.p. 59. Subsequently during the trial, Investigator Dykes testified that on February 10, 2014, Dykes assisted Detective Black with interviewing Sandra Kiete on information in reference to the incident. Tr.p. 483. Without saying what they were told, they indicated that they received information about the case and the names associated was "Dink." Tr.p. 483. Investigator Dykes later indicated that after they spoke with Sandra Kiete they spoke with her son, James Kiete. Tr.p. 490.

Counsel testified that that Sandra Kiete's name was a surprise. PCR 175. She indicated that it was in the discovery, but it was not something she focused on doing. She stated that it was provided in that massive pre-trial dump. PCR 175.

Counsel stated that she should have objected to Investigator Dykes testimony that they spoke with Sandra Kiete and she gave them information about "Dink" as investigative hearsay. PCR 177-178. See Tr.p. 483.

Counsel complained that this was an issue with discovery in the manner it was presented to her because the State was claiming it was in the discovery. PCR 178-179. Counsel stated that when you're taking someone to trial, you want to make sure you make a thorough investigation and it is harder when the state is withholding information, up until days or weeks before the trial and then discovery is dumped right before the trial. PCR 179. She claimed that she should have done a better job to bring that up during pretrial and trial. She claimed that she had been shut down so many times that she did not think of putting it on the record. PCR 180.

Related to Issue 5 concerning rewards and tipsters, counsel acknowledged that identification was a key issue in the case. PCR 180. Counsel confirmed that on June 17, 2016, she filed a Motion to for disclosure of the Crime Stoppers information. PCR 180-181. Counsel did not recall if she received any information from Crime Stoppers but may have shortly before the trial. PCR 181. I think maybe the day of trial got some information. Counsel stated that according to Applicant's Exhibit 13, she received information the Friday before the trial that Shakira Hopkins received reward money of \$10,000. PCR 182. See Tr.p. 603 (discussion of issue of reward at conclusion of trial). Counsel stated that she gave the information to her investigator at that point. PCR 183. However, they did not have any success in finding her. PCR 183. Counsel

stated that she did not have any recollection of why she did not raise the issue pretrial PCR 183. In hindsight she suggested that she should have raised it as a continuance issue. PCR 184.

As to Applicant's Exhibit 1, the statement of Shalana Thornton, counsel was sure that she reviewed it. PCR 184. She noted it had a Bates Stamp of 70 of 435 that indicates she got it early. PCR 184. However, counsel did not recall getting the statement of Shakira Hopkins, Applicant's Exhibit 3, although she was sure she reviewed it. PCR 184.

However, as to Applicant's 11, the recording of the three women, counsel had no recollection of reviewing it. Upon her review for this action, she determined that it was located among the 13 CD's that she received at the end prior to the trial. PCR 185.

Counsel claimed that there was a *Biggers* hearing prior to the trial. PCR 186. Tr.p. 84-138. Counsel noted the focus was on the identification and lineups by Knightner and Moss. Counsel stated that that if they had the information related to Moss's identification by Shalana and Shakira, she would have used it at pretrial and trial again. She asserted that she got it late and if she had time to go through the phone dump and through all the parties' discussions would have made a difference.

Counsel confirmed that it appeared from the lineup and the record that Fred Moss had been shown some photos before the photo lineup on April 14. PCR 187.¹² Counsel recalled inquiring of Moss at trial about the photos. PCR 187.

¹² During the *Biggers* hearing, Moss testified on questioning by the State that Brittainy had showed him photographs. Tr.p. 126. Moss stated that he had also shared that information with law enforcement. Tr.p. 126. Moss indicated that he wrote the information about the Facebook photo on the lineup. Tr.p. 128. Counsel Zmorczech inquired of Moss at the outset of the cross-examination about Brittainy showing him the Facebook photo. Tr.p. 129. At trial on cross-examination by counsel, she inquired about the fact that Moss and Brittainy were meeting with people and going over Facebook. Tr.p. 129. However, Moss denied meeting with anyone and stated that Brittainy was the one that showed him the Facebook photo. Tr.p. 129.

It was pointed out that in Shalana's statement, she showed Moss pictures along with Brittainy on April 10. PCR 187. Counsel asserted that she is not sure that she could have argued that the identification was tainted by the earlier showing of the photos with this additional information. However, if she was able to show the exact communication, she opined that it would have made a difference. PCR 187. However, she also noted that it was hard to say what a judge would have done, but it would have preserved the issue. PCR 188.

As to Rickena Knightner's identification, counsel noted that she pointed out at trial the multiple conflicting statements in the pretrial and trial. PCR 188. See also, Tr.p. 99-103, 518-524.

Counsel was also aware that Knightner made the 911 call. PCR 188. Counsel referred to this as a 9-1-1 nightmare. Counsel indicated that she attempted to introduce the 911 call, Defendant's Exhibit 46, at trial. PCR 189. Counsel indicated that she didn't think about introducing the call at the *Biggers* hearing. PCR 189. Counsel suggested that when she tried to introduce it later at trial in the defense case, her intent was to show there were multiple descriptions and conflicting statements by Knightner. PCR 189-190. Counsel stated that the identification was coming in. However, the 911 call could reveal a lot of background noise. PCR 911 calls are important because they record what was happening as it was happening. PCR 190-91. Applicant's Exhibit 24.

Reference was made to Investigator Charles Robert "Robbie" Lint's testimony in the *Biggers* hearing at Tr.p. 104-105, when he testified that he asked Moss the following day after the incident or at the apartment if he ever discussed seeing Brooks on social media or anything. Tr.p. 104-105. However, Lint also testified that Moss did bring him information about someone he selected on social media that he identified as "Slim Cutta." Tr.p. 105. Counsel indicated in this

proceeding that she should have asked Investigator Lint about the Facebook photographs that Brittainy and Shalana had shown Moss. PCR 192. Investigator Lint stated the description Moss gave of the perpetrator as 5'6" to 5'8" and 150 pounds with dreadlocks and that he had not saved any pictures or videos that he showed Moss noting that he did not identify anyone. Tr.p. 106.

It was noted that after Inv. Lint testified that Judge Griffith indicated that he had a difficult time in following the line of questioning and was seeking a break. Tr.p. 107. Counsel claimed that this should have alerted her that her cross-examination does not make sense. PCR 193.

Next during the testimony in the *Biggers* hearing by Sgt. Laintz, he testified that he became involved in the case on April 14, 2014 after two females had contacted the office and indicated that they had information. Tr.p. 109. In his testimony, he indicated that he was provided the nickname "Dink." Tr.p. 109. Counsel asserted in hindsight that she should on cross that she did not ask further questions about it since it would likely have been Brittainy and Shalana since he testified that they met at Brittainy's. PCR 194. Tr.p. 402-403, 467 (Investigator Longshore and Laintz met at Brittainy's with Shalana Weise and given street names of people of interest); Tr.p. 407 (cross by counsel of Longshore about meeting with Brittainy).

Counsel was asked about her examination of Fred Moss at Tr.p. 129 when he acknowledged that he saw a Facebook picture of the Applicant. She asserted that in light of the information in the discovery, she should have asked further questions. PCR 194.

Counsel opined that she hoped if this additional evidence was presented to Judge Griffith, it would have been easier for the judge to follow her logic. PCR 195.

PCR counsel pointed out that Investigator Longshore testified about the voicemail he received from Brittainy on April 14 and then went to meet her and Shalana who provides them names. Tr.p. 400-404. PCR 195. Counsel stated at that time of her career she may not have been cognizant about calls being recorded. However, she felt this should have been turned over. PCR 196.

PCR counsel pointed out Sgt. Laintz testimony about the same meeting with the woman. PCR 197. Tr.p. 467-469. Counsel indicated that she did not think these matters would be a component of the case, but in hindsight believed she should have asked the judge for a continuance and made motions to compel. PCR 198.

Concerning the issue of reward, counsel was directed to Tr.p. 496 in her cross-examination of Investigator Dykes. However, counsel did not recall her strategy in bringing the reward issue up for the first time at that point or with other investigators. PCR 199-200.

Counsel was referred to Eric Brown's testimony at Trial Tr. p. 564 involving her recall of Brown to introduce the reward poster. Counsel testified that she did not recall her strategy to introduce the reward by Mr. Brown rather than through law enforcement witnesses. PCR 200. Counsel claimed that she should have addressed the poster with every witness to talk about their biases and whether that information was being paid for. PCR 200-201.

Counsel stated that Friday before the trial she received the email with the information about the reward. At trial, she attempted to get the information in about the reward. Tr.p. 603-611. She contended that she needed more time to develop and put the reward matter together which she claimed she could not do midtrial and should have asked for a continuance. PCR 203.

Counsel acknowledged that she agreed to the stipulation at Tr.p. 633 concerning the reward, but in hindsight she claimed that she was desperate and wanted them to know there was a reward. PCR 204. However, she thinks that her better approach would have been to ask for continuance. Further, the question as to whether they should have proffered her investigator to testify to create a record was not done. As she noted in her testimony, at that time she was just trying to get the reward into evidence. PCR 204. As she had stated she would have put up Shalana Thornton and Shakira Hopkins. PCR 205.

The applicant inquired about the handling of Fred Moss's discussion about "gang" testimony. PCR 205. Counsel admitted that she had reviewed all the statements of Moss prior to the trial and his identification of the Applicant, as well as the statement of Shalana about showing the pictures to Moss. PCR 205-206. She had filed a motion to prohibit gang testimony but did not recall if she made the motion on the record. PCR 206. She recalled that in Brook's statement he refers to gang affiliation and the state agreed to redact that comment. PCR 206. Tr.p. 84-85. Counsel stated that it was her understanding that since the State redacted it in the Brooks statement that they would instruct their witnesses to not get into gang related testimony. PCR 207.

At Tr.p. 302 during Moss examination, he referred to gang matters when asked if the atmosphere at the club changed and responded that "it's a place where a lot of gang members and everything hang out and just people who do not have anything better to do." At that point, counsel Zmroczek objected to the gang evidence. Counsel testified that this was a surprise because of what had occurred. She acknowledged that the trial court gave a curative instruction related to this comment and denied a motion for a mistrial. PCR 208. Tr.p. 304-307. She agreed that agreeing to the curative instruction weakened the issue for an appeal. PCR 209. A review of

Tr.p. 528 revealed that counsel sought to preserve her objection and mistrial request on the gang evidence arguing that the evidence was prejudicial and not cured by the instruction. PCR 209. Counsel took steps to preserve the issue. PCR 210.

The Applicant raised issues with counsel about the trial judge's actions in the case. There was a question on whether counsel was argumentative and combative with her examination of Moss. PCR 210. Counsel opined that there was chaos when the event happened and she felt with the gun pictures she had seen that people were there trying to protect themselves or the cause of it, including Moss. PCR 210-211. Referring to Tr.p. 337, during cross-examination, the court interjected. Counsel stated that this did not cause concern at that point, but the comments were made in front of the jury. PCR 213. Referencing Tr.p. 347, the court sua sponte made an "asked and answered" comment (during the question of Moss related to telling the police at the line up that the circled number person was around when the shots were fired). PCR 213.

Counsel was referred to Tr.p. 351, l. 12, where counsel made a motion, but did not ask for a mistrial based upon the court's actions about asked and answered questions which had a chilling effect and were made in front of the jury. PCR 214-215. Counsel stated that her reason for not asking for mistrial was probably trying to make a note to herself to go back and add that if it happened again, but she didn't know and claimed not to have a strategic reason. PCR 215. Counsel claimed that the good judges are the ones who don't embarrass us or yell at us. Counsel felt that if there were objections, it would have been the duty of the state to object, and obviously this judge did it, and I think jurors admire judges a lot, so she opined it had an effect on her defense. PCR 216.

As to Issue 6 related to the 911 call, Applicant's no. 24, counsel stated her purpose in seeking to introduce it would have possibly impeached Knightner who did not give her name,

which she had already admitted. PCR 217. Referencing Tr.p. 100, line 13, 101, l. 7. Counsel though the 911 call could have aided in what you were trying to get across when counsel pointed out that Knightner called 911 and did not give her name or say who did it. However, counsel stated that at that time, counsel was not aware that the State would not allow her to present the 911 call later in the jury trial. PCR 217. Similarly referencing Tr.p. 518, l. 22-519, l.15, counsel asked before the jury the same questions and conflicting statements and false names. PCR 217-218.

Counsel was asked why she did not try to admit the 911 calls through Sgt. Etheredge who testified about the CAD and 911 calls in Tr.p. 391. Counsel stated that there was no reason, but it was her intent to put the 911 call in her case rather than the state's case when she called the 911 operator. PCR 218.

Counsel described the sidebar that occurred related to the 911 at Tr.p. 624-625 and the 911 operator. Counsel stated that the solicitor's office was objecting to her putting the 911 call into evidence without the communications director. Counsel stated that the witness was on the State's witness list, and she claimed that she was told their witnesses would be available to her. She stated that when she attempted to subpoena her that morning and she was off work. She claimed that this was evidence the state turned over that they were refusing to let her put in. She stated that at that time we didn't have the business record exception. Counsel noted that since then, anytime she has a case for trial, the first person she subpoenas is the 911 call operator because of this. PCR 218-219. Counsel stated that although she could have put it in through another witness and her frustration with the exchange at that time and adversity, she felt frustrated because no one had told her she would be out of town when they called the day before.

PCR 218-220. Referring Tr.p. 643, l. 16, counsel stated that she intended to play it in closing. PCR 220.

As not third party guilt she filed a pretrial motion putting state on notice and listed Antonio Williams, Da-Shun Curry, James Kiete, and Jermial Gartrell. PCR 221. She stated that she did not really have a plan relying upon *Holmes v. South Carolina*. She stated that this State reads *Holmes* it as requiring that “we have to have a specific person, a name, that exonerates the defense.” PCR 221-222. She felt, even at that point that the giving names of people who could have been possible suspects, I don’t think it would reach that required level. Counsel stated that the only way we can change law is by making objections and preserving issues for appeal, she claims that she should have done that.

As it related to Josie Paxton’s testimony at Tr.p. 168-169, 396-399, her strategy in that testimony was that she was a female that was involved in relationships with some of the men that night and counsel claimed that he was looking to that as the catalyst for why the shooting started. Counsel stated that there were some identifiable communications there that she felt like was a viable defense and something that should have been investigated more as to other parties who could have done this. PCR 223-224. She stated the purpose of calling Paxton was for the third party guilt concept. Counsel stated that she was able to get in some photographs through her in the trial but was unable to get in the photographs of the weapons which she opined could have suggested multiple weapons at the scene and multiple shooters. PCR 225. She acknowledges that even if she could show that there were multiple shooters, if she could not show with some proof that he was not part of the multiple shooters then there could not be a third party guilt showing because it would be X-out. PCR 225.

PCR counsel made reference to Antonio “Bling” Williams as a possible suspect she listed in her motion. At trial, Investigator Etheredge testified that Paxton had an ended dating relationship with Williams. Etheredge testified that she had an opportunity to meet Williams, In the Tr.p. 400, Etheredge goes through the description they had of the shooter being a small stature black male with small eyes and dreads yet found that Williams did not meet that description as he was a taller person with long dreads and a very visible tattoo in the middle of his forehead. PCR 226. Counsel stated this would have removed Williams as a viable third party suspect in the court’s eyes. PCR 226.

Concerning Jermial Gartrell in the cross-examination of Sgt. Laintz, Tr.p. 479-480, about Moss identifying him as being at the scene and having a gun during the lineup. Sgt Laintz indicated that he was not aware of the fact of him having a gun. Counsel stated that this was part of her third party guilt strategy. PCR 226-227.

Referencing Investigator Dykes testimony that on May 6, 2014 met with Gartrell aka Boss Pooh and April 21, 2014 with Dae-Dae or Da-Shun Curry and claimed to eliminate them as suspects. Tr.p. 490 – 491. Counsel stated that anytime they eliminate people that makes it challenging, but ultimately the *Holmes* thing is about having one person with a direct link to the crime like DNA or something, so I needed to narrow it down for one person, but them eliminating suspects was just trying to kick dirt on my defense. PCR 227.

Referencing Tr.p. 642, l. 4-7, the record showed that counsel in her closing was explaining to the jury that there are not saying that it was Bling or Da-shun and that “we don’t know who it is because Eric Brown testified that the Applicant beat on his window and said don’t leave me and got into his car. Counsel stated that this let the jury know “I don’t have a

specific third party” which she also claimed was a product of not having all the information. PCR 228.

Counsel confirmed that based upon the state of the law on third party guilt this case should have been more about identification than throwing up all these third party guilt suspects. PCR 229.

Concerning the request for third party guilt instruction, this issue first appears on Tr.p. 537 when counsel requested a particular third party guilt charge but indicated to the court that she thought that she needed more testimony. Tr.p. 537, l. 19-25. Counsel explained that under her understanding the stringent requirements under *Holmes*, it appears that I had probably re-read that and was thinking out loud, for lack of a better term. Counsel was asked why the suggested email with Judge Hocker’s third party guilt charge was not made part of the record. Tr.p. 579, 626. Counsel stated that since this trial she has been trying to preserve the record better for appeals. PCR 229

At the conclusion of the trial counsel inquired with Judge Griffith what decision he had made about third party guilt, noting that she had emailed a proposed charge to the court the night before. Tr.p. 626. Counsel and the State both presented arguments about the charge. Tr.p. 626-628. The trial judge concluded that the Applicant was not entitled to the charge. Tr.p. 628.¹³ When asked if counsel felt the denial of the instruction was damaging to the defense, counsel stated that she had argued for the instruction and that therefore it was damaging. PCR 230-31.

¹³ “THE COURT: All right. I don't believe that the defense has produced enough evidence to get beyond a mere suspicion that there is a second shooter and so I'm redutant to charge third party guilt and I think I'm inclined to do so because of that. The record is protected as to the request by the defense to instruct that, but the Court is not going to do that. . . .” Tr.p. 626.

Counsel was asked if she had focused on one suspect it would have added to the probative value of the photographs in light of the *Gregory* decision. She opined that it would. PCR 231.

On cross-examination, counsel asserted that Sally Henry was initially appointed on this case and then counsel Zmroczek was appointed in April 2024. After appointment counsel began filing discovery. PCR 232. Counsel stated it was her policy to not rely on getting items from the prior defense counsel. Counsel confirmed that in November 2015 she made a further discovery request. PCR 232-233.

Counsel indicated that she hired a digital forensics expert, Chris Watkins, to assist with her review of all the discovery. PCR 233. Counsel stated that she did not rely upon what the state gives her. PCR 233. She stated she hired a digital forensic expert who can do their own downloads because it's a more complete report. Counsel also reviews social media and calls people. PCR 233. She also tries to use subpoenas and different things. PCR 233-234.

For example, she indicated that she issued a subpoena to Crime Stoppers. She stated her purpose was that a lot of times they record phone calls or names, but most importantly they are relaying some hearsay which can be effective, and counsel stated that she wanted to know exactly what that person said. PCR 234.

Concerning the reward, counsel testified that on December 17, she became aware that a reward had been given by Crime Stoppers. PCR 235. By that time, she had also received from prosecution other discovery. PCR 235. She stated that she subpoenaed sheriff's department in March 2016 for records. She indicated that she was provided with a boxload of additional documents. PCR 235. She stated that she rereviewed all of it, which included statements that had

been received up to that time. She recalled that the information was similar to what she had received from the Solicitor's office. PCR 236.

She testified that at some point she thought there was some missing information because which she recalled was either things weren't lining up, or a lot of times it was officers putting in reports or people saying things that provide a basis that they got that info from someone else. PCR 236.

As a result of that review, counsel filed a motion requesting 29 specific items on March 10, 2016. PCR 237. She stated that she tried to be very specific about what she thought was missing and it was not a fishing expedition. PCR 237. This request was made after the lineups occurred.

She agreed that it was after Moss's lineup had occurred and his earlier statements and the fact that he had pointed out and told the officer that the person he picked out he had seen on a Facebook picture well before the trial. PCR 238.

Counsel testified that she was aware of Brittainy. She said she thought they attempted to interview her, but if people are aligned with the victim they do not have to. However, she stated that if she's picking up the phone, she has a paralegal or investigator in the office with me, which seems to take up a lot of time. She stated she tries to give those tasks out to other people and just rely on what they tell her. PCR 238-239.

Counsel confirmed that she had laid her eyes on that discovery that pointed her towards to the identification issues. PCR 239.

Counsel at the hearing initially did not recall if Brittainy was present at the scene but then thought that she heard about it and did not think she was at the scene or in the parking lot. PCR

239-240. She recalled that Brittainy heard about it and was at her apartment at the time of the incident and heard about it from others. PCR 240.

Concerning the photographs in the extraction report, counsel thought there were relevant to try to show additional weapons that could have been there. She thought that I think there were a bunch of different people involved. She noted that there were shell casings that were run over. She stated that the bar was a questionable location, at the bottom of kind of a gravel hill. PCR 241. She stated that she went to the scene several times. She indicated that the bar is in the back corner, but the people are all parked in this downhill gravel area. PCR 241. Counsel thought by common sense when people start firing the people get in cars and flee. She stated this messed up the scene inadvertently.

Counsel thought the state's theory was that Brooks just takes out a gun and starts shooting for no reason. She thought that was not supported by the facts. PCR 241-242. She thought that there were multiple guns out there and probably people shooting back and forth. However, the only information she had was about the chaotic situation and that other people were shot and the fact that people wouldn't talk about it. PCR 242.

When asked what her client said to her on whether there were other shooters, she only recalled that he said people were shooting in response to a question from her. PCR 242. She normally asks her clients, unlike some other lawyers, to tell her what happened so she can tell how to defend him. PCR 243. She said that he was unable to identify other shooters because it would have made an easier path for third party guilt. PCR 243. She indicated that he did not know a lot of people there. PCR 243.

Counsel stated that she hired Chris Watkins because she had worked with several times and had a PI license and was developing his digital forensics background. PCR 243. She stated that around 2015-2016, she thought almost every case used digital evidence because of the cellphones. She acknowledged that he wasn't former law enforcement, just someone who took an interest in cases and what he could do to assist.

Concerning the retention of a crime scene analyst when she looked back at her notes she did not know why she didn't do that. PCR 244-45. She stated that since this was an appointed case sometimes it's easier to get funding for that, but she did not make a funding request for it. PCR 244-45.

Counsel confirmed that she used Watkins and her own diligence to try to compare all other evidence she had to see if there was difference in testimony or statements. PCR 245. However, she qualified it with information in this PCR related to the last phone downloads she got, when I was asked at a prehearing, when she stated, "did I get a phone...?" because she loves going through that evidence. Counsel stated that when she went back and saw she got that, she couldn't say she went through it, because she just doesn't remember. PCR 246. Counsel stated that she has not gone through it since the trial and cannot say that there was anything significant that would have changed the outcome because she has not listened to the videos and recordings. PCR 246-47.

Concerning the trajectory evidence, counsel stated that she did not get an expert. However, she assumed that they would have told her it would have been difficult. She stated that probably the information about the defects or impacts on the cars may have been helpful, but the scene was incredibly chaotic, so scientifically, it would have been difficult. However, she indicated that it could have been a way to show why the certainty of the police conclusions could

have been challenged, but she did not know what they would have found. PCR 246. Counsel indicated that she was aware that the casings had been moved around and there were a lot of factors that were unknown, so she did not know if an expert could have helped that or not. However, she stated that she did not try. PCR 248.

Concerning the weapon, counsel asserted that she argued that the weapon could carry 9 bullets and that they found 10 bullets on the scene. PCR 248-249. She stated that it was part of her argument that there had to be more than one shooter because the guns only carried 9 bullets and there were 10 at the scene. She was additionally seeking a voluntary manslaughter charge. She stated that she learned this from her review of the discovery.

She stated that she was trying to show that the police were just laser focused on just this one person, so there were flaws in the investigation. PCR 249. She indicated that a gun was not found on him. It is unknown whether a gun used may have carried 10 bullets. She conceded it could have been one gun if it carried 10 bullets. PCR 250.

Counsel indicated she would have used Shalana and Shakira at trial. However, she acknowledged that she had Shalana's statement and Shakira's statement that she had reviewed before the trial. PCR 250-251. Counsel stated that she also had information from Shakira that she was willing to talk to law enforcement. PCR 251. She recalled that she sent Watkins to interview them. However, she recalled that they were either unwilling to talk with them or that they could not locate one of them or both.

Since Shalana and Shakira were not at the scene, counsel was questioned how they would use them at trial. Counsel acknowledged that there was a lot of hearsay in their PCR testimony. PCR 252. Counsel indicated that she would have used them to testify that they had shown and

their understanding of the conversation with Moss. In addition, she would have had them indicate that everyone needed money as it related to the reward. PCR 252. She acknowledged that everyone in this matter seemed to be connected. PCR 253. She confirmed that they were looking for who killed Brandon.

She stated that it went back to Moss's statement and information that Brooks was a member of a gang and the state's agreement to keep it out about the gang. PCR 254. She acknowledged that sometimes gangs are the motive for the crime, and she had previously introduced the gang element before. PCR 254. She stated that it was not automatically inadmissible. PCR 255.

Concerning Moss viewing the Facebook photographs, counsel stated that she was unaware of the circumstances that he was shown the photographs until the PCR testimony. PCR 255. She stated that she did not recall any attempt to interview Moss probably because she considered him a victim. PCR 256.

Concerning the issue related to her health, counsel stated that she was alert but exhausted because of the back to back trials. She stated that she blamed the amount of discovery she received, including the 13 discs, some of which were duplicative. However, she again clarified that the comment about her medication had nothing to do with those issues and was just off the cuff comment. It had nothing to do with a real medical emergency PCR 257-258.

Counsel stated that she cannot say that she went through all the discs because she now has been told that there were useful items in there that she did not recall, including the phone stuff. PCR 258. However, she testified that there was no evidence that the state put up at trial that was a surprise. PCR 259. She asserted that she wasn't surprised at their theory about one

person, one gun, but there could have been info in there that could have helped suppress the identification and could have used to show they just wanted this person and found him on Facebook. PCR 259. She concluded that if there were other things that existed that she should have been using, then she felt that she should have done that. PCR 259.

Counsel described her courtroom style as a very zealous advocate for the defense. She described herself as a pain in the butt who demands to be provided with everything from the state. Since she was not at the scene, she has to rely upon what evidence is gathered. She believes that criminal defense is fighting an uphill battle, so her strategy is to give 110% and try to get the jurors to understand and see why I was so frustrated in this case, like the 911 call not coming in. PCR 260-61.

Counsel acknowledged that sometimes her style of advocacy causes judges to get frustrated, angry and mad. PCR 261. She described having a target picture of herself in her office. However, she does not think if a judge gets annoyed with her that it should be done in front of the jury. PCR 261 -262.

Counsel indicated in this trial she got frustrated with Judge Griffith because she felt chastised in front of the jury. PCR 263. In hindsight she thinks that she may have needed to request a mistrial because it was done in front of the jury but expressly did not do so at the time. PCR 263-64.

Concerning the 911 call and the importance of introducing it in her case in chief, counsel stated that she believed it was independent evidence that dealt with the issues she was raising and was not smoke or muddying the water. PCR 264. She does not understand why the state fought to keep out the call. PCR 265. She stated that nothing in the 911 call identified the shooter, but

she thought that it supported the possibility of multiple shooters. It did include what Knightner was saying, which she had admitted, but it gave credence to her defense. PCR 265. She stated that she did not consider using the 911 calls in different parts of the case. PCR 265-66.

On third party guilt, she asserted that she used Josie Paxton. Counsel started that she did not think that there were any questions that counsel chose not to ask. PCR 266. She stated that Paxton's phone showed a lot of information. As to the third party guilt instructions, she was relying upon the instruction given by Judge Hocker in a Laurens case in which her client was acquitted. PCR 267. She had submitted the same charge in an Orangeburg case, and it was chopped down. Counsel confirmed that there is no form charge in the charge books. PCR 267. She opined that judges are careful not to make a charge on the facts. PCR 268.

On re-direct, counsel stated that she thought evidence about trajectory and ballistics would have been useful, but she has learned that it is not always necessary to put an expert up, but they can provide information for cross-examination. PCR 270.

Counsel clarified after reviewing Tr.p. 607-608 that Brittainy Dilworth was the person who paid out the reward money and whether to call her, that Dilworth was the person that would not talk with them. Further, after reviewing the October 21, 2016 email (Applicant's Exhibit 13), counsel clarified that she received the email a week before trial relating to Shakira receiving a reward. PCR 271.

Counsel clarified that she reviewed the material from Josie Paxton's phone dump and used the photos in her case. PCR 272. In addition, she stated that she reviewed all the photos from that phone dump.

However, counsel stated that she did not thoroughly go through the phone dump from Brittainy's phone, Applicant Exhibit 2, with the pictures and communications with Shalana and law enforcement investigation. PCR 272-273. Counsel also indicated that she would have utilized the recording of the discussions between the women. PCR 273. She stated that these would have been utilized in her argument regarding the identification by Fred Moss and the investigation in the case. PCR 273.

Counsel also suggested that tip and reward information from a testimonial witness would have been more favorable to the defense than the stipulation. PCR 274-275. She claimed that a stipulation often times hits or misses because both sides agree to things because they're insignificant facts, but this was not an insignificant fact.

Concerning Shalana statement of April 14, 2014 and Shakira statement. counsel recalled having those statements. PCR 275.

Added Testimony or Brian Setree by Applicant.

Setree was recalled by the Applicant. Setree testified that upon his review of all the records the extraction report and recording from Brittainy's phone was turned over by the state to counsel Zmroczek on May 25, 2016. PCR 280. He stated that it was received with 785 pages of discovery and 13 disks. PCR 281.

Testimony of Deputy Solicitor Rhonda Patterson

Deputy Solicitor Rhonda Patterson testified that she was the primary prosecutor in this case. PCR 282. She was reassigned this case in late 2014 from another prosecutor when Sally Henry was still appointed to represent the Applicant. PCR 282. Counsel learned Zmroczek was

assigned the case in the summer of 2015. PCR 282. Counsel withdrew her bond motion in September 2015. PCR 283.

On November 23, 2015, Patterson received a request for all discovery to be provided since it was unclear to counsel that former counsel Henry had transferred all the materials. PCR 285. Patterson stated that up to that point she had thought that all the prior discovery had been transferred. PCR 285. They began to again provide discovery at that point. PCR 285. A bond hearing held Dec 10, 2015 before Judge McMahon that was denied. PCR 286. Patterson stated that she received a copy of a subpoena to Midlands Crime Stoppers issued by Zmroczek on December 17, 2015. This requested a copy of any and all info/tips on incident at Cockpit. PCR 287. She understood that Johnny Gasser moved to quash the subpoena on behalf of Crime Stoppers. She was aware that counsel Zmroczek filed second motion for Crime Stoppers information which she thought Judge Griffith dealt with on June 17, 2016. PCR 287. She recalled there was a discussion about confidentiality issues with the subpoena and protecting public and anonymous tip providers. Patterson stated that she was aware calls had been made to Crime Stoppers identifying Brooks as the shooter. PCR 288. Patterson stated that her office and the sheriff's department have no control over information that comes through Crime Stoppers. PCR 288.

Patterson learned that on March 31, 2016, counsel had subpoenaed the sheriff's department. PCR 288. Patterson learned that after the subpoena the sheriff's department had provided her with so much discovery that it had to be placed in a banker's box. PCR 289-90. In a subsequent conversation with counsel, counsel Zmroczek told her that she received things from sheriff's office that she didn't think Patterson had in her possession. PCR 290.

On May 10, 2016, Patterson stated that they received a motion to compel from counsel. PCR 290. Patterson stated the motion was consistent with counsel's style and very thorough and prepared and calls us out when she thinks that she did not receive all of the discovery. PCR 290-91. Patterson stated that the motion to compel indicates that counsel has thoroughly gone through the discovery and noted page numbers from the discovery in her request for 29 particular items. PCR 291. Patterson stated that she and Gill Bell immediately sought to make sure that they had a response. She stated that they provided counsel May 25, 2016. PCR 291-92.

Patterson stated that counsel filed a second motion to compel on June 17, 2016. She stated, as with the first request, counsel was very thorough in the specific requests, again noting page numbers. According to the motion, this request was for 31 specific items. This showed Patterson counsel's thorough preparation and the fact that she was actively engaged in her client's defense. PCR 292.

Patterson also noted that counsel on May 12, 2016 went to the Sheriff's Department for an evidence review.

Patterson stated there was a status conference with Judge Griffith held on September 8, 2016. As a result of the conference, Patterson received on October 30 22 pretrial motions. PCR 293. Patterson stated that she was taken aback when she heard counsel's earlier testimony in this proceeding. Patterson thought that she could confidently say that she has never received this many pretrial motions from attorneys and Patterson's belief was that counsel was prepared. She noted that counsel kept her on her toes and challenged her with these motions. PCR 294.

Patterson noted that these motions included a Langford Motion seeking to have the case dismissed, a motion to sequester, a motion to introduce evidence of third party guilt, a motion to

disclose Lyle evidence and potential gang evidence matters. Patterson stated they held a *Jackson v. Denno* hearing, a *Biggers* hearing. Patterson stated that there was a motion to admit gun possession and other bad acts by the victim, a motion under Giglio, a motion to reveal any deals with Ms. Banks or Brooks girlfriend or mother of his children. She stated that there were motions about testifying co-defendants, motions for rap sheets, motion to prohibit gang testimony, motion for resumes of the state's experts, motion in limine for death and autopsy pictures, motion to suppress evidence of seized videos, photographs, Facebook pictures and videos of Brooks. Patterson also noted there was a motion to suppress the indictment for possession of a weapon by a convicted felon, and a motion for a jury view of the crime scene. PCR 295.

Patterson also stated that counsel provided a list of approximately 18 witnesses, which included the 911 witness, Chris Watkins, and a Zaxby employer.

Patterson stated that counsel cross-examined witnesses to the extent that the state had to respond. PCR 298.

On cross-examination, Patterson acknowledged that that transcript would reflect what motions were ruled upon by the court. PCR 299.

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARDS FOR CONSIDERATION

A. Ineffective Assistance of Trial Counsel, Generally

Applicant's claims of ineffective assistance of counsel are without merit. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant—like all other defendants—the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive

effective assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the

circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonably professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. “The burden of rebutting this presumption ‘rests squarely on the defendant,’ and ‘[i]t should go without saying that the absence of evidence cannot overcome [i]t.’ ” *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, “even if there is reason to think that counsel’s conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that *no competent lawyer would have chosen.*” *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

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

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is

all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn*, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id.* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland's* deferential standard.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466

U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt”).

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient “to show [counsel’s] errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” *Id.* at 687 (emphasis added). “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant’s burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Id.* at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the “benchmark” of the right to counsel is the “fairness of the adversary proceeding”); *cf. United States*

v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) (“[T]he threshold issue is not whether [the applicant’s] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.”).

Counsel's hindsight assessment of his performance is insufficient to meet Applicant's burden of proving deficiency. *See Wright v. Hopper*, 169 F.3d 695, 707 (11th Cir. 1999) (citing *Harris v. Dugger*, 874 F.2d 756, 761, fn. 4 (11th Cir. 1989)) (“The question of ineffectiveness is a question for the court to decide so admissions of defective performance by attorneys are not decisive.”); see also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“[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”). *See Heller v. Warden of Lee Corr. Inst.*, No. CV 5:23-3456-JD-KDW, 2024 WL 4186670, at *14 (D.S.C. July 23, 2024), report and recommendation adopted sub nom. *Heller v. Warden of Kershaw Corr. Inst.*, No. 5:23-CV-3456-JD-KDW, 2024 WL 3771788 (D.S.C. Aug. 12, 2024). The question of ineffectiveness is a question for the court to decide so admissions of defective performance by attorneys are not decisive. *Wright v. Hopper*, 169 F.3d 695, 707 (11th Cir. 1999), citing *Harris v. Dugger*, 874 F.2d 756, 761, fn. 4 (11th Cir. 1989). The same analysis was quoted in *Atkins v. Singletary*, 965 F.2d 952, 959-60 (11th Cir. 1992); *See also Edwards v. LaMarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (trial court is not obligated to “accept a self-proclaimed assertion of trial counsel”). *LaGrand v. Lewis*, 883 F.Supp. 451, 461 (D. Ariz. 1995), *aff’d*, *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998). Each case rejected the claims of ineffectiveness. The same result obtained in *Walls v. Bowersox*, 151 F.3d 827, 836 (8th Cir. 1998). A counsel’s admission of ineffectiveness is not determinative said *U.S. v. Eyman*, 313 F.3d 741, 743 (2d Cir. 2000), citing *Chandler v. U.S.*,

218 F.3d 1305, 1316 n. 16 (11th Cir. 2000) (en banc) and repeated in *Gentry v. Sinclair*, 576 F.Supp.2d 1130, 1154 n. 398, reconsideration den., 609 F.Supp.2d 1179 (W.D. Wash. 2009).

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO THE MERITS

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety, including the PCR transcript. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. *See, e.g., State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); *Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. *See* Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); *Lucero v. State*, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his

application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code related to the specific allegations :

GROUND ONE – Expert Witness Issue

1. Trial counsel rendered ineffective assistance when she failed to conduct a complete independent investigation prior to trial and utilize an expert prior to and during trial to address investigative and evidentiary matters.

This Court is aware that there is a “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. 668). “A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). “[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses “when it is reasonable to do so.” *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). “In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691.

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel’s duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 (noting that “this duty is limited to a reasonable investigation”). “[S]trategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690–91; *see id.* (“In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”). Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel’s decision not to undertake a particular investigation must be evaluated with heavy deference to counsel’s judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

In this assertion, the Applicant contends that the Applicant failed to adequately investigate the facts related to the crime scene and particularly failed to retain an expert to assist in that investigation. In support of that showing counsel presented the testimony in this proceeding by Robert Tressel, an expert in forensic homicide investigation. His testimony from the PCR hearing is summarized above at pages 24-31 of this order which is incorporated herein. In particular, Tressel’s summarized his opinions as follows:

First, he opined that he cannot determine where exactly the shots were fired. He stated that shell casings bounced and moved unless they landed on grass, weed, something that allows them to stick. PCR 139.

Second, he opined that Brandon Ratliff was killed by a single gunshot wound. He stated the shot was front to back, slightly right to left, with no deviation up or down. almost direct inline shot. PCR 140.

Third, the gunshot defects in the Saturn all came from behind and to the right side of the vehicle. He noted that the exact location could have been generalized had the trajectory analysis been done while vehicle was on scene. PCR 140.

Fourth, only two fired shell casings and two projectiles were examined for ballistics. He opined if the others had been tested, it could have indicated whether a second weapon was involved. PCR 140-141.

Fifth, there were conflicting interviews statements that were not corroborated. Tressel stated that Brittainy's statement did not corroborate Moss's statements. He stated Rakina Knightner's statement that Dink or Brooks was at the Cockpit at the time of the incident. PCR 141. Tressel indicated the records were that she only told law enforcement after she was shown the lineup. PCR 141.

Sixth, Tressel opined that the photo lineup identification by Moss was flawed. Tressel stated that it was not the process, but because Moss had previously seen social media photos of this gentleman so when he looks at the lineup, he is drawn to the image he previously saw. Tressel stated that if he had been the investigator, he would not have shown this lineup. PCR 142.

PCR 139-142. See also Applicant. Exhibit 20.

Also important to this Court's assessment under *Strickland* is whether there was a reasonable decision on the part of counsel in their investigation related to the retention of necessary experts. The Applicant was represented by appointed counsel at trial. Evidence in the record suggested that she was appointed in June 2015 on the charges arising from the incident on February 2, 2014. Counsel was an experienced criminal defense lawyer at the time since 2000. She was well versed in criminal law and aggressive in her pleadings to get all of the discovery in the matter. This Court finds that contrary to some of counsel's testimony, that in May 2016 she received a significant amount of discovery including the 13 CDs which contained certain videos and phone material. PCR 280-281. Compare, PCR 167-168. Counsel retained a private investigator who assisted her in the investigation, including visits to the crime scene, but his specialty was digital forensics. PCR 171-72

Counsel Zmroczek admitted that she did not retain other experts in the matter and could not recall why not. PCR 171. She confirmed that subsequently she does hire crime scene analysts. PCR 171. As to the ballistics, she did not don't know if an expert could have helped that or not. However, she stated that she did not try. PCR 248. Concerning the retention of a crime scene analyst when she looked back at her notes she did not know why she didn't do that. PCR 244-45.

She stated that since this was an appointed case sometimes it's easier to get funding for that, but she did not make a funding request for it. PCR 244-45.

The Applicant asserts that counsel performed below the standards of competency in failing to retain a similar expert to Tressel at the time of the trial. However, this Court does not need to resolve that determination. Counsel conceded it would have been helpful to her to have retained a similar expert to assist. However, she did retain investigator Setree who she used to review the documents and assist in the crime scene. Admittedly Setree was not a former police officer or a ballistics expert.

This Court must find however, as it related to Tressel opinions as an expert, the Applicant has failed to show a reasonable probability that the result would have been different in the trial had he been retained as an expert. Reviewing the expert's conclusions, though interesting, they do not undermine confidence in the outcome of the case.

Tressel's first conclusion is self-defeating concerning the location where the shots were fired. He opined that the shells casings were moved around the scene due to the chaos which occurred so the precise location of where the shots occurred could not be determined. This opinion is not inconsistent and cumulative with the evidence at trial which concerned the chaotic scene that was contaminated in the parking lot by the vehicles moving at the time of the incident.¹⁴ Tr.p. 174, 195, 234-237, 250-251(casings likely kicked); 252 (casings do not necessarily fall right beside the shooter and are unpredictable where they end up).

This Court finds that that the potential testimony in this area from the expert does not undermine confidence in the verdict under *Strickland*, particularly where similar evidence was

¹⁴ One officer described his arrival at the scene when there were probably 20 cars or so flying past him when he was going there. When he arrived on scene, there was dozens of people running trying to get away from the bar at that point. Tr.p. 164.

presented in the examinations at trial. There is no reasonable probability that the result of the proceeding would have been different.

In his second conclusion, Tressel opined another uncontested fact – that the victim died as a result of a single gunshot fired directly from the front. Tr.p. 358. In counsel Zmroczek's cross-examination of Dr. Ross, she developed the trajectory of the bullet on the victim. 358-360. Tressel's proposed opinion regarding the cause of death similarly did not create a reasonable probability that the result would have been different.

In Tressel's third conclusion, he indicated that the defects in the Saturn vehicle came from behind and to the right side of the vehicle. He also complained that the transport of the car from the scene to headquarters prevented a proper analysis of the exact location of the path of the bullets and possible location of the shooter in a trajectory analysis. He took issue with the movement of the vehicle from the crime scene and the use of the dowel or trajectory rods at the different headquarters location to show a trajectory and the use of an untrained person to do the dowel rod assessment. In his opinion, he suggested that a more technical trajectory analysis using the rods and lasers may have more accurately suggested the location of the shooter, rather than the generalized location.

What Tressel did not say is as important also. By the time Zmroczek was appointed in 2025, the vehicle was now longer at the scene, and the circumstances could not be replicated. His complaint about Deputy Shearer not being qualified to do the extensive trajectory analysis at the scene was interesting, but the fact is that Deputy Shearer did not do that type of analysis. AS stated, he was using the rods to assist in determining the path of the bullet in the seat of the vehicle, not the exact location of the shooter. Tressel does not take issue with the limited use. As noted, the more extensive testing was developed by counsel in her cross-examination of Deputy Shearer

about testing he did not do and was not qualified to do. More importantly, it is only speculation whether this this testing could have been done at the scene and narrowed to a specific area that an identified individual was or was not located at the precise time of the shooting.

The evidence at trial showed the location of the Moss's Saturn vehicle in the parking lot. The car was facing away from the bar with its rear end toward the bar and the entrance to the bar on the right side. Tr.p. 217, 236. In Moss's testimony, he indicated that he was on the passenger side and the victim was initially on the driver's side at the time of the start of the shooting. Tr.p. 313-314. Moss also indicated that the victim had already opened the driver's (right) side door when the shooting started. Tr.p. 316.

Deputy Shearer testified that he used trajectory rods (State Exhibit 6) whose purpose was to show the path of the projectile through an object. He pointed out State Exhibit 7 which indicated the rod going through the front driver's seat. Tr.p. 226-227. After he photographed the matter, he then searched in the vehicle for the projectiles. Tr.p. 227. He found three projectiles on the floorboard. Tr.p. 227-229. On cross-examination, counsel Zmroczek inquired about whether he was able to continue that trajectory using the rod to help understand where the gun was fired and Deputy Shearer indicated that he was not trained to do that. Tr.p. 237. There is no testimony that this experiment was done by Deputy Shearer to develop the precise location beyond the level of Deputy Shearer's training. Counsel's cross-examination reasonably limited the showing of Deputy Shearer's training, but it did not provide a basis to have his earlier use of the rods to be suppressed.

While at the scene, there were bullet impacts noted on the Saturn. Tr.p. 217. It was indicated that there were no impacts on the rear of the car. Tr.p. 219. Evidence was presented that the bullet came from the right driver's side of the vehicle into the vehicle. As stated, the driver's door was open at the time of the shooting.

Dr. Ross, the pathologist, indicated on cross-examination about the trajectory of the fatal bullet. Tr.p. 358. She indicated it went front to back, slightly to the right of the midline. Id.

Tressel takes issue with the fact that the vehicle was moved from the crime scene area, particularly where a more extensive trajectory assess could have been done with the use of rods and lasers. It was indicated that trial that while at the scene there were several bullet holes noted. Tr.p. 196. This knowledge caused an attempt to remove a door panel off to attempt to locate any fragmentations or bullets within the door while they processed Moss's Saturn. Tr.p. 196. It was stated that it became too intrusive at the scene to dismantle the car in the areas it needed to and a decision was made to secure the car and have it towed to headquarters. Tr.p. 197-98. Law enforcement felt that they needed a more controlled environment to complete the work on the car and they intended to complete a search to avoid further contamination instead of the damp conditions that morning. Tr.p. 221-222. The vehicle was submitted into evidence at headquarters. Tr.p. 199.

This Court finds that Brooks failed in his burden of proving 6th Amendment prejudice on this portion of the opinion. First, this opinion is merely cumulative to the evidence presented at trial. Although he disagrees with the timing in removing the vehicle from the scene to aid in the direction of a bullet or bullets that entered the vehicle, it is mere speculation about the impact that that decision since the car was secured prior transport. The crime scene photographs revealed the location of the car and it is uncontested that the driver's side door was open at the shooting. Although the crime scene was chaotic and contaminated by the fleeing people and vehicles from the scene, the proposed expert, like the CSI at the scene, could not and did not pinpoint an exact location of the shooter. It still has not been done. *See Woods v. Sinclair*, 655 F.3d 886, 911-13 (9th Cir. 2011) (if failure to challenge DNA evidence was exhausted, there was no prejudice because

there is no evidence that the analysis presented was or could be incorrect. Moreover, that counsel might have challenged the evidence “more robustly” does not create a substantial likelihood of a different result. *Also, Smith v. Angelone*, 111 F.3d 1126, 1132 (4th Cir. 1997) (counsel was not ineffective in failing to use a firearm expert where counsel obtained the same information and pursued the same defense via cross-examination of prosecution experts).

In his fourth conclusion, Tressel takes issue with the fact that only two (2) projectiles and two (2) fired shell casings were examined for ballistic evidence prior to trial. He speculates that if additional projectiles and casings were analyzed, additional information which could have supported multiple weapons. Again, this Court must conclude that the Applicant has failed in his burden of proof related to this testimony. This assertion is full of speculation because there has been no showing that additional testing would have resulted in the showing of different or multiple weapons. The evidence presented at trial was that no weapon had been located at the scene. Tr.p. 221, 223, 252. Further, it was indicated that the victim’s gun was a .40 caliber weapon. Tr.p. 288. Andre Bunch testified that his weapon was a .9 caliber weapon. Tr.p. 284. The casings that were collected were all identified as .22 caliber. Tr.p. 210-211, 213, 220, 228-229.

This Court finds that while Tressel’s opinion may have been helpful, it does not show deficient performance on the part of counsel Zmroczek that she was not aware of the ballistics report and the limited testing. To the contrary, at trial Zmroczek seemed fluent in addressing the ballistics and location of the casings. See Tr.p. 634-637. Counsel was aware all the shell casings were .22. Tr.p. 237.

The burden of proof in a PCR hearing on the second *Strickland* prejudice prong is upon the Applicant and not the state. He must show that absent the omission by counsel, that there is a reasonable probability that the result would have been a not guilty verdict. As to this specification,

the Applicant has wholly failed to prove the probability of a different result by failing to introduce this speculative evidence related to limited testing.

In Tressel's fifth conclusion he asserts that there were conflicting interviews and statements were not corroborated. Initially, he points out the versions that Fred Moss made prior to trial and before the jury was inconsistent with his testimony in the pretrial hearing when he stated that Brittainy had grabbed him leaving the scene. Tr.p. 133, l. 14-19. PCR 132-133. In that hearing, Fred Moss was asked to review the statement he had in front of him during the cross-examination by counsel Zmroczek. Specifically, Moss stated:

Q. Okay. Do you have your statement in front of you?

A. All right. So, uhm, I said, his friend came up with dreads and said, what's up? I also said what's up? So that's when Brittainy grabbed me and we left to the parking lot. The light skinned guy was on the dance floor. His friend or associate or whatever came up to me in dreads and said what's up? So I said what's up back. That's what happened.

Q. Okay. So at the side of my car and the same guy with dreads –

Tr.p. 133, l. 14-19.

The Applicant points out that Moss gave a statement on February 2, 2014 the night of the incident. However, this Court finds as a fact that in that February 2, 2014 statement Moss stated “Brandon grabbed me and we fled out of there...” Applicant Exhibit #5. There is no reference in the February 2, 2024 statement to “Brittainy.” The record also shows that Moss made another statement on April 14, 2014. In that statement he does not make any reference to who he was with when he left the bar. During the trial, Moss testified consistent with his February 2, 2014 statement about when they left the club with Brandon:

Q. Where was Brandon at this time?

A. Uhm, during that period of time when that was going on, I think Brandon saw more than me so Brandon came out of nowhere. I didn't know where he was but I

know he was on the other side of the bar because I was by the door and he came from this way and said, Fred, let's go. Let's go.

Q. Do you know where Andre was?

A. No.

Q. And then after Brandon came up to you and said let's go, what happened?

A. Things started escalating because we was just going back and forth and **Brandon grabbed me and we ran out the door. He snatched my arm and said let's go.** He said come on, I guess. Go ahead.

Tr.p. 309, l. 8-23. There was no reference to Brittainy. The record shows that the Applicant was not questioned during the trial about his reference to Brittainy during the in camera hearing in reference to his apparent review, at counsel Zmroczek request of his February 2, 2014 statement.

The Applicant claims that Moss should have been impeached specifically on that reference because the evidence and discovery which counsel had indicated that Brittainy was not at that location at the time of the shooting. The Applicant notes that Brittainy Dilworth gave a statement on February 2, 2014 that she was advised about the shooting by Stacie Mearcs who picked her up at her house and then they went to the hospital. Applicant's Exhibit 9.¹⁵ In Brittainy statement she indicated that Moss told her while at the hospital, that "Brandon and him and Shock tried to leave and the guy started shooting." Applicant's Exhibit 9. During counsel's cross-examination of Moss at trial, he again stated that when asked if he had been escorted from the bar stated: "no, Brandon grabbed me. We fled to the car. Security didn't touch me" Tr.p. 335, l. 12.

This Court finds as to this assertion, the Applicant has failed to show either deficient performance or prejudice. First, it is apparent that counsel in the in camera hearing had Moss

¹⁵ Tressel further asserted that counsel should have interviewed Stacie Meares to confirm that she picked up Brittainy and took her to the hospital. PCR 132-133. No evidence was presented at the hearing that Stacie or Brittainy indicated that this was not the correct factual situation consistent with her February 2, 2014 statement.

refereeing to his February 2, 2014 statement when the statement of Brittainy was made. Although counsel could have corrected it, if she noticed it, but it was not done. However, it was clear from the discovery that Brittainy learned of the shooting from a friend and had a conversation with Moss about it at the hospital. To the extent that counsel did not impeach Moss related to the apparent misstatement in the in camera proceeding, this Court finds counsel was not deficient because it cannot conclude that reasonable counsel would have always done so.

Assuming deficient performance, the Court concludes that the Applicant has failed to prove Sixth Amendment prejudice. There is no reasonable probability that the jury would have rejected Moss's testimony, consistent with his February 2, 2014 if it was pointed out earlier that when he was referencing the statement he misstated Brittainy – a person who was not there – rather than the victim in leaving the bar. Confidence in the outcome of the case was not undermined.

In his next conclusion, Tressel indicated that he had reviewed the statements of Rickena Knightner. PCR 133. Applicant Exhibit 22. Tressel stated that in her Feb. 6, 2014 interview she indicated that she knew Brooks by the name "Dink." She claimed in her next statement that she did not give that information to law enforcement on the night of the incident. On April 15, 2014, she identified Brooks in a lineup when shown by investigators. PCR 133-134. Tressel claimed that Knightner failed to indicate that she knew Brooks or that she was there until April 2014. PCR 133-134.

This Court finds that the Applicant failed to show a Sixth Amendment violation related to this information. The record shows that Rickena Knightner testified at trial, as well as in the *Biggers* hearing concerning her identification of Brooks. Tressel also reviewed the earlier statements of Rickena Knightner. PCR 133. Applicant's Exhibit 22. Tressel stated that in her Feb. 6, 2014 interview she indicated that she knew Brooks by the name "Dink." She claimed in her next

statement that she did not give the information to law enforcement the night of the incident. However, on April 15, 2014, she identified Brooks in a lineup when shown by investigators. PCR 133-134. Tressel claimed that Knightner never indicated that she knew Brooks or that she was there until April 2014. PCR 133-134.

This Court finds that the Applicant failed to prove deficient performance related to her handling the testimony of Knightner. Counsel credibly testified that she pointed out at trial the multiple conflicting statements in the pretrial and trial. PCR 188. See also, Tr.p. 99-103, 518-524. Knightner testified in the Biggers hearing related to her identification of Brooks. Tr.p. 93-104. She testified there that she was witness to the shooting. Tr.p. 93. She was presented with the photo lineup from April 15, 2014. She stated that prior to the lineup she had indicated that she thought she could pick out a suspect. She indicated that she saw the person she identified on February 2. She described seeing him in the club that night and during the actual shooting. Tr.p. 95-96. She stated that she knew the person to be known as "Dink." Tr.p. 96. She stated that she had seen that person four or five times before. Tr.p. 96-97. However, she indicated that she did not know his real name. Tr.p. 97. She noted that the Applicant's hair was shorter but claimed she identified him by how his face looked. Tr.p. 97-98.

During the *Biggers* proceeding, counsel Zmroczek immediately challenged her with the fact that she did not include that she knew the Applicant as Dink in her February 6 statement. Tr.p. 99. She also pointed out that Knightner failed to tell them she knew who did the shooting. Tr.p. 100. Counsel also pointed out that Knightner used a false name in her statement and lied. Tr.p. 101. Knightner indicated that she did not want to get involved. Tr.p. 101.

During her trial testimony Knightner testified similarly. She testified that she knew Dink because she was a friend's baby father. Tr.p. 501-502. The night of the shooting, she indicated that

she saw Dink before the incident in the bar. Tr.p. 503. After hearing some commotion, she testified at trial to the following:

Q. What do you remember happening next?

A. When I standing there, I started looking up and that's when I heard all the commotion, then that's when I seen - that's when I seen Dink going back like this right here (indicating) with the gun. I said, no, Dink. No, Dink. Then he put his arm back and he said like get down. And from that point on I got down and did that (indicating) against my car and then another car pulled behind my car and then he got in the car and left.

Q. Let's just slow down a little bit. So where did you see Dink coming from?

A. From on the sidewalk coming from the top of the hill.

Q. How did you see him coming towards you?

A. He was like - like sideways. Like his back, his back was turned like coming down like sideways down the sidewalk. His body was facing up but he was coming like sideways down the sidewalk.

Q. How close did he get to you?

A. Close. Probably close as me and him to each other (indicating.)

Q. What were you saying?

A. I said, no, Dink. No, Dink.

Tr.p. 506. Knightner indicated that she was scared at the time because she had never been in a similar situation. Tr.p. 506. She also confirmed that she called 911, but that she did not give them her name. Tr.p. 508-509. She later met with law enforcement and did not tell them she knew who the shooter was because she did not want to get involved although she gave a description of the shooter and later met with SLED. Tr.p. 509-510. Subsequently she admitted that she identified Brooks in the lineup. Tr.p. 512-513. However, during the line-up, Knightner again failed to tell them that she knew Brooks. Tr.p. 513-514.

On cross-examination by counsel Zmroczek, she developed that Knightner knew Brooks and had met him about five times, initially when he lived with one of her friends. Tr.p. 519. Although she did not want to get involved, she admitted calling 911 and did not give her real name, but her alias Shontay. Tr.p. 519-520. She admitted that she also gave the statement on February 6 under her alias. Tr.p. 519. Knightner indicated that the first time she indicated that she knew Dink was a couple of weeks after she made the sketch with Etheredge. Tr.p. 519-520. Knightner indicated in her statement on February 6, 2014, that she did not know the shooter which she admitted was a lie. She acknowledged that she spoke to Brooks at the club that night but denied it was a full-out conversation. She admitted that she gave another statement on April 15, 2014 and said she was 99% sure that person was the shooter. Tr.p.522. Counsel Zmroczek then proceeded to impeach Knightner on the number of untruths she had given on her name and whether she knew the shooter. Tr.p. 522-527.

Tressel pointed out that had he known that Knightner knew Brooks previously that he would not have shown her a photo lineup. While interesting, the evidence in the record is that at the time of the line-up, law enforcement was unaware that Knightner knew Brooks. On cross-examination, counsel developed through Investigator Dykes that Knightner indicated prior to the lineup when asked if she knew Brooks outside of that evening that she had seen him around. Tr.p. 90, 1. 19-21.

This Court finds that counsel was not deficient in her handling of Rickena Knightner. Her credibility was attacked in the pretrial hearing and trial based upon the developing inconsistencies in her statements. The fact that she knew Brooks prior to the incident and line-up was presented in both settings for the trial judges and the jury's consideration. The Applicant has also failed to prove prejudice. Even if the photo line-up had been suppressed due to her prior knowledge of

Brooks, her remaining testimony would still have been admissible in her description of the crime. The Applicant has failed to prove a probability that the result in the proceeding would have been different. Moreover, because Knightner knew Brooks prior to being shown the photographs, the likelihood of misidentification was substantially less. *See United States v. Burgos*, 55 F.3d 933, 942 (4th Cir. 1995) (finding that the likelihood of misidentification is substantially less when a witness is asked to identify someone with whom he is acquainted, rather than a stranger).

In the next conclusion, Tressel contended that the speculation about the involvement of a second weapon could have been added by his presentation. As noted above in the summary of his conclusions, he is aware that some guns may hold up to 10 cartridges, even though the magazine will only hold nine cartridges. At trial, counsel sought to introduce two images of a .22 cal. handgun collected off a cellphone by investigators shortly after the murder. (Tr.p. 544-546). The cellphone belonged to Josie Paxton who was a patron at the Cockpit Bar and Grill on the night of the murder. Paxton was the former girlfriend of Antonio Williams. Counsel contended that the alleged relevance to the two images was a connected text message that Williams had sent to Paxton in which he stated, "my home dog just shot my other home dog." Despite testifying that she did not see the shooting take place, Paxton informed law enforcement, based off the text message, that Williams may have information regarding the shooting. Law enforcement eventually met with Williams and dismissed him as a suspect. Counsel Zmroczek Defense Counsel sought to introduce the photo for the purpose of proving third party guilt. (Tr.p. 544-546).¹⁶ The trial court denied counsel's request to present the pictures. In reaching this conclusion the trial court stated:

Absolutely not. That's just a picture on someone's cell phone of a gun that -- I don't know, you've got a picture and suspicion and five steps away from an actual -- I

¹⁶ In light of the counsel's attempts to incriminate Antonio Williams, the State presented several witnesses who testified that Williams could not be mistaken for Applicant in light of the fact that Williams was much larger than Appellant and had a distinctive tattoo of an "L" on his forehead.

mean, I don't understand how that's not confusing to the jury, a picture on a cell phone of a gun and we don't have a gun here. There's a .22 caliber. There's testimony the gun that was fired was a .22 caliber because the shell casings were there and there's a .22 recovered from the victim. Aside from that that's about all we got.

(Tr.p. 546, l. 14-23).

In finding the trial judge did not abuse his discretion in denying admission of the photographs, the Court of Appeals held :

Appellant asserts the circuit court erred by excluding from evidence two photographs found on the cell phone of a bar patron present at the shooting and in communication with a suspect. He argues the photographs showed a gun of the same caliber as shell casings found at the scene and, thus, were relevant to his defense of third party guilt. He maintains that the photographs "would have assisted the jury in determining whether [he] was the person who shot Brandon or whether someone else was the triggerman." We conclude that the circuit court acted within its discretion in excluding the photographs from evidence. *See Dickerson*, 395 S.C. at 116, 716 S.E.2d at 903 ("The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion.").

It is well-established that a criminal defendant's offer of evidence concerning a third party's commission of the charged crime "must be limited to such facts as are inconsistent with his own guilt[] and to such facts as raise a reasonable inference or presumption as to his own innocence." *State v. Gregory*, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (quoting 16 C.J. 560) (cited with approval in *Holmes v. South Carolina*, 547 U.S. 319, 328, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). "[E]vidence [that] can have [no] other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." *Id.* (third alteration in original) (quoting 16 C.J. 560).

[B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by

fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id. at 104–05, 16 S.E.2d at 535 (emphasis added) (quoting 20 Am. Jur. 254).

[T]he *Gregory* rule requires the trial judge to consider the probative value or the potential adverse effects of admitting proffered third-party guilt evidence.” *State v. Swafford*, 375 S.C. 637, 641, 654 S.E.2d 297, 299 (Ct. App. 2007) (citing *Holmes*, 547 U.S. at 329, 126 S.Ct. 1727). In *Holmes*, the United States Supreme Court characterized the *Gregory* rule's purpose as focusing “the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues.” 547 U.S. at 330, 126 S.Ct. 1727. The *Holmes* court recognized that evidence of third-party guilt is appropriately managed by evidentiary rules such as Rule 403, SCRE. 547 U.S. at 327, 126 S.Ct. 1727. Rule 403 states, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). The appellate court reviews the circuit court's Rule 403 ruling “pursuant to the abuse of discretion standard and [is] obligated to give great deference to the [circuit] court's judgment.” Id.

Here, when defense counsel proffered the photographs at trial, she explained that the gun from the photographs was a .22 caliber gun that held nine .22 caliber “shell casings or bullets” and nine shell casings were collected from the scene after the shooting. However, the record indicates that ten, rather than nine, shell casings were collected at the scene. Counsel stated that the photographs were discovered the day after the shooting on the cell phone of Josie Paxton, who was inside the Cockpit at the time of the shooting. Counsel also stated that Josie gave a statement to police and they took her phone because Antonio “Bling” Williams, her ex-boyfriend, “texted her and called her and told her that [his] home dog just shot [his] other home dog.” Yet, there is no evidence in the record substantiating the contents of Bling's alleged text to Josie. Ultimately, the circuit court ruled that the photographs were inadmissible because they would be confusing to the jury. In light of the other evidence presented at trial, this ruling was correct.

Josie Paxton testified that she was inside the Cockpit when the shooting occurred. She spoke with the police later that morning and advised them that Bling had information about the shooting. However, she did not identify Bling as the shooter. Sergeant Cathy Etheredge, a deputy with the Lexington County Sheriff's Office, spoke to Josie in a parking lot near the Cockpit and took photographs of text messages on Josie's cell phone. Sergeant Etheredge stated that Josie was agitated with Bling, with whom she had just spoken by phone, and she was upset about the

shooting. Sergeant Etheredge also stated that Bling “showed up at the club where [Josie] was,” but she did not state when this occurred. Sergeant Etheredge later met with Bling as part of her investigation, but she did not provide any useful information about this interview during her testimony.

Appellant maintains that the probative value of the photographs was high because the police had not recovered a gun connected to the shooting and the photographs cast doubt on Appellant's guilt by showing “Bling was the shooter.” Appellant also maintains that the jury would not have been confused or misled “into believing the photographs purported to be anything except what they were—evidence of a gun capable of shooting the same caliber of bullets as those shot at Brandon and of holding the same number of bullets as shell casings found at the scene.” However, ten shell casings were found at the scene, and Appellant has asserted the gun in the photographs could hold only nine bullets. Further, there is no evidence placing Bling at the scene before or during the shooting. The only testimony placing Bling at the Cockpit was from Sergeant Etheredge, who stated that Bling “showed up at the club where [Josie] was” without any indication of when this occurred.

Moreover, Josie described Bling as tall with dreadlocks that extended below his shoulders and a tattoo of the letter “L” in the middle of his forehead. On the other hand, Fred, who interacted with the shooter, never mentioned seeing any tattoos on him. Rather, he described the shooter as approximately five feet, eight inches tall with shoulder-length dreadlocks, dark skin, and small eyes. Fred also described the shooter as short. Likewise, Sergeant Etheredge recounted Rickena's description of the shooter as small in stature with small eyes and dreadlocks. In contrast, Sergeant Etheredge described Bling as a “taller” black male with long dreadlocks and an “L” tattoo in the center of his forehead. Therefore, the evidence indicates that Bling did not match the description of the shooter.

Based on the foregoing, we conclude that Appellant has not presented the requisite “train of facts or circumstances” tending “clearly to point out [the] other person as the guilty party.” *Gregory*, 198 S.C. at 105, 16 S.E.2d at 535. Therefore, there are no exceptional circumstances warranting a reversal of the circuit court's exclusion of the photographs from evidence. *See Collins*, 409 S.C. at 534, 763 S.E.2d at 28 (“A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.”). We conclude that the circuit court acted within its discretion in excluding the photographs from evidence. *See Dickerson*, 395 S.C. at 116, 716 S.E.2d at 903 (“The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion.”); *Pittman*, 373 S.C. at 570, 647 S.E.2d at 166–67 (“An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.”).

State v. Brooks, 428 S.C. 618, 634, 837 S.E.2d 236, 244–45 (Ct. App. 2019).

The Applicant urges that if counsel had argued that a .22 could carry 10 cartridges or more rather than only 9 cartridges that the result would have been different at trial, and the evidence would have been admitted. This Court must conclude that the Applicant has failed to prove prejudice. Other than .22 spent cartridges found at the scene; there is no evidence other than speculation about the actual weapon used or that the particular magazine that was in the unknown weapon. It remains that 10 casings were found at the scene and now, the Applicant in this proceeding has presented evidence that any .22 weapon can use 10 cartridges, even if there is a nine (9) cartridge magazine or more that their expert presented. The Applicant's suggestion that because a posted photograph of Williams with a .22 that according to Tressel was capable of dispensing ten (10) rather than nine bullets is speculative and does not satisfy the condition precedent required under *Holmes* and *Gregory*. Assuming arguendo if Brooks used a .22, it could also have dispensed 10 spent cartridges. There is no reasonable probability that the result of the proceeding would have been different had this potential been made at trial.

In his last conclusion, the Applicant, through Tressel, also contends that the identification of Brooks by Fred Moss is flawed because of the interactions with Brittainy Dilworth and Shalana. He contends that he could have been useful in developing this information for counsel. This Court finds that under this specification the Applicant has failed to prove ineffective assistance of counsel.

First, some limited, but critical information about the interactions between Moss and third parties prior to the lineup was known by the jury and judge and defense counsel during the trial.

The defense counsel and the judge were aware at trial of these salient points through the evidence presented:

- Moss was present with the victim at the incident.

- Moss met with Brittainy the day of the incident at the hospital and described the incident. Brittainy's statement. Feb. 2, 2014. (Applicant's Exhibit #8).
- Moss met with Law Enforcement at the hospital and gave his statement. Tr.p. 328, 337-338.

The Applicant contends that counsel was deficient because he did not use Shalana Weise (Thornton) or Brittainy to challenge the identification by their efforts to locate the shooter. As noted above, in the *Neil v Biggers*, 409 U.S. 188 (1972) hearing and trial, Moss was unequivocal that he had been shown a photograph the Applicant prior to the line-up.

- Moss was shown a Facebook picture of Applicant prior to the lineup .but not by law enforcement. Tr.p. 126-28. Moss was shown the picture by Brittainy, not law enforcement. Tr.p. 126, 129.
- Moss told law enforcement at the line-up that he had been shown a picture from Facebook. Tr.p. 127-128.
- Moss identified Applicant in the line-up on April 14, 2014.
- Counsel argued for suppression of the photograph due to the exposure to the Facebook photograph from Brittainy. Tr.p. 135-139.
- Moss identified Applicant at trial. Tr.p. 327-328.
- Counsel objected to the identification of the line-up, subject to her previous objection. Tr.p. 323, l. 7-12.

Counsel Zmroczek stated that she was aware of this information that Moss was shown a Facebook picture prior to the lineup from the discovery. PCR 238-240. She argued that that the fact Moss had been shown pictures from social media by both and that a group was researching

social media was a concern. Tr.p. 138. The trial court indicated that it was something for cross-examination. Tr.p. 138-139.

Recently the Court of Appeals held in reversing the grant of post-conviction relief where the witness had viewed matters on Facebook:

The first prong of *Neil v. Biggers* requires finding that the identification process was unduly suggestive in order to exclude an identification. **Because law enforcement was not involved in the process Alston employed to identify Upson, the process could not have been unduly suggestive.** *See Perry*, 565 U.S. at 248, 132 S.Ct. 716 (“[W]e hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.” (emphasis added)). If the first prong fails, the court does not need to reach the second prong. *Id.* at 235, 132 S.Ct. 716 (upholding the trial court's conclusion that because the witness “spontaneously” and “without any inducement from the police” identified the defendant, the reliability of this identification was for the jury to consider); *State v. Dukes*, 404 S.C. 553, 557–58, 745 S.E.2d 137, 139 (Ct. App. 2013) (“If the court finds [an] identification did not result from impermissibly suggestive police procedures, the inquiry [under *Neil v. Biggers*] ends there and the court does not need to consider the second prong.”).

Upson v. State, 442 S.C. 359, 368, 897 S.E.2d 564, 569 (Ct. App. 2024), reh'g denied (Mar. 1, 2024), cert. denied (Sept. 24, 2024) (the witness pulled a photograph from Facebook before speaking with law enforcement and had received from .” (emphasis added) and was later presented with a list of names that included Upson's name). *See also State v. Crummey*, 443 S.C. 94, 103, 902 S.E.2d 391, 396 (Ct. App. 2024) (We are not persuaded by Crummey's argument that the lineup was unnecessary, unreliable, and cumulative because Dulce had already identified him from Facebook).

This Court further finds that Sixth Amendment prejudice has not been shown by the failure to present Brittainy or Shalana. Viewing Shalana's testimony as a whole as set forth above, she indicated that the meetings with the group were to help Brittainy and the victim's family to locate

the shooter and nothing else. The development of the Facebook photograph and others developed from the information the group had gathered and ultimately resulted in Moss's acknowledgement that Dink/Brooks was the shooter. This Court must conclude that the information that existed at the time of the trial which related to the interaction specifically with Brittainy was presented that he had seen the Facebook picture and it was shown to him by Brittainy was presented and known by the jury and subjected to the cross-examination by counsel. Although Shalana's testimony may have been a more robust presentation about their attempts to locate the identity of the shooter, the critical point that the Facebook photo was presented to the jury. In light of that fact, as well as the other information about the identification by Knightner required this Court to conclude that there is no reasonable probability the result would have been different.

2. Trial counsel rendered ineffective assistance when she failed to request a continuance and/or properly address, handle or preserve the following matters:
a) The need for additional time to prepare due to counsel's trial schedule and medical concerns; and b) The failure to receive discovery in a timely manner and/or receive complete discovery. Additionally, failure to properly handle the admission of hearsay testimony regarding information provided to law enforcement.

In the second allegation of ineffective assistance of counsel the Applicant contends that counsel was deficient in failing to request a continuance in the case. He asserts that counsel was faced with preparing multiple serious felony cases at the time and had not fully reviewed the discovery. In addition, she claims to have been under serious medical issues at the time. Based upon the testimony presented and a review of the Public Index, this Court makes these initial findings.

Counsel Zmroczek made a notice or representation on May 6, 2015 with motion for disclosures of evidence. According to the Public Index and published reports, among other of her cases, she was representing Michael Juan Smith in the so-called 5 Point shooting. The State v.

Smith case was tried from August 10-17, 2015 and resulted in a verdict on August 17, 2015. See C-Track. *State v. Michael Juan Smith*, Initial Brief of Appellant, Appellate Case No. 2015-001905. Counsel Zmroczek also indicated that she was involved in the defense in the bakery case. This was the matter of *State v. Troy Stevenson*, involving the death of Kelly Hunnewell. In Richland County. According to published reports, this prosecution initially resulted in a mistrial on June 23, 2015 and Stevenson was later acquitted in a retrial on December 14, 2018.

The Applicant's case was tried October 31, 2016 through November 3, 2016 before Judge Griffith. According to the testimony of the primary prosecutor, the following salient points are relevant. After inquiry was made to the solicitor on November 23, 2015, Patterson received a request for all discovery to be provided since it was unclear to counsel that former counsel Henry had transferred all the materials. PCR 285. Patterson stated that up to that point she had thought that all the prior discovery had been transferred. PCR 285. They began to again provide discovery at that point. PCR 285. Patterson stated that she received a copy of a subpoena to Midlands Crimestoppers issued by Zmroczek on December 17, 2015. This requested a copy of any and all info/tips on incident at Cockpit. PCR 287. She was aware that counsel Zmroczek filed second motion for Crimestoppers information which she thought Judge Griffith dealt with on June 17, 2016. PCR 287. Patterson learned that on March 31, 2016, counsel had subpoenaed the sheriff's department. PCR 288. Patterson learned that after the subpoena, the sheriff's department had provided her with so much discovery that it had to be placed in a banker's box. PCR 289-90. In a subsequent conversation with counsel, counsel Zmroczek told her that she received things from sheriff's office that she didn't think Patterson had in her possession. PCR 290.

On May 10, 2016, Patterson stated that they received a motion to compel from counsel. PCR 290. The motion to compel indicated that counsel had thoroughly gone through the discovery

and noted page numbers from the discovery in her request for 29 particular items. PCR 291. Patterson stated that she and Gill Bell immediately sought to make sure that they had a response. She stated that they provided the response to counsel on May 25, 2016. PCR 291-92.

Counsel made a second motion to compel on June 17, 2016. She stated, as with the first request and listed 31 specific items. PCR 292.

Patterson also testified that on May 12, 2016 counsel went to the Sheriff's Department for an evidence review. A status conference with Judge Griffith was held on September 8, 2016. As a result of the conference, Patterson received on October 30, twenty-two (22) pretrial motions. PCR 293. This activity gave the prosecutors a reasonable impression that counsel was prepared. PCR 294.

These motions included a *Langford* Motion seeking to have the case dismissed, a motion to sequester, a motion to introduce evidence of third party guilt, a motion to disclose *Lyle* evidence and potential gang evidence matters. Patterson stated they held a Jackson v. Denno hearing, a Biggers hearing. Patterson stated that there was a motion to admit gun possession and other bad acts by the victim, a motion under *Giglio*, a motion to reveal any deals with Ms. Banks or Brooks girlfriend or mother of his children. She stated that there were motions about testifying co-defendants, motions for rap sheets, motion to prohibit gang testimony, motion for resumes of the state's experts, motion in limine for death and autopsy pictures, motion to suppress evidence of seized videos, photographs, Facebook pictures and videos of Brooks. Patterson also noted there was a motion to suppress the indictment for possession of a weapon by a convicted felon, and a motion for a jury view of the crime scene. PCR 295. What it did not include was a motion for a continuance.

Patterson also stated that counsel provided a list of approximately 18 possible witnesses, which included the 911 witness, Chris Watkins, a Zaxby employer of the Applicant.

Importantly, counsel, in her testimony questioned her ability to go through the CD disks of discovery that she received which included phone data, among other matters. It is important to note that the Applicant's PCR investigator indicated that upon his review of all the records the extraction report and recording from Brittainy's phone was turned over by the state to counsel Zmroczek on May 25, 2016. PCR 280. He stated that it was received with 785 pages of discovery and 13 disks. PCR 281. These are the matters at issues in some of the testimony.

The Applicant contends that counsel should have moved for a continuance prior to the trial. This Court respectfully finds that counsel was not deficient and has failed to prove prejudice. The granting or denial of a motion for a continuance is within the sound discretion of the trial judge whose ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant. *State v. Dingle*, 279 S.C. 278, 306 S.E.2d 223 (1983).

When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

State v. Motley, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968). Further, a party cannot complain of an error which his own conduct has induced. *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984). *State v. Babb*, 299 S.C. 451, 454–55, 385 S.E.2d 827, 829 (1989).

This Court finds that counsel had sufficient time to prepare for the trial and was prepared for the trial. As noted in her testimony she was not surprised by any of the state's testimony that was presented. The record supports that the large dump of discovery did not occur on the eve of the trial but in May 2016 five months before the trial. Her action on her motions to compel on May

10, 2015 and June 17, 2015 reflects that she was actively reviewing the discovery throughout the period. The Applicant has failed to prove that there was any particular in any final disclosure after the September 8, 2016 status conference with Judge Griffith that would mandate the trial court to grant a continuance.

This Court is aware that counsel had in 2016 and has an active criminal defense practice with high profile cases on occasion. However, the Court must conclude that the Applicant has failed to prove that counsel was engaged in multiple actual trials in the month leading up to the October 30 trial that specifically impacted on her ability to prepare. The assertion that she had back to back cases suggested that she was in trial in different cases consistently leading up to this trial.

Further, in this proceeding, there is an assertion that counsel suffered from medical issues during the trial based upon a comment she made in passing during the charge conference. This Court finds credible counsel clarification that there was no medical issue prior to or during trial that necessitated a continuance motion. Counsel stated that she suffered from autoimmune disorder which she tries to keep under control. Counsel was directed to Tr.p. 681, l. 24. In that passage during the exceptions to the jury charges, counsel sought to renew an objection under *Belcher* and indicated “but also, and I may have missed something because, Judge, I try to pay attention, but I did not take my medication this morning...” Tr.p. 681, l. 24- 682, l. 1. Counsel stated that she also has ADHD. However, she stated that anyone who knows her can tell when she does not take her medication. She stated that this was a “tongue and cheek comment” because she believed that she argued the jury charges ad nauseum. PCR 171, l. 6-11. She again clarified that the comment about her medication had nothing to do with those issues and was just off the cuff comment. It had nothing to do with a real medical emergency PCR 257-258.

This Court also finds that the Applicant failed to show prejudice. The focus appeared to be one the recorded discussion among the females in their attempt to locate the actual shooter. In the PCR proceeding, counsel had no recollection about reviewing the discussion which was in the extraction that was provided to counsel in the May 2016 discovery disclosure. It is not surprising that the victim's girlfriend was trying to solve the death of Brandon with her friends. As noted above, counsel was aware of the written statements that were presented by Shalana and Brittainy as well as the fact that Moss was shown the photograph. In addition, she inquired Moss about Moss and Brittainy meeting with people at the outset other her cross-examination of him. Tr.p. 129. 138. PCR 238-240. Counsel had similar information at the time of the trial.

This Court finds that the Applicant failed to prove that had counsel made the motion to continue at the October 31, 2016 trial that there is a reasonable probability that the trial judge, in his discretion, would have granted it.

The Applicant also complains that counsel erred in his failure to object to the introduction of alleged investigative hearsay. The Applicant contends that Investigator Dykes testified about his interview with Sandra Kiete revealed hearsay information to the jury.

During the pretrial proceeding, on cross-examination of Investigator Dykes by counsel Zmroczek, Dykes testified that Applicant's name came up from Sandra Kiete who has a son names James Kiete who knows Brooks and his family. Tr.p. 59, l. 4-10. Investigator Dykes indicated that they knew his nickname at the time. Tr.p. 59.

Subsequently during the trial, Investigator Dykes testified that on February 10, 2014, Dykes assisted Detective Black with interviewing Sandra Kiete on information in reference to the incident. Tr.p. 483. Without saying what they were told, they indicated that they received

information about the case and the names associated was “Dink.” Tr.p. 483. Investigator Dykes later indicated that after they spoke with Sandra Kiete they spoke with her son, James Kiete. Tr.p. 490.

Counsel was referred to the discussion at trial about Sandra Kiete. Tr.p. 141. PCR 174-175. In that discussion, counsel argued that Investigator Dykes had indicated that he was provided with information from Sandra Kiete, but counsel claimed that she had never received a statement from her. She indicated that her information was the Kiete had indicated that Dink looked like the prepared sketch. Tr.p. 141. Counsel had complained that she could not locate her, had never been provided with contact information and claimed that a picture of her also resembles the sketch. Tr.p. 141. Counsel claimed that Sandra Kiete was the Applicant’s initial accuser and should have been presented in court. Tr.p. 142. At that time, Solicitor Patterson advised the trial judge that they do not have a statement from Kiete, but that it was included in Investigator Dykes’s report that she came to headquarters and talked to them about the information that they heard from her son, which would be hearsay and that her son heard it from someone else and that they did not intend to call her or her son. The State indicated this was not the only source of the Applicant’s name. Tr.p. 142-143. At that time, counsel requested the name of others who the others were.

Subsequent to this 2016 trial, in 2017, in *State v. King*, 422 S.C. 47, 66–68, 810 S.E.2d 18, 28–29 (2017), the Supreme Court cautioned against the use of so-called investigative hearsay. In that opinion the Court stated its reasoning as follows:

. . . we believe it is necessary to caution prosecutors against using “investigative information” as it appears this is an attempt to circumvent the rules against hearsay. *See, e.g., Lewis v. State*, 80 So.3d 442, 444 (Fla. Dist. Ct. App. 2012) (concluding that investigating officer's testimony that he developed a suspect and, in turn, a photographic lineup, after speaking with two non-testifying witnesses constituted inadmissible hearsay; stating, “[w]here the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement offered to prove

the defendant's guilt, the testimony is not admissible" (citation omitted)); *State v. Magee*, 143 So.3d 532, 537 (La. Ct. App. 2014) ("The fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, but may not be used as a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule." (emphasis added)).

We are persuaded by the explanation offered by the Supreme Court of Kentucky. *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015). In *Ruiz*, the court attempted to dispel any misconception that testimony from an investigating officer regarding the content of out-of-court statements was admissible. Specifically, the court explained:

An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. If it is relevant and probative only to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. And, as any other statement, if the out-of-court statement made to a police officer has relevance and probative value that is not dependent upon its truthfulness, and it is not offered into evidence as proof of the matter asserted, then by definition the evidence is not hearsay.

* * *

** In such circumstances, because the out-of-court statement would not be subject to the hearsay rule, its admissibility would be determined by application of other rules of evidence. So-called "investigative hearsay" is still, fundamentally, hearsay. There is no special kind of evidence known as "investigative hearsay;" we have no rule of evidence called the "investigative hearsay rule." Use of the term imparts no *68 meaningful information to the analysis that is not otherwise supplied by the word "hearsay."

Ruiz, 471 S.W.3d at 680-82 (citations and footnote omitted).

Based on this reasoning, we caution against the use and admission of "investigative information." While it may be couched in terms of explaining an officer's conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state's rules against hearsay.

State v. King, 422 S.C. 47, 66-68, 810 S.E.2d 18, 28-29 (2017).

This Court finds that counsel was not deficient in failing to object. First, during the pretrial proceeding, counsel opened the door in her inquiry of Investigator Dykes which created the response concerning Sandra Kiete. Tr.p. 59, l. 4-10. However, this was a preliminary proceeding

with limited applicability of the rules of evidence. *State v. Pressley*, 288 S.C. 128, 341 S.E.2d 626 (1986) (use of hearsay evidence in hearing before judge to determine admissibility of evidence was proper); See SCRE Rule 104,1101. *See also U.S. v. Matlock*, 455 U.S. 164 (1974).

In the trial setting before the jury, the Applicant questions the testimony of Investigator Dykes as it related to Sandra Kiete. In that testimony, the following unobjected inquiry occurred:

Q. What was the next thing, if any, that you did in this case?

A. On February 10th, 2014, I assisted Detective Black with interviewing Sandra Kiete on information received in reference to this incident.

Q. Without saying what she may have told you, did she give you some information about this specific case?

A. She did.

Q. Was it a name associated with the case?

A. It was.

Q. What was the name?

A. The name Dink.

Q. At this point was you familiar with that name?

A. I was.

Q. How was you familiar with that name?

A. I had received a voice mail, a anonymous voice mail two days prior saying that, all it said was a male voice said that Dink was the shooter in this incident. Q. How many voice mails did you receive?

A. Total two.

Q. Did they appear to be the same voice?

A. They did.

Q. Were you able to save those voice mails?

A. I was not.

Tr.p. 483, l. 2-25.

The Applicant contends that counsel should have objected to this evidence as “investigative hearsay” and was deficient in failing to do so. “[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.” *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). Neither the trial court or the parties at the time of the trial were aware of the future decision in *King* and its later cautionary statement. Our courts have “never required an attorney to be clairvoyant or anticipate changes in the law.” *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). E.g., *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law....” (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), overruled on other grounds by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”).

This Court finds that the admission of this evidence in 2016 was consistent with the *Brown* decision. As such counsel could not be found deficient. However, this Court is aware that in 1996, the Supreme Court found that PCR relief needed to be granted and distinguished *Brown* in *German v. State*, 325 S.C. 25, 27, 478 S.E.2d 687, 688 (1996). The Court held therein that in *Brown*, statements regarding the defendant's neighborhood were not hearsay because they were not offered to prove the truth of the matter asserted. Rather the statements were offered to explain why the police began their surveillance. The *German* decision found *Brown* was distinguishable because the statements in *Brown* did not refer specifically to the defendant's character. The statements referred to drug activity in the apartment complex in which the defendant lived. However, in granting PCR in *German*, the Court held counsel should have objected to these statements as improper comments on petitioner's character and her failure to do so prejudicial. The Court also

cited *State v. Pollard*, 260 S.C. 457, 196 S.E.2d 839 (1973) which reversed the defendant's conviction because testimony was admitted that a police officer signed a warrant based upon information received in his investigation. The Court held the testimony was objectionable hearsay. The German court also cited *State v. Dennison*, 305 S.C. 161, 406 S.E.2d 383 (Ct.App.1991), the Court of Appeals followed *Pollard* in a case where evidence was that informants told the witness that the defendant was engaged in distributing crack. The Supreme Court concluded in *German* that *Pollard* and *Dennison* were incorrectly decided. The *German* court held that the statements were not objectionable as hearsay. However, they were objectionable as improper comments on the defendant's character. *Cf. State v. Middleton*, 441 S.C. 55, 66, 893 S.E.2d 279, 284 (2023) (finding evidence that the defendant was avoiding appointments was not admissible under *Brown* or *King* since there was no appropriate nexus to its admissibility for relevance).

The above was the landscape of the law at the time Brooks was tried. The comment about being given a name of Dink was not hearsay and the evidence was limited to the fact that a name was given and the context did not go to the truth of the matter asserted. Since *King* was decided after the trial, counsel was not deficient.

Even if this Court finds *arguendo* that counsel was deficient, the Applicant failed to show prejudice by the failure to object. The evidence shows that the investigator was already aware of "Dink" from other sources. In addition, evidence was presented about the lineups and identifications made by Moss and Knightner. There is no information relayed in comment by Kiete that if removed undermines confidence in the verdict. The Applicant has failed in showing a reasonable probability that the result would have been different if there had been an objection.

3. Trial counsel rendered ineffective assistance for failure to properly handle the testimony of Fred Moss, to include failure to address the matter of gang testimony prior to and during trial and failure to conduct an effective cross-examination. Appellate counsel rendered ineffective assistance for failure to raise the motion for mistrial on appeal.

In his third allegation of ineffective assistance of counsel, the Applicant contends that counsel failed to adequately address that the comment about “gang”. In Moss’s testimony, when asked if the atmosphere changed at the club, Moss stated: “Well, yeah, That’s one of the reasons why - - It’s a place where a lot of gang members and everything hang out and just people who don’t have anything better to do.” The record at trial showed that the jury was sent out, there was an argument by counsel and a request for a mistrial by counsel Zmroczek. Tr.p. 303-307. The trial record also showed that a curative instruction was entered related to the testimony. The curative instruction read as follows:

THE COURT: Folks, when we took a break, the Court took up a matter and I'll just give you an instruction Some prior testimony of the witness included some of his observations of some of the patrons in the club, whether or not they were members of any type of clubs or gangs, that type of thing. That's not relevant to the trial here. He said it was only his second trip in here. That testimony is stricken. I would request that you not consider that testimony and we'll continue on with the testimony from there. Is that sufficient, Ms. Zmroczek?

MS. ZMROCZEK: Yes, Your Honor. Thank you.

Tr.p. 306-307.

Counsel testified that this was a surprise because of what had occurred when Moss made reference to “gang.”¹⁷ She acknowledged that the trial court gave a curative instruction related to this comment and denied a motion for a mistrial. PCR 208. Tr.p. 304-307. Counsel agreed that

¹⁷ Counsel had filed a motion to prohibit gang testimony but did not recall if she made the motion on the record. PCR 206. She recalled that in Brook’s statement he refers to gang affiliation and the state agreed to redact that comment from Brook’s statement. PCR 206. Tr.p. 84-85. Counsel stated that it was her understanding that since the State redacted it in the Brooks statement that they would instruct their witnesses to not get into gang related testimony. PCR 207.

agreeing to the curative instruction weakened the issue for an appeal. PCR 209. A review of Tr.p. 528 revealed that counsel sought to preserve her objection and mistrial request on the gang evidence arguing that the evidence was prejudicial and not cured by the instruction. PCR 209. Counsel took steps to preserve the issue. PCR 210.

“Evidence of gang affiliation demands careful handling because of its power to distract the fact finder from its rational task of deciding the facts from objective evidence, luring their attention to the lurid, raising the risk that they will decide the case on an improper or subjective ... basis.” *State v. Robinson*, 438 S.C. 421, 438, 882 S.E.2d 883, 892 (Ct. App. 2023), reh'g denied (Feb. 9, 2023) (citing *Johnson v. State*, 433 S.C. 550, 558-59, 860 S.E.2d 696, 701 (Ct. App. 2021)).

This Court finds that counsel was not deficient in her handling of Moss's comment about gang member frequenting the bar that night. She made a timely objection, as well as a request for a mistrial. Moss's comment was immediately objected to by counsel. The Applicant suggests that counsel should have pursued pretrial her motion to prohibit gang testimony which would have prevented the comment and had a misunderstanding that the state had already agreed to prevent similar evidence because they removed it from the Applicant's statement.

The solicitor indicated that they had no idea this was coming and that the comment was not identified with the Applicant. Solicitor Patterson noted that Moss was only talking about gang members in general. Tr.p. 306, l. 2-10. Although the Court concurs that resolving the matter pretrial may have prevented this comment, the Court must find that counsel acted reasonably with the immediate objection. This Court finds that counsel acted reasonably in seeking to preserve the objection through the remainder of the trial after the trial judge struck the gang evidence. At no point was any other evidence presented concerning gang affiliation.

This Court finds that deficient performance was not proven. The trial judge made an immediate curative instruction striking the evidence from the jury's consideration. The comment never identified the Applicant as a member of a gang. No further reference was given to the jury about gangs or gang affiliation. This is in stark contrast to the prejudicial situation in *State v. Robinson*, 438 S.C. 421, 882 S.E.2d 883 (Ct. App. 2023), reh'g denied (Feb. 9, 2023), where a witness definitively stated he and defendant were members of gang, and 15 others witnesses testified that defendant was associated with gang or that they heard he was in gang).

For similar reasons, this Court must find that the Applicant has failed to show prejudice under *Strickland*. Because the comment was stricken and did not identify Brooks as a gang member, but only in a bar where gang members and others attended, there is no reasonable probability that had counsel acted to address the gang evidence pretrial that the result of proceeding would have been different.

This Court further must find that appellate counsel Hackett was not deficient in failing to raise the failure to grant a mistrial on appeal related to the gang comment. Hackett confirmed that she reviewed this section of the trial. She stated that she thought that it was preserved for an appeal. PCR 70. However, Hackett did not believe this issue was as strong as the two issues she raised. She opined that the one sentence Moss stated was general and referred to other people at the bar and was not specific to Mr. Brooks. She noted that this did not come up again. Hackett further pointed out that the defense counsel had earlier been successful in redacting any gang references from Brooks' statements and it was not discussed in the closing arguments. Counsel Hackett believed the other issues were stronger than this mistrial issue. PCR 71.¹⁸

¹⁸ Counsel Hackett confirmed that she did not see in the record where the defense had moved to exclude the gang references in testimony at trial but was aware of the pretrial discussions redacting Brook's gang references,

“The decision to grant or deny a mistrial is within the sound discretion of the trial judge.” *State v. Adams*, 354 S.C. 361, 376, 580 S.E.2d 785, 793 (Ct.App.2003). A mistrial should only be granted when “absolutely necessary,” and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. *State v. Stanley*, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct.App.2005). *State v. Ward*, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). The issue in the direct appeal would have been whether the trial judge abused his discretion in denying the motion for mistrial.

A defendant is also constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). In analyzing a claim of ineffective assistance of appellate counsel, courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel. See *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

This Court finds that the Applicant failed to prove deficient performance on the part of counsel Hackett in failing to raise the gang evidence on appeal. Counsel reviewed the record, was aware of the issue and found it to be preserved. However, she also reasonably determined that it was a weaker issue than the two issues she actually raised. This Court agrees with the assessment and concludes that counsel acted reasonably in not raising this issue based upon her professional assessment and not the result of neglect or ignorance of the issue.

particularly to Folk Nation, in his statements to police. PCR 71. However, Hackett conceded there was a dispute as to how the references were removed and whether there was a violation of any pretrial order. PCR 72. However, counsel Hackett could not locate where counsel Zmroczek made a formal motion to exclude the evidence or a ruling by the judge. PCR 72.

This Court further finds the Sixth Amendment prejudice related to appellate counsel was not proven. Counsel would have to have raised this issue about the unexpected gang comment under the abuse of discretion standard.¹⁹ The timely and reasonable curative instruction removed the potential prejudicial taint from its comment. Further, the State may have contended that even though counsel objected to the giving of the curative instruction (Tr.p. 305, l. 13-24) may have argued that the matter was not preserved based upon the fact that she did not immediately object after the instruction was stated. However, it appears that the objection was adequately preserved. This Court concludes that it does not appear that the trial judge abused his discretion in denying the mistrial and instead entered the curative instruction striking the comment and clarifying the consideration by the jury. This Court finds under *Strickland* that the Applicant has failed to show that had counsel raised the mistrial issue in the appeal that there was a reasonable probability that the result of the appeal would have been to grant a new trial. It must be denied.

This Court also concludes that counsel's cross-examination of Moss was not deficient. Cross-examination is a matter of trial tactics. *See Hunt v. Nuth*, 57 F.3d 1327, 1333 (4th Cir. 1995) (disfavoring "criticisms [that] ... constitute a grading of the quality of counsel's cross-examination" (internal quotation marks omitted)). As an initial matter, tactical decisions such as what questions to ask of witnesses are "virtually unchallengeable." *Powell v. Kelly*, 562 F.3d 656, 670 (4th Cir.2009) (quotation marks omitted); see also *United States v. Orr*, 636 F.3d 944 (8th Cir. Mar.3, 2011) ("[Courts] generally entrust cross-examination techniques, like other matters of trial

¹⁹ When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue. Moreover, as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review. *See, e.g., State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct.App.2006) (indicating a curative charge is generally deemed to cure an allegation of error). *See State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010)

strategy, to the professional discretion of counsel.”); *United States v. Jackson*, 546 F.3d 801, 814 (7th Cir.2008) (“[D]eciding what questions to ask a prosecution witness on cross-examination is a matter of strategy.”); *DeLozier v. Sirmons*, 531 F.3d 1306, 1326 (10th Cir.2008) (“[C]ounsel’s decisions regarding how best to cross-examine witnesses presumptively arise from sound trial strategy.”); *Dunham v. Travis*, 313 F.3d 724, 732 (2d Cir.2002) (“Decisions about whether to engage in cross-examination and, if so to what extent and in what manner, are strategic in nature and generally will not support an ineffective assistance claim.” (quotation marks and ellipses omitted)). *id.* (collecting cases). *U.S. v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985); *U.S. v. Murray*, 751 F.2d 1528, 1535 (9th Cir. 1985); *Bible v. Schriro*, 497 F.Supp.2d 991, 1046 (D. Ariz. 2007) (that a cross-examination tactic was unsuccessful does not translate to ineffective assistance), affirmed *Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009). “Counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’ ” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690).

The Applicant complains that counsel should have more thoroughly impeached Moss based upon his prior statements. However, a review of the cross-examination reveals that Moss was questioned by counsel before the jury about his statement at the hospital and his memory about his travels that night. Tr.p. 328 – 332. He was Also challenged by counsel on the description of the perpetrator he gave. Tr.p. 332-334. She also challenged him of his proximity to the aggressor. Tr.p. 334. She challenged him on anything he said to law enforcement that night about security at the club that he could not remember. Tr.p. 334-335. In particular, she attempted to challenge Moss about what he said to police that night and she was required by the trial court to let Moss see the

statement. Tr.p. 337-338. She proceeded to ask Moss what he said that night and not what was written and claimed he did not recall saying a person with dreads walked away, Tr.p. 338. Counsel then asked about his statement that he saw number 2 in the lineup with what looked like a .9 millimeter gun tucked in his belt. Tr.p. 341. Counsel also asked him about the passenger door still being locked and when the driver's door became open. Tr.p. 342-43. Counsel questioned him about whether he saw only one person shooting when he had previously said "they." Tr.p. 343-344. She inquired about which hand the shooter was holding the gun after the shot, which Moss indicated he could not do, thought it was the right hand. Tr.p. 344. Counsel had Moss attempt to describe the lighting in the area at the time of the shooting. Tr.p. 345-346. Counsel stated that he made a mistake in his written statement if he did not put certain facts in it, as it related to seeing the other guy with a gun. Tr.p. 346. He was questioned again about the April 14 statement he made during the lineup meeting and what he wrote about whether another person had a gun and explained what he wrote on the lineup. Tr.p. 347-348. Counsel also questioned him about his recollection about the dark eyes of the perpetrator and the fact that he went on social media with some people to figure out who these people were. Tr.p. 348, l. 14-25.

The Applicant contends that counsel erred in additionally failing to question him about the reward or his interaction with Shalana. However, there is no evidence that Moss received a reward as a result of any of his statements he gave. Further, Moss admitted that he had gone on social media in the cross-examination looking for the people involved. In the Biggers hearing, he had stated that Brittainy had showed him the picture.

This Court finds that counsel was not deficient in failing to cross-examine differently. Counsel performed within the standards of competence demanded of lawyers practicing criminal law. The difference in style and emphasis the Applicant and his expert suggest do not cause this

Court to conclude that counsel was deficient. This Court further finds that even if in hindsight counsel thought it would have been helpful, he has failed to show that there was a reasonable probability that the result would have been different if he had done so. The assertion must be denied.

4. Trial counsel rendered ineffective assistance for failure to properly address the matter of judicial actions affecting the defense and trial.

Tr. p. 337, 340, 347. *Sosebee v. Leeke*.

In the fourth assertion of ineffective assistance of counsel, he asserts that counsel was ineffective in the manner he addressed two situations involving actions of Judge Griffith in front of the jury. The Applicant relies upon *Sosebee v. Leeke*, 293 S.C. 531, 362 S.E.2d 22 (1987).

The following passages were presented as being supportive of the allegation. During the testimony of Fred Moss, the following occurred during counsel's cross-examination:

Q. And at the hospital you said that the male with dreads walked away?

A. Huh? Let me see the statement. I don't know anything about –

Q. I'm not asking about your written statement yet.

THE COURT: You just did. You just said at the hospital you told them.

MS. ZMROCZEK: Your Honor, I can show him, but this is Investigator Black's notes so...

THE COURT: All right. You leading him to believe you're looking at a statement he gave to the female officer. That's what he's asking about.

MS. ZMROCZEK: I mean, that's fine.

THE COURT: He hasn't seen it in a long time. Maybe it's a little unfair for you to quiz him on it without showing it to him.

MS. ZMROCZEK: Sure.

BY MS. ZMROCZEK:

Q. How about I'll let you review it. How about that?

A. Okay. What part did you say I said the guy walked away.

MS. PATTERSON: Your Honor, that's the officer's report. That's not his written statement.

MS. ZMROCZEK: That's right. That's why --

THE COURT: Y'all come over here real quick.

(Side bar off the record.)

Tr.p. 337, l. 10-338, l. 6. In Tr.p. 340, counsel asked the statement about the guy with dreads who had a nine millimeter to determine which guy he was talking about. Tr.p. 340, l. 14-17. Moss stated it was the guy who had it tucked and Moss stated this guy right here. Then counsel stated:

Q. You saw him with a nine millimeter?

A. It may not be accurate but...

THE COURT: Make sure. What exhibit is that?

BY MS. ZMROCZEK:

Q. I'm showing you State's 3, pointing to number 2 that you picked out, correct?

A. Correct.

Q. And State's 3, pointing to number 2 that you picked out, you're saying that's who you saw flash or had tucked the nine millimeter?

A. He had it tucked. Yeah.

Tr.p. 340, l. 23- p. 341, l. 8.

Q. Did you tell the police then that there was a second gun?

A. No. Because they said which person had the gun and I'm thinking about the shooter and then the guy, from what I saw, the other guy didn't even pull it out. He was just flashing it. Now, he may have. I don't know, but he was the one - he's the one that shot though.

Q. Okay. And I'm showing you again State's number 3 where you circled the person, number 2. And tell the jury what you wrote.

A. I said he was around. He was around when the shots occurred.

Q. Okay. But you didn't tell them that he had a gun?

THE COURT: He's already testified to that several times.

MS. ZMROCZEK: Okay.

THE COURT: Asked and answered three times at least.

Tr.p. 347, l. 8- 25.

During the break after testimony of Moss was completed, counsel took a matter up before the court:

MS. ZMROCZEK: Thank you, Your Honor. Your Honor, respectfully, and most respectfully, I have never tried a case before this Court and so I know that it's different with each judge but, Your Honor, my client, his family, everyone has noticed that the chastising and maybe objections from the bench about asked and answered are having a chilling effect on the defense. **I have not asked for a mistrial.** I'm not asking for a mistrial but under *State v. Wright*, Your Honor, I understand that you would like me to move it along, but I think that for the record I need to put that on the record, that my client feels like the comments in front of the jury from the bench directly to me are having a chilling effect on his defense.

THE COURT: All right. I disagree with you. I'm not trying to do that but once you get to the third time asking a question, I think it's incumbent on me to keep the trial moving and I'm trying to do that but you seem to have that habit of asking the same question repetitively. For instance, that last witness, when did you tell the police that the guy with the hair with the longer dreads had a gun. He said numerous times and it's -- I apologize if it was said with any type of tone. It was not meant to. It was meant to mean move on. Would you like me to move that better, say it very soft asked and answered?

MS. ZMROCZEK: I will, Your Honor. And I'll do better of being more cognizant as well.
Tr.p. 351-352.

During the PCR hearing, counsel stated that her reason for not asking for mistrial was probably trying to make a note to herself to go back and add that if it happened again, but she didn't know and claimed not to have a strategic reason for not seeking a mistrial. PCR 215. Counsel claimed that the good judges are the ones who don't embarrass us or yell at us. Counsel felt that if there were objections, it would have been the duty of the state to object, and obviously this judge did it, and I think jurors admire judges a lot, so she opined it had an effect on her defense. PCR 216, 263. In hindsight she thinks that she may have needed to request a mistrial because it was done in front of the jury but expressly did not do so at the time. PCR 263-64.

It is well established that a trial judge must refrain from any comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of an accused, or any fact in controversy. *Sosebee v. Leeke*, 293 S.C. 531, 362 S.E.2d 22 (1987); *State v. Smith*, 288 S.C. 329, 342 S.E.2d 600 (1986). *Sosebee* and *Smith*, however, are easily distinguishable. In *Smith*, during the jury instruction, the judge, after describing what the

State had to prove in order for evidence of a breathalyzer exam to be admissible, commented, “You have heard such evidence.” Smith, 288 S.C. at 331, 342 S.E.2d at 601. In *Sosebee*, after petitioner’s counsel objected that certain testimony was only designed to buttress the victim’s testimony, the judge declared:

No sir, it’s not necessarily to buttress it in a situation such as this. You have suggested that her story is patently incredible, but within a few moments after reporting back home she told that story. It isn’t something she made up between then and now, as you suggested.

Sosebee, 293 S.C. at 533, 362 S.E.2d at 23. On appeal, the Supreme Court found this statement to be prejudicial. In *State v. Brisbon*, 323 S.C. 324, 332, 474 S.E.2d 433, 437 (1996), the court found within the instruction on credibility the language “was the defendant forthright or hesitant” in no way compares to the prejudicial comments made by the trial courts in the above cases. The court found the statement here was simply a “slip of the tongue”; it was not an affirmative comment upon the evidence.

This Court finds that counsel was not deficient in failing to request a mistrial based upon these comments. Each of these comments were not about the weight of the evidence but appear to be brief attempts at preventing confusion in the evidence or simply moving the case along. Under SCRE Rule 611 the trial judge shall exercise “reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” Counsel acted reasonably in pointing out her concern to the court, however there was no requirement under the Sixth Amendment to demand a mistrial under these circumstances.

This Court must further find that the Applicant failed to show a reasonable probability that a mistrial would have been granted had counsel suggested. These comments by Judge Griffith did not undermine confidence in the outcome of the case and are easily distinguishable from the comments in *Sosebee*. The judge was correct in noting that the questions relating to whether Moss had told the police that there was a second gun which he had previously answered. Similarly, the court's comment about showing the witness a statement after he asked for it counsel agreed with the court that that was fair because of the nature of the questions at that time.

Because the Applicant failed to prove deficiency and prejudice under Strickland, the allegation must be denied.

5. Trial counsel rendered ineffective assistance for failure to properly address pre-trial and/or during trial the matter of identification, a tipster, and reward money. Alternatively, newly discovered evidence if information and witnesses were unavailable prior to and during trial.

In his fifth specification, the Applicant contends that counsel was ineffective in failing to adequately investigate and present evidence of tipsters and reward money. The Applicant contends that this would have undermined the identification by Moss. This Court finds that the Applicant has failed to show a Sixth Amendment violation.

In the factual summary above, the PCR testimony of Shalana Thornton (Weise) and Shakira Hopkins was summarized and is incorporated herein by reference. Order, *infra.*, at p. 7-11 (Hopkins), p. 11-14 (Hopkins). What is clear to this Court from Shalana's testimony is that prior to the trial, she and Brittainy's purpose was to help solve the murder because they were dissatisfied with law enforcement's inability to do so. Further, it is clear that the evidence was that when shown the Facebook photograph of Brooks, the Applicant did identify Brooks as the one of the

perpetrators in the meeting with Brittainy and Shalana as noted above in the earlier discussions and findings. It is further clear to this Court that counsel was aware that Shaira receive a reward.

This Court has already determined that Moss advised law enforcement and the jury that he had seen the Facebook photograph of the Applicant prior to his lineup identification. This Court also had determined that there was evidence in the record about a reward and that a stipulation was entered into the record about the reward. The stipulation read.:

“Regarding the reward that was presented in some exhibit, it showed a social media screen shot about a reward offered by some person. The parties have agreed, the State and defense, that this reward was gathered up or raised by friends and family of the victim. It was paid to someone or some people. I don’t know. Those people aren’t available as witnesses but there was a reward raised by the family and friends. It was paid. Whether to one person or multiple people we don’t know. But those witnesses are not available to either side, so you just know it was done. . . .”

Tr.p. 633, l. 1-12. No objection was entered by either side.

This Court also finds important that there is no evidence in this record that Fred Moss, Rickena Knightner, or Andre Bunch had received any reward concerning their testimony.

This Court finds as to the issue of the reward, counsel was aware and was diligent in seeking the information through her motions with Crime Stoppers and ultimately learned before trial that Shakira Hopkins had received a reward. PCR 103 This knowledge would have been important if Hopkins had been called to testify for the State to impeach her credibility. However, she did not testify.

This Court has addressed the impact of Moss identification and the interaction with Brittainy and Shalana in previous portions which is also incorporated herein by reference. This Court has concluded that counsel Zmroczek had information related to Brittainy and Shalana from their statements and the jury had information based upon testimony from law enforcement officers

about meeting with them. Tr.p. 402-403, 407, 467, (Longshore, Laintz meeting with Shalana and Brittiany). In hindsight, counsel stated that she should have put up Shalana and Shakira. PCR 205.

This Court finds that the Applicant has failed to prove Sixth Amendment prejudice. The Court concludes that had counsel pursued the investigation and placed Shakira on the witness stand and Shalana on the witness stand the result of the proceeding to a reasonable probability would not have been different. Neither witness was present at the scene and admitted that they did not know anything about the case other than hearsay. The fact of the reward was placed before the jury pursuant to the stipulation, but there was no indication that the trial witnesses had received any reward. The jury was aware from Moss's testimony that Moss had met with Brittainy and been shown pictures that included the Applicant before his testimony. There is no evidence that Moss or Knightner, who identified the Applicant, profited from any reward. In cross-examination of Investigator Dykes, counsel brought out that there was a reward offered. Tr.p. 496-97. Counsel developed though Eric Brown seeing the reward on social media although he declared he had not profited from it. Tr.p. 563-564. Although counsel never interviewed either Shakira or Shalana she indicated that she was aware of the statements which apparently gave her the basis of the inquiries she made during the trial of the witnesses. PCR 205-206, 250-251, 275. It is unclear to this Court how a more robust presentation by presenting these two witnesses to further describe their understanding of the conversation with Moss, although restricted by the hearsay rules.

This Court finds that the Applicant has failed to show as to this assertion that had counsel presented Shalana and Shakira, there was a reasonable probability that the result of the proceeding would have been different. It must be denied.²⁰

²⁰ The Applicant also presented evidence from Shalana that Moss had indicated to her subsequent to the trial a possibility that he would recant his testimony. However, the Applicant failed to present Moss in this proceeding to

6. Trial counsel rendered ineffective assistance for failure to properly subpoena a necessary witness and to introduce the 911 call and/or evidence.

In this assertion, the Applicant contends that counsel; was ineffective in failing to subpoena the 911 operator to allow for the playing of the 911 call during the trial. The record shows that Rickena Knightner made a 911 call although she gave a false name which is the subject of an earlier allegation. Tr.p. 100-101, 508-509, 518-519. In addition, Sgt. Etheredge testified about reviewing the 911 calls later and making contact with Knightner days later in his investigation. Tr.p. 389-391.

During the trial, counsel asserted it was her intent to call the 911 operator, but that the operator was not available at the time of the trial when the defense case proceeded. Tr.p. It is evident from the record that counsel had not subpoenaed the 911 call operator and she was not available. It is also clear that the prosecution would not stipulate its introduction without the operator's presence to authenticate it. Tr.p. 624.

During the PCR hearing, counsel was questioned about her purpose in seeking to introduce the 911 call. Counsel was also aware that Knightner made the 911 call. PCR 188. Counsel referred to this as a 9-1-1 nightmare. Counsel indicated that she attempted to introduce the 911 call, Defendant's Exhibit 46, at trial. PCR 189. Counsel indicated that she didn't think about

support the suggestion. This Court finds that the credibility of the recantation after sworn court testimony is a threshold showing for a motion involving a new trial request. *State v. Harris*, 391 S.C. 539, 544-45, 706 S.E.2d 526, 529 (Ct.App.2011) ("A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the [circuit court]."); *id.* at 545, 706 S.E. 2d at 529 ("[T]his court will affirm the [circuit] court's denial of such a motion unless the [circuit] court abused its discretion."); *Hayden v. State*, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) ("A party requesting a new trial based on after-discovered evidence must show that the evidence ... [i]s such as would probably change the result if a new trial was had."); *Harris*, 391 S.C. at 545, 706 S.E.2d at 529 ("The credibility of newly-discovered evidence is for the [circuit] court to determine."); *id.* ("Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial."). Since Moss did not testify in this proceeding and apparently rejected the request of Shalana to talk with law enforcement the Applicant failed in his burden of proof in showing credible evidence.

introducing the call at the *Biggers* hearing. PCR 189. Counsel suggested that when she tried to introduce it later at trial in the defense case, her intent was to show there were multiple descriptions and conflicting statements by Knightner. PCR 189-190. Counsel stated that the identification was coming in. However, the 911 call could reveal a lot of background noise. PCR 911 calls are important because they record what was happening as it was happening. PCR 190-91. Applicant's Exhibit 24.

Counsel stated her purpose in seeking to introduce it would have possibly impeached Knightner who did not give her name, which she had already admitted. PCR 217. Referencing Tr.p. 100, line 13, 101, l. 7. Counsel thought the 911 call could have aided in what you were trying to get across when counsel pointed out that Knightner called 911 and did not give her name or say who did it. However, counsel stated that at that time, counsel was not aware that the State would not allow her to present the 911 call later in the jury trial. PCR 217. Similarly referencing Tr.p. 518, l. 22-519, l.15, counsel asked before the jury the same questions and conflicting statements and false names. PCR 217-218.

Counsel was asked why she did not try to admit the 911 calls through Sgt. Etheredge who testified about the CAD and 911 calls in Tr.p. 391. Counsel stated that there was no reason, but it was her intent to put the 911 call in her case rather than the state's case when she called the 911 operator. PCR 218.

Counsel described the sidebar that occurred related to the 911 at Tr.p. 624-625 and the 991 operator. Counsel stated that the solicitor's office was objecting to her putting the 911 call into evidence without the communications director. Counsel stated that the witness was on the State's witness list, and she claimed that she was told their witnesses would be available to her. She stated that when she attempted to subpoena her that morning and she was off work. She claimed that this

was evidence the state turned over that they were refusing to let her put in. She stated that at that time we didn't have the business record exception. Counsel noted that since then, anytime she has a case for trial, the first person she subpoenas is the 911 call operator because of this. PCR 218-219. Counsel stated that although she could have put it in through another witness and her frustration with the exchange at that time and adversity, she felt frustrated because no one had told her she would be out of town when they called the day before. PCR 218-220. Referring Tr.p. 643, l. 16, counsel stated that she intended to play it in closing. PCR 220.

This Court finds that the Applicant has failed to show prejudice in the error in not having the operator subpoenaed to allow the playing of the 911 call by Rickena Knightner. Counsel asserted that she wanted this to be played to allow the jury to hear the background noise and drama at the scene as the event had recently played out and to reveal the demeanor of Knightner in giving the false name and lack of identifying Brooks, a person she knew, shortly after the incident. This Court finds that there was evidence in the record that it was a chaotic scene. Further, counsel had impeached Knightner when Knightner testified as noted above, particularly that she gave a false name related to the 911 call. Tr.p. 519. See also Tr.p. 508-509 (gave false name because she was scared and knew who did the shooting). Further Sgt. Etheredge testified at trial that when he reviewed the 911 call CAD number and Knightner had given a false name as Shontay when being interviewed as a result of the 911 call. Tr.p. 391-93.

This Court finds that the jury was aware of essentially the same information that would have been revealed by the 911 call. Its introduction may have shown a more robust presentation as the counsel anticipate, the jury was shown similar information that was not contested by the state. The Court finds that had the 911 been played that there is no reasonable probability that the result of the proceeding would have been different. The allegation must be denied.

7. Trial counsel rendered ineffective assistance for failure to properly prepare, investigate and present a third-party guilt defense. Ineffective assistance of appellate counsel for failure to raise the court's denial of a third-party guilt instruction on appeal.

This issue relating to trial counsel was essentially addressed above related to Ressel's testimony about third party guilt and the weapons photographs. This is incorporated herein by reference where the Court earlier concluded that the Applicant had failed to prove ineffective assistance of counsel under *Strickland*. Order, p. 79-83.

This Court finds that the Applicant has failed to show a basis for a viable third-party guilt defense that existed in 2016 at the time of the trial. As noted above, there was only speculation about other suspects which is insufficient under *Holmes* and *Gregory*. The Applicant has presented no evidence to suggest that another particular individual committed the crime. *See State v. Brown*, 437 S.C. 550, 570, 878 S.E.2d 364, 375 (Ct. App. 2022) (other than "bare suspicion" and the close proximity of his home, there is simply no evidence to suggest that a particular person was the perpetrator here. As evidence in the record supports the circuit court's denial of motion to introduce evidence of third-party guilt, we find no abuse of discretion). *See e.g., State v. Cope*, 405 S.C. at 341, 748 S.E.2d at 206 (recognizing under *Gregory* that "evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded" and must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." (alteration in original) (quoting *Gregory*, 198 S.C. at 104, 16 S.E.2d at 532)).

The Applicant has failed to show either deficient performance or prejudice since there was been no credible evidence presented to this court to show admissible evidence of third party guilt under *Gregory*. See also *State v. Singleton*, 438 S.C. 629, 637, 885 S.E.2d 415, 419 (Ct. App. 2023) (showing insufficient under **Gregory** for a third party guilt instruction where evidence that others had sexual intercourse with ten-year-old victim was not inconsistent with defendant's guilt and did not raise inference or presumption as to his innocence, and even if defendant was not father of victim's unborn child, evidence that someone else impregnated victim would not preclude defendant's guilt for charged crime, since defendant could have had sexual intercourse with victim without impregnating her).

The Applicant also questions whether counsel was ineffective in failing to preserve his request for a third party guilt instruction when she gave the proposed instruction by email but failed to make it a part of the record for preservation. She was relying upon the instruction given by Judge Hocker in a Laurens case in which her client was acquitted. PCR 267. First, it is clear from this proceeding and the record that Judge Griffith had received and reviewed the proposed instruction proffered by counsel Zmroczek. The record reflects the proposed instruction was discussed by counsel with the trial judge concerning an instruction that she had used in a prior trial. Tr.p. 537-538. The request to charge was argued prior to the instruction, with opposition by the State. Tr.p. 626-628. ²¹The Court denied the request finding not enough evidence had been produced about a second shooter. Tr.p., 628, l. 8-12.

²¹ The State opposed the instruction request as follows:

MS. PATTERSON: Sir, we would ask that that not be charged, Your Honor. There has been nothing - there has been nothing presented, Your Honor, that is, first of all, inconsistent with Mr. Brooks' own guilt. And secondly, the fact that these facts only raise a reasonable inference as to his innocence. The Court does require, Your Honor, that and those are two prongs that the Court requires, Your

This Court finds that counsel adequately presented the request for third party guilt instructions to the court. It was noted that counsel emailed the charge to the trial judge. Tr.p. 537, l. 19-24. Tr.p. 626, l. 14-22. This was prior to the trial judge's decision on the facts that the Applicant was not entitled to the charge.

This Court also finds that prejudice under *Strickland* has not been shown. The Applicant has failed to show an instruction if preserved by being made a part of the record, to a reasonable probability had changed the trial judge's mind and caused it to submit the charge based upon the evidence presented in the trial. The allegation must be dismissed.

Similarly, the Applicant has failed to show prejudice related to preservation of the issue for an appeal had the particular instruction been made part of the record at trial. The Applicant has failed to show a reasonable probability that the Applicant would have been successful in the appeal if the instruction that was emailed to the court had been made a part of the record. The assertion otherwise is dismissed.

8. Appellate counsel provided ineffective assistance that was prejudicial to Applicant when she failed to raise additional issues on appeal.

Honor. Evidence which has no other affect than to cast a bare suspicion upon another is not admissible. The only thing that has been testified to, Your Honor, with respect to this Antonio Williams is that he had dreads and he had an "L" on his forehead and that he was at the club. There was so many people there with dreads, Your Honor. There has been nothing testified to in the duration of this trial, Your Honor, that would suggest that he committed this offense. The only person that was identified as the shooter was her client Mr. Brooks.

And with respect to Dashun Curry, Your Honor, the only other thing testified to about him was that, yes, he was at the club and that he had dreads. There has been nothing testified to and nothing indicated that he had anything to do with this shooting. As a matter of fact, his dreads was longer. Two witnesses identified Mr. Brooks as the shooter; that there has been nothing raised but mere suspicion and we would ask that third party guilt not be instructed to the jury,

Tr.p. 627-628.

The Applicant asserts alternate grounds that appellate counsel was ineffective in her handling of the appeal. This Court finds that the Applicant has failed to prove either deficient performance or prejudice. A summary of appellate counsel Hackett's testimony is included at pages 14-20 and is incorporated herein by reference. The issue of ineffective assistance of appellate counsel was addressed earlier in this Order at pages 99-101. Those findings and conclusions are incorporated herein by reference. The allegation must be denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes 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.

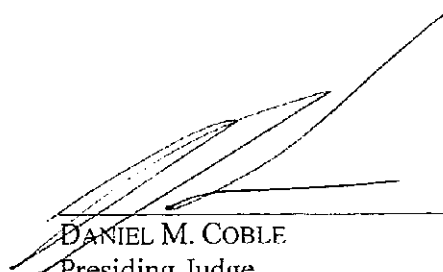
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an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

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations.
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this ____ day of _____, 2025

Richland, South Carolina



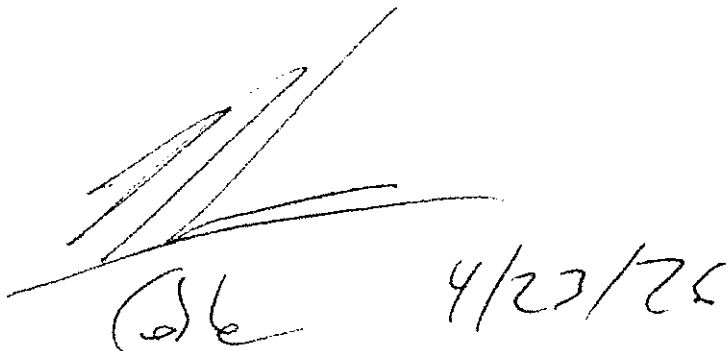
DANIEL M. COBLE
Presiding Judge
Eleventh Judicial Circuit

March 6, 2026

534, 536 (Ct. App. 1994) (holding there was "no merit in Pollard's assertion that the circuit court committed reversible error in denying her motion to alter or amend the judgment under Rule 59(e) SCRCF, without first conducting a hearing or allowing [the parties] 'to fully brief' the issues raised in [the] motion").

AND IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]



Handwritten signature and date: 4/23/26