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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

2017-CP-33-0219

Shaheed Hayes, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Shaheed Hayes appeals the Honorable George McFaddin, Jr.'s Order of Dismissal filed April 7, 2026, and Order Denying Applicant's Motion to Alter or Amend after the Judgement filed May 22, 2026.

This 4th day of June, 2026.

s/ Susannah Ross
Susannah Ross, Attorney at Law
Bar # 11025
330 E. Coffee St.
Greenville, SC 29601
susannah@rossenderlin.com
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
D. Russell Barlow II, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA COUNTY OF MARION Shaheed Hayes Applicant, v. State of South Carolina Respondent.	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-33-0219 ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND AFTER THE JUDGMENT

In this post-conviction case, this court dismissed the application with prejudice by written order on October 21, 2025. Applicant filed and served his motion for reconsideration (alter or amend) of that order. This weekend I reviewed the motion and the order along with the file. I respectfully decline the motion to alter or amend the order. It is within the court's discretion to issue a ruling from or related to a motion to alter or amend without holding a motion hearing. Here, counsel for Applicant provided the motion with concise reasons for the motion. I do not, therefore, hold a hearing. The motion is denied.

George M. McFaddin, Jr.
Circuit Court Judge

May 18, 2026
Sumter, SC

State of South Carolina
Circuit Court Judge, Third Judicial Circuit, Seat 3

GEORGE M. McFADDIN, Jr.
JUDGE

215 N. HARVIN STREET
SUMTER, SOUTH CAROLINA 29150

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Andrea M. Morris
Administrative Assistant

May 19, 2026

The Honorable Christy M. Gray
Marion County Clerk of Court
PO Box 295
Marion, SC 29571

RE: Hayes v. State of SC
Order Denying Applicant's Motion to Alter or Amend
2017-CP-33-0219

Ms. Gray:

I have enclosed the original Order to be filed in the above-referenced matter.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Andrea M. Morris
Administrative Assistant to
The Honorable George M. McFaddin, Jr.

/amm

Enclosure

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

April 16, 2026

Christy M. Gray
Marion County Clerk of Court
1305 N. Main St.
Marion, SC 29571

To Whom It May Concern:

Please find for filing the enclosed Motion to Alter or Amend. Please return a stamped copy to me by e-mail or post. If you have any questions or concerns, please let me know.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

2026 MAY 12 P 2:14
MARION COUNTY SC
CHRISTY M. GRAY
CLERK OF COURT

330 E. COFFEE ST. • GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

STATE OF SOUTH CAROLINA COUNTY OF MARION	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
SHAHEED HAYES, v. THE STATE OF SOUTH CAROLINA, RESPONDENT.	MOTION TO ALTER OR AMEND THE JUDGEMENT CASE # 2017-CP-33-0219

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on April 7, 2026. The Applicant takes issue with the findings of fact and conclusions of law set forth in the denial of post-conviction relief in his case. He further argues that even if a single allegation does not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989).

As to the findings regarding the allegation that trial counsel failed to object or take exception to the jury instruction on attempted murder, the Applicant points out that Raheem D. King's trial was prior to his 2014 trial and had his counsel objected to the charge at trial as King's counsel did, the outcome would have been different. (Order p.19). Raheem D. King's case was remanded after the court "clarify[ied] that the offense of attempted murder, as codified in section 16-3-29 of the South Carolina Code and viewed in its entirety, requires a specific intent to kill." State v. King, 810 S.E.2d 18, 422 S.C. 47 (S.C.2017). The opinion relied on the plain wording of the statute and existent case law such that it would not require clairvoyance to object to the instruction that "a specific intent to kill is not an element of attempted murder".

Additionally, the Applicant argues that the Order's findings regarding the investigator and Solicitor vouching for key witnesses were erroneous. (Order pp. 28-30, & 38-42). Two co-defendants testified at Applicant's trial: Willie Bethea and Jamie Williams. (Trial Tr. p. 468 & p. 539). Jamie Williams later seemed to recant. (PCR Tr. p. 38). At trial, the investigator said that his honest opinion based on his 18 years of law enforcement was that Willie Bethea was most sincere and apologetic and remorseful. (Trial Tr. P. 230). As sincerity indicates truthfulness, this comment amounted to vouching and counsel did not object. The prejudicial effect was heightened by the solicitor's comments at trial, stating in summation, "They told the truth". (Trial Tr. 493). Applicant's counsel did not object. "It is improper for a judge or a prosecutor to bolster a witness's credibility by stating to the jury his or her view that the witness is likely being truthful." State v. Reyes, 432 S.C. 394, 401, 853 S.E.2d 334, 338 (2020). "Credibility is a determination for the jury." Id. at 404, 853 S.E.2d at 339. Moreover, "[a] solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002)."

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of dismissal.

Respectfully submitted.

Susannah Ross #11205
Attorney for the Applicant
330 E. Coffee St.
Greenville, SC 29601
susannah@rossenderlin.com
(864) 242-0029

This ___ day of _____, 2026

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
SHAHEED HAYES, v. THE STATE OF SOUTH CAROLINA, RESPONDENT.	)	CERTIFICATE OF SERVICE BY ELECTRONIC MAIL CASE # 2017-CP-33-0219

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by E-mail exists throughout the state of South Carolina and this is a proper circumstance of service by E-mail.

3. I have this day served a copy of the **Amended Application** in the above-captioned matter on the following person by E-mail to:

russbarlow@scag.gov

Susannah Ross
Attorney for Applicant

This 16th day of April, 2026

Outlook

Shaheed Hayes v. State 2-17-CP-33-0219

From [redacted]
Date Tue 5/12/2026 11:56 AM
To [redacted]

1 attachment (1 MB)
CCF_000370.pdf;

[redacted]

This message came from outside your organization.

Hi There,

Please find the attached filing. Let me know if you find the original or how you want to proceed.

Thanks,

Susannah

2026 MAY 12 P 2:15

MARION COUNTY SC
CINDY H. GRAY
CLERK OF COURT

--
Susannah Ross
Ross and Enderlin, PA
330 E. Coffee St.
Greenville SC 29601
(864) 242-0029

STATE OF SOUTH CAROLINA COUNTY MARION	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Shaheed Hayes, #329512, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2017–CP–33–0219 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. George M. McFaddin, Jr.
Applicant's Attorney:	Jonathan D. Waller, Esq.
Respondent's Attorney:	Joshua A. Edwards, Esq. D. Russell Barlow II, Esq.
Trial Counsel:	Hon. Steven H. DeBerry, IV
Date of Hearing:	April 18, 2022
Court Reporter:	Michael Drake

This matter comes before the Court by way of Shaheed Hayes's (Applicant) application for post-conviction relief (PCR) filed on March 22, 2017. On June 26, 2017, Respondent filed its Return and Partial Motion to Dismiss and Motion to Strike. On August 31, 2021, Applicant filed amendments to his PCR application.

On April 18, 2022, an evidentiary hearing was held before the Honorable George M. McFaddin, Jr., at the Florence County Courthouse. Applicant was present and represented by Jonathan D. Waller, Esquire (PCR Counsel). Assistant Attorney Generals Joshua A. Edwards and D. Russell Barlow, II, represented Respondent. At the hearing, Applicant proceeded forward on all allegations within his original and amended application. In support of these claims, Applicant testified on his own behalf and presented the testimony of Rachel Williams and his co-defendant, Jamie Williams. Applicant also presented the testimony of the Honorable H. Steven DeBerry, IV (Trial Counsel).

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

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment of the Marion County Clerk of Court. In February 2013, the Marion County Grand Jury indicted Applicant for Murder, Discharging a Firearm in a Dwelling, Possession of a Weapon During the Commission of a Violent Crime, and four counts of Attempted Murder (2013–GS–33–0097). Trial Counsel represented Applicant. Twelfth Circuit Solicitor E. L. Clements, III, prosecuted the case. Joshua Bailey, Esquire, represented Applicant's co-defendant, Blaton Smith.

On August 6–8, 2014, Applicant proceeded to a joint jury trial before the Honorable D. Craig Brown. The jury found both Applicant and his co-defendant guilty as indicted on all charges. Judge Brown sentenced both Applicant and his co-defendant to life imprisonment for murder, ten (10) years for discharging a firearm in the dwelling, five (5) years for possession of a weapon during the commission of a violent crime, and thirty (30) years for each count of attempted murder to be served consecutively.

Applicant filed a timely notice of appeal. Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense perfected the appeal, raising the following issue:

> The trial judge erred in refusing to allow cross-examination of a witness, who had been diagnosed with schizophrenia, concerning the witness smoking marijuana immediately prior to giving a statement inculpating [Applicant] to police and the witness admitting to a psychiatrist that marijuana made him delusional.

The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Hayes, Op. No. 2016–UP–317 (S.C. Ct. App. filed June 22, 2016). The Remittitur was returned to the circuit court on July 15, 2016.

SUMMARY OF THE FACTS ADDUCED AT TRIAL

On the night of April 12, 2012, Gavin Graves,[1] Victim,[2] Derrick Wilson,[3] Christopher Kollock,[4] and Darrell Davis[5] were sitting in a home off North Highway 501 in Marion County. (R. pp. 263–265; Trial Tr. pp. 359, l. 2 – 361, l. 13). The home belonged to Graves, but Wilson lived there, too. (R. pp. 264–266, 305; Trial Tr. pp. 360, l. 1 – 362, l. 10; Trial Tr. p. 428, ll. 11–21). The group had started the evening playing cards, but then they hooked Graves's computer up to his television to browse Facebook. (R. p. 266; Trial Tr. p. 362, ll. 11–20). They were also drinking beer and smoking marijuana. (R. p. 271; Trial Tr. p. 367, ll. 12–19). A little after midnight, they thought they heard a knock at the back door. (R. pp. 266–272, 309–312; Trial Tr. pp. 362, l. 11 – 368, l. 5; Trial Tr. pp. 432, l. 10 – 435, l. 8). Davis got up to check, but there was no one there. (R. p. 272; Trial Tr. p. 368, ll. 1–7).

About three minutes later, a number of bullets were fired into the home from somewhere outside. (R. pp. 272–273; Trial Tr. pp. 368, l. 1 – 369, l. 15). According to Graves, "[i]t was like a rain of bullets, like ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping. Like—it was like it wouldn't never stop." (R. p. 273; Trial Tr. p. 369, ll. 11–13). Inside the trailer, "[t]he sheetrock was busting up. It was smoky. The cabinets [were] opening up.

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[1] Also known as "Bullet" or "G." (R. p. 307; Trial Tr. p. 430, ll. 16–19).
[2] Also called "C–Murder" because his favorite rapper was C–Murder Master P. (R. p. 307–08; Trial Tr. pp. 430, l. 22 – 431, l. 6).
[3] Also known as "Eyebrows." (R. p. 308; Trial Tr. p. 431, ll. 7–13).
[4] Also known as "O.J." or "Juice Man." (R. p. 307; Trial Tr. p. 430, ll. 20–23).
[5] Also called "Goo Baby." (R. p. 307; Trial Tr. p. 430, ll. 12–15).

Glass that was sitting out that the bullet must have went through. You could hear the glasses breaking." (R. p. 272; Trial Tr. p. 368, ll. 20–22). Wilson testified that "it sounded like at least 20–25" gunshots, but there might have been more. (R. p. 315; Trial Tr. p. 438, ll. 16–22). When the gunfire stopped, the men realized that Victim had been hit. (R. pp. 273–274, 316–317; Trial Tr. pp. 369, l. 16 – 370, l. 7; Trial Tr. pp. 439, l. 13 – 440, l. 7). They immediately called 9–1–1 and then tried to care for Victim, who was gasping for breath. (R. pp. 274–276, 317–318; Trial Tr. pp. 370, l. 1 – 372, l. 5; Trial Tr. p. 440, l. 8 – 441, l. 18). They took Victim outside because he said he was hot, and then the group waited for emergency responders to arrive. (R. pp. 274–276, 318–319; Trial Tr. pp. 370, l. 8 – 372, l. 19; Trial Tr. pp. 441, l. 13 – 442, l. 17). EMS came and took Victim away, but he later died from a gunshot wound. (R. pp. 259–262, 276–277; Trial Tr. pp. 354, l. 23 – 357, l. 15; Trial Tr. pp. 372, l. 14 – 373, l. 14). The other men stayed at the house and talked to police officers who had arrived to investigate the shooting. (R. pp. 321–322; Trial Tr. pp. 444, l. 8 – 445, l. 11).

The police were unable to recover any physical evidence from the scene that pointed to any particular suspects. However, Wilson provided the officers with information that helped them to develop potential suspects. Wilson told police that Victim had never had any problems with "the Smith boys" or anybody that Wilson knew of. (R. pp. 323–324; Trial Tr. pp. 446, l. 23 – 447, l. 6). Wilson, on the other hand, had had problems with Adrian Smith, Blaton Smith's cousin, and he told the police about that. (R. p. 324; Trial Tr. p. 447, ll. 7–11). Detectives Charlie Watson and Martin Bell with the Marion County Sheriff's Department followed up on those leads. (R. pp. 132–139; Trial Tr. pp. 224, l. 17 – 231, l. 18). The detectives contacted Blaton Smith's mother, and she brought him to Marion County for an interview with the police, but Smith was uncooperative. (R. p. 136; Trial Tr. p. 228, ll. 2–15).

Through their investigation, Detectives Watson and Bell also learned that a man named Willie Bethea[6] may have been involved in the shooting. (R. p. 135; Trial Tr. p. 227, ll. 4–11). Bethea also met with the police, and he admitted his involvement in the shooting. (R. pp. 136–138; Trial Tr. pp. 228, l. 16 – 230, l. 17). As a result of their conversation with Bethea, the police arrested Blaton Smith, Applicant, Bethea, and Jamie Williams.[7] (R. pp. 137–138; Trial Tr. pp. 229, l. 6 – 230, l. 25). Adrian Smith was not arrested because he was out of their jurisdiction, and police could not pinpoint anything that Adrian Smith had done in Marion County. (R. p. 139; Trial Tr. p. 231, ll. 1–18).

At trial, both Jamie Williams and Willie Bethea testified about what happened the night of the shooting. Williams testified that Applicant, Smith, and Bethea picked him up from his home on April 12, 2012. (R. pp. 344–346; Trial Tr. pp. 472, l. 7 – 474, l. 17). Smith was driving Adrian Smith's car, and Bethea was in the front passenger seat. (R. pp. 344–346; Trial Tr. pp. 472, l. 20 – 474, l. 1). Applicant was sitting in the back seat on the passenger's side, and Williams took the seat beside him on the driver's side. (R. p. 346; Trial Tr. p. 474, ll. 2–13). According to Williams, they drove past a home on Highway 501, and Applicant saw Wilson's SUV parked out back. (R. pp. 346–349; Trial Tr. pp. 474, l. 18 – 477, l. 7). Smith turned around and slowly drove back by the home[8] while Applicant and Williams shot at the house. (R. pp. 349–352; Trial Tr. pp. 477, l. 2 – 480, l. 25). Williams testified that Smith told him to shoot. (R. p. 352; Trial Tr. p. 480, ll. 16–

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[6] Also called "Boo Boo." (R. p. 394; Trial Tr. p. 531, ll. 11–14).

[7] Also known as "Lil Boosie." (R. pp. 138, 340–341; Trial Tr. p. 230, ll. 20–25; Trial Tr. pp. 468, l. 20 – 469, l. 2).

[8] Williams was very unsure of the roads in that area. At the time of the shooting, he did not even know they were on Highway 501, but he found out that information afterwards. (R. pp. 346–347; Trial Tr. pp. 474, l. 18 – 475, l. 1). Williams testified that before the shooting began, "we turned around, I don't know how it happened. Like, I don't know the roads or nothing like that. We turned back around and slowed down." (R. p. 349; Trial Tr. p. 477, ll. 8–11).

21). Applicant was shooting directly out of the rear, passenger window, and Williams had to hang out of the car and shoot over the top of the car. (R. p. 351; Trial Tr. p. 479, ll. 3–22). Williams testified that he only shot three to five bullets because he "froze up." (R. pp. 351–352; Trial Tr. pp. 479, l. 23 – 480, l. 7). But Applicant emptied a clip into the home. (R. p. 352; Trial Tr. p. 480, ll. 8–15). They then drove back to Latta, where Smith stopped at a house and took the guns inside while the others waited in the car. (R. pp. 352–354; Trial Tr. pp. 480, l. 22 – 482, l. 9). After that, they dropped off Williams back at his house. (R. pp. 354–355; Trial Tr. pp. 482, l. 19 – 483, l. 4).

Two days after the shooting, Williams received a call from Smith, who told him that someone had died and warned him that he better not say anything. (R. p. 355; Trial Tr. p. 483, ll. 5–20). Williams went to Adrian Smith's house later that day. (R. p. 355; Trial Tr. p. 483, ll. 21–24). Williams testified that "they were kind of mad that they hit the wrong person . . . " (R. pp. 355–356; Trial Tr. pp. 483, l. 25 – 484, l. 2). According to Williams, "Eyebrows" was the person who was supposed to have gotten hit—"they wanted him dead." (R. pp. 356, 361; Trial Tr. pp. 484, ll. 3–8; Trial Tr. p. 489, ll. 1–8). Williams did not know Wilson (Eyebrows). (R. p. 362; Trial Tr. p. 490, ll. 9–19). Williams testified that he was scared of Adrian Smith because, though Adrian Smith is a paraplegic, "[h]e got people too." (R. pp. 356–357; Trial Tr. pp. 484, l. 20 – 485, l. 5).

Williams testified that when he first spoke with police, he lied and said that Applicant and Smith were the shooters, but he later admitted that he was one of the shooters and that Smith was driving the car instead. (R. pp. 357–359; Trial Tr. pp. 485, l. 20 – 487, l. 21).

Bethea's testimony regarding the shooting was largely consistent with Williams's. Bethea testified that he and Smith were cousins. (R. p. 394; Trial Tr. p. 531, ll. 15–25). He also identified Applicant as "[o]ne of my people from Latta." (R. p. 395; Trial Tr. p. 532, ll. 1–13). Bethea

testified that he and Smith were together all day on April 12, 2012. (R. pp. 398–399; Trial Tr. pp. 535, l. 10 – 536, l. 18). They picked up Williams and Applicant later that evening. (R. pp. 399–401; Trial Tr. pp. 536, l. 16 – 538, l. 10). Bethea believed they were going to a club in Latta on Old Ebenezer Road, which is not far from Highway 501. (R. p. 401; Trial Tr. p. 538, ll. 11–24). But they passed that club, so he assumed they were headed to Fusion in Marion. (R. p. 403; Trial Tr. p. 540, ll. 4–17). Smith, who was driving, then stopped in front of a trailer that Bethea identified as "Eyebrows' trailer." (R. pp. 403–404; Trial Tr. pp. 540, l. 25 – 541, l. 8). Smith said, "'This is the house right here. That's the car in the back.'" (R. p. 404; Trial Tr. p. 541, ll. 9–14). Applicant and Williams then started shooting. (R. pp. 406–410; Trial Tr. pp. 543, l. 19 – 547, l. 3). After they finished, Applicant said he hoped he had hit somebody in the house. (R. p. 410; Trial Tr. p. 547, ll. 5–10). They then drove back to Latta, and Smith dropped the guns off at "Karen['s] house." (R. pp. 410–413; Trial Tr. pp. 547, l. 11 – 550, l. 6).

According to Bethea, afterwards, "[w]e just said don't say nothing about it and just keep your mouth closed." (R. pp. 413–414; Trial Tr. pp. 550, l. 25 – 551, l. 3). Smith later told Bethea, "'Keep your cool'" and advised him not to say anything about what had happened. (R. pp. 415–416; Trial Tr. pp. 552, l. 7 – 553, l. 5). Bethea learned that Victim had been killed in the shooting. (R. p. 416; Trial Tr. p. 553, ll. 9–25). Bethea testified that it was Wilson, not Victim, who was the intended target of the shooting because Wilson and Smith had bad blood. (R. p. 417; Trial Tr. p. 554, ll. 1–15). Bethea left town because he was "worried something crazy was going to happen. That somebody was going to get shot or something." (R. pp. 417–418; Trial Tr. pp. 554, l. 16 – 555, l. 20). When asked if he left town because he was worried about Smith or Applicant, Bethea responded, "They just told me—they kept calling me, like, don't say nothing or we're going to do something to you." (R. p. 418; Trial Tr. p. 555, ll. 21–24). Nevertheless, Bethea eventually turned

himself in after his mother told him, "The police kept coming to her house and she wasn't going to have it . . ." (R. pp. 421–422; Trial Tr. pp. 558, l. 16 – 559, l. 14). After the police spoke with Bethea, they arrested him. (R. p. 422; Trial Tr. p. 559, ll. 10–22).

CURRENT APPLICATION

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. "Trial Counsel prejudiced applicant by failing to request for mistrial for tampering and altering evidence at the crime scene."
   b. "Trial Counsel prejudiced Applicant by failing to prepare and to conduct a proper pre-trial investigation to interview Adrian Smith."
   c. "Trial Counsel prejudiced Applicant by failure to request written notice to seek life without parole."
   d. "Trial Counsel prejudiced Applicant by failing to request a jury charge in compliance with State v. Logan."
   e. "Also, trial counsel failed to object to the judge charging the jury that specific intent to kill is not required to prove attempted murder."
2. Juror Misconduct
   a. Applicant alleges after discovered evidence of affidavits by two jurors who were sleeping during the trial and were not paying full attention.

On August 31, 2021, Applicant amended his application to include the following additional allegations as follows:

3. Newly Discovered Evidence
   a. Applicant's co-defendant, Jaime Williams, who testified against Applicant, has given a statement that he provided false testimony during Applicant's trial. Neither Applicant nor counsel had notice of the admission of falsity of Mr. Williams' testimony and could not have discovered such. Mr. Williams has provided an affidavit, dated December 6, 2017, where he acknowledges the falsity of his testimony.
1. Ineffective Assistance of Trial Counsel
   f. Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant.
   g. Counsel was ineffective for failing to properly object to impermissible testimony and argument during the course of Applicant's trial, allowing the jury to hear impermissible testimony and thus failing to preserve the issues for direct appeal.

h. Counsel was ineffective for failing to object to the incorrect instruction on the law to the jury, specifically with regards to the instructions for the charge of Attempted Murder.
i. Counsel was ineffective for failing to object to improper vouching testimony during the testimony of Investigator Charlie Watson.

Applicant raised the following allegations during the evidentiary hearing:

1. Ineffective Assistance of Counsel
   j. Failure to meet, prepare case for trial, and review discovery.
   k. Failure to discuss constitutional rights.
   l. Failure to object to Solicitor's comments in opening statements and closing arguments as impermissible vouching (Citing pp. 43, ll. 8–13; 485, ll. 4–6; 486, ll. 20–21; 488, ll. 18–20; and 493, ll. 5–15).
   m. Failure to move to suppress and object to admission of shell casings into evidence based on incomplete chain of custody.
   n. Failure to raise Brady violation for late disclosure of shell casings mishandling.

Applicant failed to present testimony or other evidence in support of various allegations raised in his pleadings, and therefore, this Court deemed them abandoned. The allegations are addressed specifically, *infra*.

Before this Court are the records of the Marion County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and records from the current PCR action, along with any amendments to his application.

STANDARD OF REVIEW

The Uniform Post–Conviction Procedure Act[9] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;

[9] S.C. Code Ann. §§ 17–27–10 to –160.

3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17–27–20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post–conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two–part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required

showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then–existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best

practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of Trial Counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

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

Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post–conviction relief. See Rule 71.1(e), SCRCP (stating that in a post–conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is

entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post–conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of fact and conclusions of law as required by § 17–27–80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant he rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Allegation 1a: Trial Counsel Failed to Request a Mistrial Based on State Tampering and Altering Evidence at the Crime Scene

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to request a mistrial based on the State's tampering and altering evidence at the crime scene. Specifically, Applicant averred that Trial Counsel should have requested a mistrial because first responders moved several shell casings out of the roadway at the crime scene. This Court finds this allegation to be without merit.

"A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct.

App. 2010); See State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) ("A mistrial should only be granted when absolutely necessary, and a defendant must show both error and ... prejudice in order to be entitled to a mistrial."). "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." State v. White, 371 S.C. 439, 447–48, 639 S.E.2d 160, 164 (Ct. App. 2006). The court considers the entire record in determining prejudice. Id. "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998).

Trial

On direct examination, Corporal Marion Richardson (Corporal Richardson) testified that he did not move any shell casings out of the roadway. (Trial Tr. pp. 131–132). On cross–examination, Corporal Richardson testified he had no idea if any shell casings were moved. (Trial Tr. p. 138).

On direct examination, Sergeant Clemson Legette (Sergeant Legette) testified that Patrolman Pike advised him that Corporal Richardson had moved some shells out of the roadway so they would not get run over. (Trial Tr. p. 153). Sergeant Legette testified that he would not have moved any evidence, and he would have stopped traffic. (Trial Tr. pp. 153–154). On cross-examination, Sergeant Legette testified that Corporal Richardson likely picked up the shells and moved them out of the roadway. (Trial Tr. pp. 163–164). Sergeant Legette testified that it is not standard practice to move evidence, and it was a mistake that it was moved. (Trial Tr. p. 164). Sergeant Leggette testified that he has no way of knowing where the evidence was located prior to it being moved off the roadway. (Trial Tr. p. 164). Sergeant Legette testified that the fact that

the shells were moved was not included in the report. (Trial Tr. p. 165). Trial Counsel continued to cross-examine Sergeant Legette concerning the moved evidence. (Trial Tr. pp. 167, 169). Additionally, Trial Counsel cross-examined Charlie Watson concerning the moved shells. (Trial Tr. pp. 242–243).

In closing, Trial Counsel argued that because Marion Richardson lied about moving the shell casings, where the shooters came from is uncertain and creates reasonable doubt. (Trial Tr. pp. 649–650).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he first learned that some of the evidence was mishandled at his trial. (PCR Tr. p. 23). Applicant testified that his discovery failed to mention that some shell casings had been moved out of the roadway. (PCR Tr. p. 23; State's Exhibit 40).[10] Applicant testified he told Trial Counsel when he became aware, but did not recall what Trial Counsel said. (PCR Tr. 24). Applicant testified that after Officer Pike's testimony, he and Trial Counsel discussed the shell casings with his co-defendant and his counsel. (PCR Tr. p. 26). Applicant testified that Trial Counsel, his co-defendant, and his co-defendant's counsel knew about the mishandled evidence, but he did not know about it before their conversation. (PCR Tr. p. 26). Applicant testified that Trial Counsel's strategy did not change after those potential issues arose. (PCR Tr. p. 26).

On direct examination, Trial Counsel testified that the movement of shell casings by one of the first responding officers came up at trial. (PCR Tr. p. 8). Trial Counsel testified

[10] Notably, at trial Agent Michelle Eichenmiller received six fired bullets, then one fired bullet, a small jacket fragment, along with twenty–one (21) fired .40 S&W caliber cartridges, two different firearms, and unfired ammunition. One firearm was a Taurus Millenium Pro PT140 in .40 S&W caliber and one Smith and Wesson model XW 40 VE also in .40 S&W caliber. (Trial Tr. p. 338).

that they made a great deal about the mishandling of evidence. (PCR Tr. p. 8). Trial Counsel further testified that he remembered the issue being an argument for the jury at the end of the trial. (PCR Tr. p. 9). Trial Counsel testified that he does not recall this influencing his representation. (PCR Tr. p. 9). Trial Counsel further testified that nobody contested the fact that somebody went and shot the house from the roadway. (PCR Tr. p. 9).

On cross-examination, Trial Counsel testified that, ultimately, whether the shell casings were moved was a matter for the jury. (PCR Tr. p. 15). Trial Counsel also testified that this was not a basis for a direct verdict motion or a mistrial. (PCR Tr. p. 15).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* Trial Counsel **credibly** testified that the mishandling of shell casings came about during trial, and it was an issue for the jury. Trial Counsel **credibly** testified that even if the shell casings had been moved, it was an issue for the jury to decide. See Madray v. United States, 55 F.2d 552 (4th Cir. 1932) (The weight of the evidence is for the jury.). Trial Counsel **credibly** testified that there was no denying that somebody went and shot the house from the roadway. Therefore, Trial Counsel cannot be deficient where he articulated a valid strategy for not moving for a mistrial. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Moreover, Applicant is unable to establish that had Trial Counsel moved for a mistrial, the outcome of his trial would have been different. It is not likely a mistrial would have been granted based solely on the mishandling of evidence, considering the other competent evidence that was presented to the jury implicating Applicant in this crime. For example: Applicant's co-defendant, Jamie Williams' testimony implicating Applicant as one of the shooters (Trial Tr. pp. 229–230, 472–474, 477–480); Willie Bethea's testimony corroborating Jamie Williams' testimony concerning the shooting (Trial Tr. pp. 531–550); the gun seized from the victims did not match the gun used to commit the crime (Trial Tr. pp. 232, 338); and Investigator Charlie Watson's testimony as to the original location of the shell casings and when they were moved (Trial Tr. pp. 242–245). Additionally, the fact that the trailer had been shot up was never contested. See State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010) (a mistrial should only be granted when absolutely necessary, and movant must show both error and prejudice in order to be entitled to a mistrial; insubstantial errors that do not impact the result of the case do not warrant a mistrial in a criminal case when guilt is conclusively proven by competent evidence, and the determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case).

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

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

Allegation 1e: **Trial Counsel Failed to Object to Judge Charging the Jury that Specific Intent to Kill is Not Required to Prove Attempted Murder**

Allegation 1h: **Trial Counsel Was Ineffective for Failing to Object to the Incorrect Instruction on the Law to the Jury; Specifically With Regards to the Instructions for the Charge of Attempted Murder**

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to object to the improper jury charge on attempted murder, that it was a general intent crime and not a specific intent crime. This Court finds this allegation to be without merit.

"In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge must charge only the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and doe not have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury

charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

Trial

At trial, the trial court gave the following jury charge regarding attempted murder:

> The defendants are also charged with four counts of attempted murder: one count of attempted murder of Derrick Lamont Wilson, one count of attempted murder of Darrell Antonio Davis, one count of attempted murder of Gavin Graves, and one count of attempted murder of Christopher Kollock.
>
> In order to prove this crime, the State must prove beyond a reasonable doubt that the defendants attempted to kill Derrick Lamont Wilson, Darrell Antonio Davis, Gavin Graves, and Christopher Kollock with malice aforethought, either express or implied.
>
> Now, as I stated to you previously and I will say again, while the defendants are charged with four counts of attempted murder, in addition to murder, discharging a firearm into a dwelling, and possession of a weapon during the commission of a violent crime, you must decide each charge separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other charge. The defendants may be convicted or acquitted on any or all of the offenses charged.
>
> Now, malice as I explained to you earlier, ladies and gentlemen -- malice is as I have explained to you earlier. Furthermore, malice aforethought again may be express or inferred.
>
> If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you, the jury, along with the other evidence in the case, and you may give it the weight you decide it should receive.
>
> A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury. Intent means intending the result which actually occurs; not accidentally or involuntary. Intent may be shown by acts and conduct of the defendants and other circumstances from which you may naturally and reasonably infer intent.

(Trial Tr. pp. 686–687).

Findings

As an initial matter, this Court notes that while Applicant raised this allegation within his PCR application, no testimony or evidence was presented to this Court to support Applicant's

allegation at the evidentiary hearing. Nevertheless, this Court finds it necessary to address this allegation as a matter of law.

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. An attorney is not required to anticipate or discover changes in the law or facts, which did not exist at the time of trial, to render effective assistance of counsel. Thomes v. State, 310 S.C. 306, 309–310, 426 S.E.2d 764, 765 (1993).

In State v. King, the Court of Appeals held for the first time that "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder." 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015). Thereafter, our Supreme Court, in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), agreed that attempted murder was a specific intent crime. However, our Supreme Court recognized the confusion, stating, "While it may seem counterintuitive for the attempt of a crime to require a higher level of *mens rea* than that of the completed crime, this is the majority rule and a rule that our appellate courts and General Assembly have followed." King, 422 S.C. at 56, 810 S.E.2d at 22.

This Court finds that the jury charge as given in Applicant's trial in 2014 was a correct statement of the law at that time. Thus, Applicant cannot prove Trial Counsel's representation was deficient, nor can he show any resulting prejudice from the alleged deficiency. See Teamer v. State 416 S.C. 171, 182-83, 786 S.E.2d 109, 114-15 (2016) (finding PCR court erred in finding counsel deficient for not objecting to charge that had not yet been found improper); Strickland,

466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.").

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

Allegation 1f: Trial Counsel Failed to Properly Investigate the Facts and Circumstances Surrounding the Allegations Against Applicant

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to properly investigate the facts and circumstances surrounding Applicant's case. Specifically, failure to investigate a possible alibi defense. This Court finds this allegation to be without merit.

"A criminal defense attorney has a 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 upon 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 v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (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.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The applicant must further present evidence demonstrating how the discoverable matters or defenses would have resulted in a different outcome. Id. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

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 ("this duty is limited to [a] reasonable investigation"). The United States Supreme Court also instructed reviewing courts to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690. 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 any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied

by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

Through an alibi, an accused attempts "to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d Criminal Law § 136). To do so, the accused must show "he was at a place so distant that his participation in the crime was impossible." Id. Furthermore, the alibi must account for the entire time during which these crimes were committed. Id. "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." State v. Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (citing Robbins, 275 S.C. 373, 271 S.E.2d 319).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he provided Trial Counsel with information on where he was and who he was with on the day of the shooting. (PCR Tr. p. 21). Applicant testified that he asked Trial Counsel to call a witness for him or put him on the stand to testify. (Trial Tr. p. 22). Applicant testified that Trial Counsel felt it was best for him not to testify, so the defense could have the last argument. (PCR Tr. p. 22).

On direct examination, Trial Counsel testified that attorneys have duties to their clients. (PCR Tr. p. 8). Trial Counsel testified that he did not have much of a defense other than that Applicant did not commit the crime. (PCR Tr. p. 9). Trial Counsel testified that at trial, he made efforts to raise additional defenses, and while a few points came up, none were substantial. (PCR Tr. p. 10). Trial Counsel testified that when someone maintains they are not involved, they cannot

assist with providing information because they were not present. (PCR Tr. p. 10). Additionally, Trial Counsel testified that nobody contested the fact that the shooting took place. (PCR Tr. 9).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Trial Counsel **credibly** testified that he did not have much of a defense, other than that Applicant maintained he did not commit the crime and was not at the scene. Trial Counsel **credibly** testified that he investigated to the best of his ability with the information available to him. Trial Counsel **credibly** testified that Applicant maintained he was not involved, and so he could not assist in the investigation. Therefore, Trial Counsel is not deficient for failing to investigate and present an alibi defense.

Moreover, Applicant failed to provide the name or present testimony or other evidence establishing the existence of the alleged alibi witness. See Harris, 377 S.C. at 75–76, 659 S.E.2d at 145–46; see also Glover, 318 S.C. at 498–99, 458 S.E.2d at 540 (To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence.). Therefore, Applicant's general testimony of an existing alibi witness that he advised Trial Counsel of is **not credible**, and Applicant cannot establish prejudice resulting from Trial Counsel's performance. Clark v. State, 315 S.C. 385, 434

S.E.2d 266 (1993) (Applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice.).

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

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

Allegation 1i: **Trial Counsel Failed to Object to Improper Vouching Testimony of Investigator Charlie Watson.**

Allegation 1g: **Trial Counsel Failed to Object to Impermissible Testimony During Trial Thereby Failing to Preserve the Issues for Direct Appeal.**

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to object to impermissible testimony during trial, thereby failing to preserve the issues for direct appeal. Specifically, Applicant alleged that Trial Counsel was constitutionally ineffective for failing to object to the improper vouching testimony of Investigator Charlie Watson. This Court finds these allegations to be without merit.

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

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

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

"Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury." State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), rev'd and remanded, 534 U.S. 246 (2002), citing United States v. Walker, 155 F.3d 180 (3d Cir. 1998). In State v. Kelly, the Supreme Court held that questions posed by the prosecuting attorney that convey they believe the witness is telling the truth constitute vouching. 343 S.C. at 369, 540 S.E.2d at 860–61; State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity[ ] or where a prosecutor implicitly vouches for a witness's veracity by indicating information not presented to the jury supports the testimony.").

"This court decided the testimony of a witness is improper bolstering if: (1) the witness directly states an opinion about the [other witness]'s credibility; (2) the sole purpose of the testimony is to convey the witness's opinion about the [other witness]'s credibility; or (3) there is no way to interpret the testimony other than to mean the witness believes the [other witness] is telling the truth." State v. Geter, 434 S.C. 557, 864 S.E.2d 569 (Ct. App. 2021), aff'd, 445 S.C. 139, 912 S.E.2d 255 (2025) (citing Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019)).

Trial

At trial, Solicitor questioned Investigator Charlie Watson as follows on direct examination:

> Q: Okay. Did — when you talked to Willie Bethea, did he have a nickname, if you recall?
> A: I can't recall the nickname.
> Q: Okay. When you talked to Willie Bethea, can you describe for us what was his demeanor and how did he act?
> A: Mr. Willie Bethea was very cooperative. Out of all the co-defendants involved in this, he was probably the only person that I can give an honest opinion of 18 years of law enforcement to be sincere and apologetic and remorseful for what happened.

(Trial Tr. p. 230).

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that there was no strategic reason for not objecting to Investigator Watson's comment. (PCR Tr. pp. 12–13).

Findings

As an initial matter, this Court finds that the complained-of testimony of Investigator Watson was not improper bolstering or vouching and that any objection from Trial Counsel would not have been meritorious. See Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) (finding "counsel's performance was not deficient if he declined to pursue a futile tactic.") (applying Strickland, 466

U.S. at 688, 694 (explaining that, in order to succeed on a claim of ineffective assistance, defendant must demonstrate both deficient performance and cognizable prejudice)); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

In this context, the Solicitor's inquiry was specifically focused on Bethea's demeanor, rather than on his overall truthfulness or credibility. Importantly, Investigator Watson addressed the Solicitor's questions and provided his professional assessment of Bethea's demeanor. While Investigator Watson's remark regarding his lengthy tenure in law enforcement may have been tangential, it was not prompted by the Solicitor's line of questioning and did not detract from the main issue. What is more, it is unequivocal that Bethea provided a statement against his own penal interest, which goes to Bethea's credibility and justifies Investigator Watson's commentary on Bethea's demeanor. This Court finds Applicant has failed to show that had an objection been made that there is a reasonable probability that the outcome of his trial would have been different; thus, Applicant has failed to show any deficiency in Trial Counsel's representation or any prejudice flowing therefrom.

Further, as this Court finds any objection would not have been meritorious, this Court also finds that even if it were preserved for appeal, it would not have been successful on appeal. Therefore, Applicant has failed to show any deficiency or prejudice from trial counsel's failure to preserve the issue. Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018) (Holding that the appropriate inquiry to determine prejudice from failure to preserve an issue is whether it would have been successful on appeal); McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (Finding "that, even if trial counsel had renewed his motion in order to preserve the issue, McHam has not shown there

is a reasonable probability that the outcome of the trial would have been different because his Fourth Amendment claim fails on its merits.")

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

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, these allegations must be **DENIED and DISMISSED with PREJUDICE.**

Allegation 1j: Failure to Meet, Prepare the Case for Trial, and Review Discovery.

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to review and discuss discovery. Specifically, Applicant alleged that Trial Counsel failed to review the chain of custody, his co-defendant's statements with him prior to trial, and Willie Bethea's medical records. This Court finds the allegation to be without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with

his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) (finding "Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Additionally, "brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." Id.; see Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); Skeen v. State, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)). Furthermore, an

applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he reviewed some of the evidence in his case when he received his Rule 5 motion, about a year before his trial. (PCR Tr. p. 20). Applicant testified that he did not have an opportunity to discuss the evidence with Trial Counsel. (PCR Tr. p. 20). Applicant testified that he knew that Williams and Bethea were going to testify against him and his co-defendant. (PCR Tr. p. 22). Applicant testified that he discussed Bethea's mental health background with Trial Counsel. (PCR Tr. p. 22). Applicant testified that he was unable to review Bethea's medical records because they were privileged. (PCR Tr. p. 23). Applicant testified that he did not have a complete chain of custody. (PCR Tr. p. 27). Applicant testified that he did not have a chance to discuss the chain of custody of the evidence in his case with Trial Counsel. (PCR Tr. p. 27). Applicant further testified that it was not something he worried about and figured he would find out at trial. (PCR Tr. p. 27).

On cross-examination, Applicant testified that he received the discovery a year before trial. (PCR Tr. p. 28). Applicant also testified that he knew all along that his co-defendant, Bethea, would testify against him, and that statement led to multiple arrests, including his. (PCR Tr. p. 28).

On direct examination, Trial Counsel testified that he recalled meetings with Applicant on several occasions, both in Marion County and in Marlboro County. (PCR Tr. p. 7). Trial Counsel testified that he became aware that shell casings were moved at the scene when it came out through testimony at Applicant's trial. (PCR Tr. p. 8). Trial Counsel testified that Applicant was unable to assist with his defense because he maintained he was not at the scene. (PCR Tr. p. 10). Trial Counsel testified that it was not a surprise at all that the co-defendants were cooperating. (PCR Tr. p. 7). Trial Counsel testified that he attempted to craft a defense based on the trajectory of the bullet holes into the house, suggesting that the bullets could have been fired from behind the house. (PCR Tr. p. 11). Trial Counsel testified that when evidence is in SLED's custody, they are required to keep a chain of custody the entire time. (PCR Tr. p. 12). Trial Counsel testified that the timeline is anybody's guess, where you might get something back or you might not get something back for a long time. (PCR Tr. p. 11).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds that Applicant has failed to overcome his burden in proving that Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Applicant testified that he met with Trial Counsel prior to trial, received and reviewed discovery, and discussed various matters, including Bethea's mental health background. Applicant testified that he was not able to review Bethea's medical records himself, as they were privileged documents. Based on Applicant's own admission, failure to review these records was not based on any deficiency on the part of Trial Counsel. Additionally, while

Applicant testified that he did not review the chain of custody, he also testified that he was not concerned about it and knew he would learn about the chain of custody at trial. Further, Trial Counsel **credibly** testified that he met with Applicant several times and crafted a defense as best as he could based on the limited information Applicant provided him with.

Additionally, even if this Court were to find Trial Counsel's representation was deficient, which it does not, Applicant failed to prove any prejudice, as he failed to provide this Court with the alleged evidence or defenses that would have been available to him had he spent more time in consultation and preparation with Trial Counsel. Applicant's testimony amounts to mere speculation, as he provided general testimony about evidence that Trial Counsel could have reviewed with him, but failed to provide the evidence itself and failed to provide how it would have affected the outcome of his trial. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

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

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, these allegations must be **DENIED and DISMISSED with PREJUDICE.**

Allegation 1k: Failure to Discuss Applicant's Constitutional Rights.

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to explain his constitutional rights. This Court finds this allegation to be without merit.

Trial

The following colloquy occurred at trial between the trial court, Applicant, and his co-defendant:

The Court:	If each of you would, raise your right hand to be sworn. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God, Mr. Smith?
Defendant Smith:	Yes, sir.
The Court:	Mr. Hayes?
[Applicant]:	Yes, sir.
The Court:	All right. You can put your hands down. All right. At this time, gentlemen, I am going to explain to you certain of your rights. If you do not understand anything that I say, please let me know. If you want me to explain anything in more detail, please let me know as well. Do each of you understand, Mr. Smith?
Defendant Smith:	Yes, sir.
The Court:	Mr. Hayes?
[Applicant]:	Yes, sir.
The Court:	All right. We have now reached the stage of the trial where you may present your defense. You have the right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States and that amendment states in part that no person -- no person shall be compelled in any criminal case to be a witness against himself. This means that you cannot -- you cannot be required to testify in this case. You have the right to testify on your own behalf. However, no one -- and I repeat no one can make you testify. This is a personal right and no one can waive this right except you. If you decide to testify, you will be subject to the same rules that govern other witnesses and you may be examined and cross examined on any relevant issue in this case. In addition, if you have any convictions involving dishonesty or false statement or for crimes punishable by imprisonment for more than one year and this Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to you, the solicitor will be able to introduce your record to attack your credibility. If you decide to testify, this decision on your part must be freely, voluntarily, and intelligently made with knowledge 1 of the protections given to you by the Fifth Amendment and the consequences of your decision to testify. If you decide not to testify, I will

instruct the jurors that they cannot -- that they cannot give the fact that you did not testify any consideration whatsoever and that there is to be absolutely no prejudice to you because you did not testify. Now, it is left entirely up to you whether or not you testify. You may talk with your attorney, your family, friends, or anyone else, but the final decision is left entirely up to you. Do you understand what I have explained to you, Mr. Smith?

Defendant Smith: Yes, sir.

The Court: Mr. Hayes?

[Applicant]: Yes, sir.

The Court: Do you have any questions about what I have explained to you, Mr. Smith?

Defendant Smith: No, sir.

The Court: Mr. Hayes?

[Applicant]: No, sir.

The Court: Have you discussed with your attorney whether or not you should testify, Mr. Smith?

Defendant Smith: Yes, sir.

The Court: Mr. Hayes?

[Applicant]: Yes, sir.

The Court: Do you need any more time to talk to your attorney, Mr. Smith?

Defendant Smith: No, sir.

The Court: Mr. Hayes?

[Applicant]: Yes, sir.

The Court: All right.

Mr. Bailey: I was going to request a few minutes to talk.

The Court: Well, I'm going to stand down for just a minute and allow you two to -- or allow each of you to talk with your respective attorneys. Let me know when you all are finished talking to your clients. At that time, I want to talk with all the lawyers in chambers concerning the charge and et cetera. All right? All right. We'll stand down for just a few minutes. You all may be seated, Mr. Hayes and Mr. Smith.

(Whereupon, there is a break in the proceedings from 10:52 a.m. until 11:16 a.m.)

The Court: All right. We stood down for a minute for the defendants, Mr. Smith and Mr. Hayes, to speak with their respective attorney. Mr. Smith, if you would, please stand. Mr. Hayes, would you please stand? Have each of you had sufficient time -- enough time to talk with your lawyer concerning whether or not you will testify, Mr. Smith?

Defendant Smith:	Yes, sir.
The Court:	Mr. Hayes?
[Applicant]:	Yes, sir.
The Court:	Do you wish to testify in this case, Mr. Smith?
Defendant Smith:	No, sir.
The Court:	Mr. Hayes?
[Applicant]:	No, sir.

(Trial Tr. pp. 616–620).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not discuss his constitutional rights with him. (PCR Tr. p. 19).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Applicant's testimony Trial Counsel did not discuss his constitutional rights with him is **not credible**. Applicant merely provided that Trial Counsel failed to discuss his constitutional rights, without more. Notably, the record indicates that the trial court advised Applicant of his right to present a defense and testify, and Applicant indicated he had discussed his right to testify with Trial Counsel. (Trial Tr. pp. 616–620). This Court finds that Trial Counsel was not deficient, and Applicant failed to establish any resulting prejudice from Trial Counsel's alleged deficient performance.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably

effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 11: Failure to Object to the Solicitor's Comments in Opening and Closing Arguments as Impermissible Vouching.

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to object to the Solicitor's comments in opening statements and closing arguments as impermissible vouching, the challenged comments cited below. This Court finds this allegation to be without merit.

A solicitor may not vouch for the credibility of a witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). "Vouching" occurs where the prosecutor indicates to the jury that her argument regarding the credibility of a witness is based on something *other* than the evidence admitted—i.e., that the prosecutor "knows something about the credibility of a witness that the jury does not know." State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023).

On the other hand, when the solicitor bases her credibility arguments on evidence *within* the record, or on reasonable or common-sense inferences therefrom, no improper vouching occurs. State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990), overruled on other grounds by State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006); see also Busse, 439 S.C. at 109, 886 S.E.2d at 211 ("A prosecutor arguing forcefully during closing argument that the jury should

believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial."). A solicitor has the right to argue to the jury regarding the weight that should be given to a witness's testimony. State v. Gibbs, 438 S.C. 542, 553, 885 S.E.2d 378, 384 (2023). In fact, "a prosecutor is *expected* to comment on the credibility of the witnesses when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer." Busse, 439 S.C. at 111, 886 S.E.2d at 212 (emphasis added). Such comments are especially necessary when the case involves a "swearing contest" between a witness and the defendant. State v. Raffaldt, 318 S.C. 110, 115, 456 S.E.2d 390, 393 (1995).

To find whether a prosecutor's comments in a closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Brown, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." Fortune, 428 S.C. at 550, 837 S.E.2d at 40 (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)).

The legal concept of vouching prohibits a prosecutor from giving the jury any indication that she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury. See State v. Kelly, 343 S.C. 350, 368, 540 S.E.2d 851, 860 (2001) (quoting United States v. Walker, 155 F.3d 180, 184 (3d Cir. 1998))), rev'd and remanded on other grounds by Kelly v. South Carolina, 534 U.S. 246, 122 S.

Ct. 726, 151 L. Ed. 2d 670 (2002). "It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994).

Trial

At trial, the Solicitor made the following comments in his closing arguments:[11]

> But it boils down to those two young men and I'll admit to you right now if you don't believe them, the State doesn't have that much of a case, but I'm going to tell you they're believable. They're credible. Just as I know that y'all know they were credible. You heard it on the stand. They could not be shaken from what they said.

(ROA p. 483, ll. 8–13).

> If he's shooting over the top of the car, the car is going towards Marion, just like Willie "Boo Boo" Bethea told you it was.

(ROA p. 485, ll. 4–6).

> I submit to you, ladies and gentlemen, Jamie was telling the truth.

(ROA p. 486, ll. 20–21).

> Now, Jamie – – I think he told the truth absolutely clear, you know, getting it off his conscience and putting himself there and putting himself in and owning up to what he did.

(ROA p. 488, ll. 18–20).

> So don't get caught up in that smoke. Weigh it. Compare it. All these pieces of the puzzle fit together and you can believe Jamie and you can believe Boo Boo. I'm sure they're hoping — you know, we've all been told all our lives the truth will set you free. The truth is your friend. You've got to be truthful. And if you're truthful, good things can happen to you. You know, no deals have been made. They testified to that. Nothing has been offered, but they know. They're not stupid. They know the best thing they can do is tell the truth and hope for the best, and they told the truth. They told the truth.

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[11] While Applicant's allegation is to improper comments during opening and closing, Applicant did not cite to and presented no evidence of improper statements made during the Solicitor's opening statement.

(ROA p. 493, ll. 5–15).

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that during openings and closings, he makes objections only in extreme circumstances. (PCR Tr. p. 13). Trial Counsel testified that, if objecting under these circumstances, you run the risk of offending the jury. (PCR Tr. p. 13). Trial Counsel testified that "if something is going afoul, then certainly something you have to consider." (PCR Tr. p. 13).

Findings

As an initial matter, Applicant presented no evidence to this Court regarding any alleged improper comments in the Solicitor's opening statement, and therefore, this Court finds Applicant has abandoned that portion of the allegation. Thus, that portion of the allegation is **DENIED and DISMISSED with PREJUDICE**.

Turning to the failure to object to portions of the Solicitor's closing argument as impermissible vouching, this Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds that Applicant has failed to overcome his burden in proving that Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that the Solicitor's comments during his closing argument did not constitute improper vouching. The challenged comments were inferences and comments on evidence that was before the jury, and did not constitute assurances of any of the witnesses' credibility based on the Solicitor's personal knowledge or information not presented to the jury. See Kelly, 343 S.C. at 368, 540 S.E.2d at 860

(2001) ("Vouching constitutes an assurance by the prosecuting attorney of the credibility of a government witness through personal knowledge or by other information outside of the testimony before the jury.").

Moreover, the Solicitor's comments were a presentation of the State's theory of the case based on the evidence presented to the jury, and a comment on the weight of the testimony presented. See State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented and furthermore may comment on the weight to be accorded such testimony."). Therefore, Trial Counsel was not ineffective for failing to object to the challenged comments in closing, as any objection would have been futile. See Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) (finding "counsel's performance was not deficient if he declined to pursue a futile tactic.") (applying Strickland, 466 U.S. at 688, 694 (explaining that, in order to succeed on a claim of ineffective assistance, defendant must demonstrate both deficient performance and cognizable prejudice)); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

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

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

Allegation 1m: **Failure to Move to Suppress and Object to the Admission of the Shell Casings Based on an Incomplete Chain of Custody.**

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to move to suppress and object to the admission of the shell casings based on an incomplete chain of custody. This Court finds this allegation to be without merit.

The proof of chain of custody does not have to negate all possibilities of tampering; the State only needs to establish a complete chain of evidence as far as practicable. State v. Rogers, 603 S.E.2d 910 (S.C. Ct. App. 2004). Instead, "where the identity of persons handling the specimen is established...evidence regarding its care goes only to the weight of the specimen as credible evidence," and not to the admissibility of the evidence. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d. 835, 837 (2001); see United States v. Allen, 619 F.3d 518 (6th Cir. 2010) (Holding that the bag of cocaine was properly admitted even though original evidence bag was destroyed and replaced, and the weight of the cocaine diminished over time, as appellant merely raised possibility of tampering and there was nothing improper about officers replacement of original bag); see also United States v. Lewis, 363 Fed.Appx. 382, 390 (6th Cir. 2010) (affirming admission of allegedly mishandled evidence where "[t]he undisputed evidence presented at trial indicates that the officers carefully documented each step between recovery of the [evidence] and its placement into the evidence vault").

PCR Evidentiary Hearing

On direct examination, Applicant testified that he first learned that some of the evidence was mishandled at his trial. (PCR Tr. p. 23). Applicant testified that his discovery failed to mention that some shell casings had been moved out of the roadway. (PCR Tr. p. 23; State's Exhibit 40). Applicant testified that he informed Trial Counsel upon becoming aware, but he did

not recall Trial Counsel's response. (PCR Tr. 24). Applicant testified that Trial Counsel's strategy did not change after those potential issues arose. (PCR Tr. p. 26). Applicant testified that he did not discuss a suppression hearing with Trial Counsel. (PCR Tr. p. 27). Applicant testified that Trial Counsel should have asked for a suppression hearing before his trial, because the only evidence to prove his innocence or guilt was not presented at trial. (PCR Tr. p. 27). Applicant testified that they resubmitted the shell casings for fingerprint analysis thirty-three days before his trial. (PCR Tr. p. 27). Applicant testified that he felt his rights were violated at the beginning and end of the trial. (PCR Tr. p. 27).

On direct examination, Trial Counsel testified that the movement of shell casings by one of the first responding officers came up at trial. (PCR Tr. p. 8). Trial Counsel testified that they made a great deal about the mishandling of evidence. (PCR Tr. p. 8). Trial Counsel further testified that he remembered the issue being an argument for the jury at the end of the trial. (PCR Tr. p. 9).

On cross-examination, Trial Counsel testified that, ultimately, whether the shell casings were moved was a matter for the jury. Trial Counsel testified that he did not think there was a basis for a motion for a mistrial. (PCR Tr. p. 15).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

Trial Counsel **credibly** testified that the mishandling of shell casings came about during trial, and even if the shell casings had been moved, it was an issue for the jury to decide. It was established at trial that: Corporal Richardson moved some of the shell casings out of the road (Trial Tr. pp. 153, 195–196), Investigator Charlie Watson testified that the detective division collected the shell casings from the roadway, and it was given to the evidence custodian, Lieutenant Eddie Sawyer (Trial Tr. p. 234); and Lieutenant Sawyer received the shell casings, held them in evidence, and carried them to SLED (Trial Tr. pp. 318–322). As the identity of all people who handled the shell casings was established, the chain of custody was complete. The mere fact that some shell casings were moved out of the roadway does not make them inadmissible, especially where only a few of the numerous shell casings were moved, and Officer Greg Pike testified he arrived first on the scene and saw the shell casings on the highway. See Carter, Allen, Lewis, *supra.*

Additionally, it was brought out in testimony that some shell casings were moved out of the roadway in a misguided effort to preserve the evidence, not for some improper basis (Trial Tr. p. 153). Therefore, Trial Counsel is not ineffective for failing to object to the admissibility of the shell casings based on an incomplete chain of custody, as any objection would have been futile. See Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) (finding "counsel's performance was not deficient if he declined to pursue a futile tactic") (applying Strickland, 466 U.S. at 688, 694 (explaining that, in order to succeed on a claim of ineffective assistance, defendant must demonstrate both deficient performance and cognizable prejudice)); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably

effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 1n: Failure to Object to Admission of Shell Casings Based on Brady Violation.

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to object to the admission of the shell casings based on Brady[12]. This Court finds this allegation to be without merit.

The South Carolina Supreme Court has found: "A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). The duty to disclose evidence is applicable even where it has not been requested by the accused, and the duty encompasses impeachment evidence and exculpatory evidence. United States v. Agurs, 427 U.S. 97, 107 (1976); United States v. Bagley, 473 U.S. 667, 676 (1985).

Not every violation of a prosecutor's duty to disclose results in an unjust outcome, as "there is never a real Brady violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281 (1999) (internal quotations omitted).

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

PCR Evidentiary Hearing

On direct examination, Applicant testified that he first learned that some of the evidence was mishandled at his trial. (PCR Tr. p. 23). Applicant testified that his discovery failed to mention that some shell casings had been moved out of the roadway. (PCR Tr. p. 23; State's Exhibit 40). Applicant testified that he informed Trial Counsel upon becoming aware, but he did not recall Trial Counsel's response. (PCR Tr. 24). Applicant testified that Trial Counsel's strategy did not change after those potential issues arose. (PCR Tr. p. 26).

On direct examination, Trial Counsel testified that the movement of shell casings by one of the first responding officers came up at trial. (PCR Tr. p. 8). Trial Counsel testified that they made a great deal about the mishandling of evidence. (PCR Tr. p. 8).

Findings

This Court finds the combination of the record and Trial Counsel's testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

This Court finds that the failure to disclose the moving of the shell casings did not constitute a Brady violation, as the evidence was not material. As noted *supra*, only a few of the shell casings were moved, not all, and the other evidence was "formidable," including the eyewitness testimony from several co-defendants. See State v. Proctor, 358 S.C. 417, 424, 595 S.E.2d 476, 480 (2004) ("We find that the nondisclosure of proficiency test results was not material. The other evidence was formidable: the test results could only have reduced the probabilities."). This is even more

clearly demonstrated by Trial Counsel's extensive cross-examination of various witnesses concerning the movement of the shell casings, the theory he put forward that the shots might have come from the trailer and not the highway, and his closing argument. Trial Counsel took advantage of these facts and repeatedly put them before the jury throughout the trial, yet the jury convicted Applicant. Therefore, Applicant has failed to prove any deficiency in Trial Counsel's representation for failing to object to the admissibility of the shell casings based on Brady, as any objection would have been futile. See Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) (finding "counsel's performance was not deficient if he declined to pursue a futile tactic") (applying Strickland, 466 U.S. at 688, 694 (explaining that, in order to succeed on a claim of ineffective assistance, defendant must demonstrate both deficient performance and cognizable prejudice)); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

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

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

ALLEGATION OF NEWLY DISCOVERED EVIDENCE

Allegation 3a: **Applicant's Co-Defendant, Jamie Williams, Who Testified Against Applicant, Has Given a Statement That He Provided False Testimony During Applicant's Trial. Neither Applicant nor Counsel Had Notice of The Admission of Falsity of Mr. Williams' Testimony and Could Not Have Discovered Such. Mr. Williams Has Provided an Affidavit, Dated December 6, 2017, Where He Acknowledges the Falsity of His Testimony.**

Applicant alleged that he recently discovered his co-defendant, Williams, provided false testimony at his trial. Specifically, Applicant alleges that Williams provided an affidavit dated December 7, 2017, acknowledging the falsity of his testimony. This Court finds this allegation to be without merit.

To obtain a new trial based on newly or after discovered evidence under S.C. Code Ann. § 17–27–20(A)(4), a PCR applicant must show the evidence:

1. would probably change the result if a new trial is had;
2. has been discovered since the trial;
3. could not have been discovered before trial;
4. is material to the issue of guilt or innocence; and
5. is not merely cumulative or impeaching.

Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993); see Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (setting forth the five factors to be analyzed when considering a newly–discovered evidence claim) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979))); see also, e.g., United States v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007) ("Every element of this test . . . is essential, and a failure to establish any one element will defeat the motion.").

However, the granting of a new trial based on after–discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); see also State v. David, 14 S.C. 428, 432 (1881) ("There can be no doubt that motions of this sort should be received with

the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up . . ."). The "credibility of newly-discovered evidence . . . is a matter for determination by the circuit judge to whom it is offered." State v. Mayfield, 235 S.C. 11, 34, 109 S.E.2d 716, 729 (1959); Harris, 391 S.C. at 544–45, 706 S.E.2d at 529 ("The credibility of newly–discovered evidence is for the trial court to determine."); 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.").

PCR Evidentiary Hearing

On direct examination, Applicant testified that he does not recall when he became aware of Williams giving statements to law enforcement. (PCR Tr. p. 12).

On direct examination, Williams testified that he was charged with Smith, Bethea, and Applicant. (PCR Tr. p. 35). Williams testified that his testimony from the August 2014 trial was true and accurate. (PCR Tr. p. 37). Williams testified that he recalled the contents of his affidavit and signed it. (PCR Tr. p. 38; Applicant's Exh. 3). Williams further testified that his sister was told that he had to plead to perjury so that his murder case would be dismissed. (PCR Tr. p. 39).

Findings

As an initial matter, this Court is not persuaded by Williams' incredible testimony. Further, upon conducting and completing its analysis, this Court finds Applicant has failed to meet the requisite burden of proof regarding newly or after-discovered evidence under S.C. Code Ann. § 17–27–20(A)(4) (2014) and further failed to establish any constitutional violations or deprivations that would entitle Applicant to relief. See Rule 71.1 (e), SCRCP (stating that in a post–conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). As aforementioned, it is a "fixed rule that the credibility of

newly discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered." State v. Parker, 249 S.C. 139, 141, 153 S.E.2d 183, 184 (1967); see also Clemons v. Mississippi, *supra*.

The determination of whether new evidence is credible for the purposes of a new trial rests with the trial court. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, "our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citing Porter, 269 S.C. at 621, 239 S.E.2d at 643). "When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence." State v. Deese, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing State v. Fowler, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)).

Specifically, Applicant contends that his co-defendant, Williams, admitted to presenting false testimony by way of an affidavit dated December 6, 2017. However, contrary to Applicant's assertions, Williams testified that his testimony at trial was true and accurate. Further, William's intense concern with being charged with perjury calls into question his signed affidavit, which contradicts his testimony at the evidentiary hearing. Further, even if Williams testified consistently with his affidavit, his recantation is unreliable and merely has impeachable value. State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959) ("Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.") (internal quotations omitted)). Moreover, Williams' affidavit is not material to Applicant's guilt or innocence, as it was not his testimony solely that implicated Applicant.

Accordingly, this Court further finds Applicant has failed to meet his burden, and the evidence presented does not constitute newly discovered evidence. Importantly, even if the evidence constituted newly discovered evidence, it was immaterial to Applicant's guilt or innocence and would not change the result if Applicant was granted a new trial. Thus, this allegation must be **DENIED and DISMISSED with PREJUDICE.**

ALLEGATIONS OF JUROR MISCONDUCT

Allegation 2a: Juror Misconduct in the Form of Jurors Sleeping During Trial.

Applicant alleged that juror misconduct in the form of jurors sleeping during his trial. Specifically, the Applicant presented two affidavits from two jurors, Rachel Williams (Rachel) and Diamond A. Brown (Brown), in which they admitted to sleeping during Applicant's trial. This Court finds this allegation to be without merit.

A "defendant has a constitutional right to be tried by competent jurors," which "implies a tribunal both impartial and mentally competent to afford a hearing." Tanner v. United States, 483 U.S. 107, 134 (1987) (Marshall, J., dissenting) (citing Jordan v. Massachusetts, 225 U.S. 167 (1912)). Consistent with these principles, "a juror who has not heard all the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict." People v. Valerio, 141 A.D.2d 585, 529 N.Y.S.2d 350, 351 (1988).

Juror misconduct discovered post-trial is not properly considered as newly discovered evidence; instead, it is a separate basis for a new trial. McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013). Misconduct of a juror is "a fact to be determined by the trial judge from the circumstances" of each case. 23A C.J.S. Criminal Law § 1437 at 381; see also State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (trial court has broad discretion in assessing

allegations of juror misconduct); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), cert. denied, 525 U.S. 1077 (1999). The general test for evaluating alleged juror misconduct is whether there, in fact, was misconduct and, if so, whether any harm resulted to the defendant as a consequence. See 23A C.J.S.Criminal Law § 1437 at 381. Indeed, the great majority of courts in other states considering the sleeping juror question have utilized this approach. See 59 A.L.R.5th at 42 (because harm to defendant does not automatically follow a determination that a juror was sleeping, most states require a defendant to show prejudice, such as the juror "failed to follow some essential part of the proceedings"); People v. Bradford, 15 Cal.4th 1229, 65 Cal.Rptr.2d 145, 939 P.2d 259 (1997).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he recalled jurors sleeping during his trial. (PCR Tr. p. 24). Applicant testified that he told Trial Counsel, and the trial court made a mention about it during the trial. (PCR Tr. p. 25). Specifically, Applicant testified that Rachel kept sleeping on and off. (PCR Tr. p. 24).

On direct examination, Trial Counsel testified that he did not recall any members of the jury nodding off or falling asleep. (PCR Tr. p. 14). Trial Counsel testified he did not recall Applicant telling him about any jurors falling asleep. (PCR Tr. p. 14).

On direct examination, Rachel testified that she did not recall signing an affidavit back in 2016. (PCR Tr. p. 31). Rachel testified that it was her signature on the affidavit. (PCR Tr. p. 31). Rachel testified that she recalled saying that she was sleeping during trial but that she "wasn't asleep where [she] couldn't, you know, hear anything." (PCR Tr. p. 32).

On cross-examination, Rachel testified that attorney Shelly Williams contacted her about providing an affidavit. (PCR Tr. p. 33; Applicant's Ex. 1).[13]

Findings

This Court finds the combination that Applicant failed to meet his burden in proving that there was juror misconduct, and that he suffered any resulting prejudice from the jurors' conduct and was denied his right to a fair trial with an impartial jury. See 23A C.J.S.Criminal Law, *supra*. As an initial matter, Applicant failed to show any existing juror misconduct as it pertained to Brown, as Brown failed to appear and testify concerning this matter. See Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing did not establish the alibi); See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Concerning Rachel, she testified that she may have nodded off during trial, but not to the extent that she could not hear what was taking place. Further, contrary to Applicant's testimony and the affidavit, there is no indication in the record that the trial court admonished any of the jurors for sleeping or not paying attention. Trial Counsel testified that he did not recall an issue with jurors sleeping, and did not recall having a conversation with Applicant about jurors sleeping. Based on the lack of this issue appearing in the record, Rachel's testimony that she did not recall sleeping, and testimony that she was able to hear what was going on throughout the trial, and Trial Counsel's inability to remember such an issue, this Court finds Applicant's testimony that he saw

[13] The second juror, Diamond Brown was subpoenaed but did not appear at Applicant's evidentiary hearing. PCR Counsel offered Brown's affidavit as Applicant's Exhibit 2. (PCR Tr. p. 34). The trial record does not corroborate the juror's affidavit.

multiple jurors sleeping throughout the trial **not credible**. Applicant failed to establish that either Brown or Rachel failed to follow some essential part of his trial. See 59 A.L.R.5th at 42, *supra.*

Therefore, this Court finds Applicant has failed to establish any juror misconduct or any prejudice flowing therefrom. Thus, this allegation must be **DENIED and DISMISSED with PREJUDICE**.

ALLEGATIONS ABANDONED

Allegation 1b:	**Trial Counsel Failed to Prepare and Conduct Pre-Trial Investigations to Interview Adrian Smith.**
Allegation 1c.	**Trial Counsel Failed to Request Written Notice to Seek Life without Parole.**
Allegation 1d:	**Trial Counsel Failed to Request Jury Charge in Compliance with State v. Logan[14].**

Applicant failed to present any evidence, testimony, or legal authority regarding these allegations at the evidentiary hearing. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47. 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). Therefore, the Court deems these allegations abandoned.

|CONCLUSION & SIGNATURE PAGE FOLLOWS|

[14] 405 S.C. 83, 747 S.E.2d 444 (2013).

CONCLUSION

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

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

IT IS THEREFORE ORDERED:

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

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

AND IT IS SO ORDERED this 21 **day of** October, **2025.**

GEORGE M. McFADDEN, JR.
Presiding Judge
Twelfth Judicial Circuit

, South Carolina

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MARION COUNTY SC
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Outlook

HAYES Shaheed 2017-CP-33-219

From [redacted]
Date Mon 4/6/2026 4:27 PM
To [redacted]

1 attachment (19 MB)
HAYES Shaheed - signed OOD.pdf;

External Sender - From: **(Summer Etheredge** [redacted]
This message came from outside your organization.

Per our conversation, please find the signed Order of Dismissal for filing in your office.

Please let me know if I need to do anything further.

[redacted]
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-2567
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