

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

) Case No.: 2019-CP-30-00026

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the Honorable Frank R. Addy, Jr. The jury found Applicant guilty of murder but not guilty of the weapons charge. Judge Addy sentenced Applicant to life imprisonment.

Applicant filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on April 19, 2017. *State v. Walker*, Op. No. 2017-UP-169 (S.C. Ct. App. filed April 19, 2017.) Applicant then filed a petition for rehearing that was denied by the South Carolina Court of Appeals on June 23, 2017. On August 14, 2017, John Strom, Esquire, filed a petition for writ of certiorari on behalf of the Applicant. The Supreme Court of South Carolina denied the petition for writ of certiorari on February 1, 2018. The remittitur was returned to the circuit court on February 2, 2018.

Factual Summary

Late at night on October 31, 2013, Johnny Lee Cheeks ("Victim") was shot at his Enoree residence where he lived with Kelly Ball.

Toris Moore, Applicant's niece, testified Applicant stopped by to see her on the night of the shooting. (R.p.75, line 25-p.76, line 4; p.76, line 17-p.77, line 15). Applicant was with two other men—Christopher Wells and Johnny Lee Saxon—and Applicant asked Moore if she had a gun he could borrow. (R.p.77, line 16-p.78, line 8). Moore testified Applicant told her the three men were "going to Enoree to rob an older man at his house" and said they only had one gun and wanted another. (R.p.78, lines 9-11; p.79, lines 10-18). Applicant further told Moore the older man lived with a white woman and sold drugs and liquor out of his home. (R.p.78, lines 12-17). Moore testified she told Applicant her mother pawned the gun because Moore did not want to be involved in the robbery. (R.p.78, line 18-p.79, line 5).

Kelly Ball testified that she was with Victim on the night of the shooting. (R.p.86, lines 9-

24.) The two had just returned to Victim's mobile home when someone knocked on the door, and Victim answered it. (R.p.91, lines 3-12.) Ball testified Victim walked out, carrying keys and money in his pockets and a gun. (R.p.92, lines 2-17; p.103, lines 10-13.) Ball heard arguing and "some cursing," and testified she heard three voices, but only recognized that of Victim. (R.p.92, line 18-p.93, line 1.) Ball stated she also heard "scuffling," a loud thud, and seconds later she heard a gunshot. (R.p.93, lines 2-6.) Ball ran down a short hallway toward the front door and subsequently heard four more gunshots. (R.p.93, lines 9-20; p. 127, lines 12-21.) The door was not closed, so Ball could see out into the yard. (R.p.93, line 21-p.94, line 2.) Ball crouched down in the doorway and yelled, asking Victim if he was okay, and he told her he had been shot and to get help. (R.p.94, lines 2-5.) Ball testified when she looked outside, she saw a man lying on the ground, later identified as Applicant, and a second man standing near him. (R.p.94, lines 6-10; p.124, lines 2-20.) The second man was standing in a well-lit area, and Ball stated she made eye contact with him and got a good look at his face before he ran away from the scene. (R.p.95, line 20-p.96, line 8.) Ball later identified the man under the light as Christopher Wells. (R.p.96, lines 9-19; p. 120, lines 4-14.) Ball testified Wells ran to a waiting vehicle, got in the back seat, and the car drove away; Ball did not get a look at the driver. (R.p.97, lines 4-25.)

Ball dragged Victim inside the house and called 911, leaving Applicant on the ground outside. (R.p.98, lines 1-11.) Ball stated Victim was panicked and said he was "going to lay here and die." (R.p.99, lines 19-24.) A few minutes later, someone banged on the door and Ball asked who was there, and the person replied, "David." (R.p.100, line 5-p.101, line 3.) Ball testified Victim told her, "Do not open that door. That is who shot me." (R.p.101, lines 4-10.) The knocking soon stopped. (R.p.101, lines 17-22.) Victim told Ball the attackers had taken everything he had on him, including his money, keys, and jewelry. (R.p.129, lines 11-14; p.137, lines 13-24).

Law enforcement arrived minutes later. (R.p.101, line 23-p. 102, line 1.) Lieutenant Marty Crain was the first deputy to approach the mobile home, and he testified he saw Applicant collapsed in a chair on the porch and he heard a woman screaming inside. (R.p.140, lines 19-21; p.140, line 25-p.141, line 4; p.141, lines 22-23; p.142, lines 5-13; p. 143, lines 1-3.) Ball opened the door and Crain saw Victim on the floor inside, bleeding, with at least one gunshot wound to his neck. (R.p.143, line 22-p.144, line 17.) Crain testified Victim was conscious and talking; Victim told Crain the man on the porch had shot him. (R.p.144, line 22-p.145, line 5.) Another deputy who arrived shortly after Crain found a gun on the ground in the yard, which was later determined to be a .380 Lorcin handgun. (R.p.167, lines 2-5; p.170, lines 4-13; p.279, lines 6-13.)

Sergeant Robert Timmons remained on the porch with Applicant until medical crews arrived. (R.p.209, lines 20-22; p.213, lines 4-9.) Timmons testified Applicant was not a suspect at the time, and deputies thought he might be a victim even though Applicant said he had not been shot, but had been "jumped." (R.p.214, lines 4-14; p.353, line 21-p.354, line 17.) Specifically, Applicant told Timmons a few people "jumped on [him] and his arm was broken in two places." (R.p.214, lines 15-21.) Applicant said his attackers took off in a tan Ford Bronco before law enforcement arrived. (R.p.214, lines 22-24.)

The lead investigator, Lieutenant Bryant Cheek, testified Victim was still alive and talking when he arrived at the scene. (R.p.352, lines 8-21; p.360, lines 7-17.) Victim told Cheek that "they" came to his home to rob him, that Applicant shot him, that Victim then shot Applicant, and that Applicant subsequently shot him again. (R.p.355, lines 1-5.)

Both Applicant and Victim were taken to the hospital. Cheek testified he did not realize how serious Victim's injuries were until he arrived at the hospital to continue his investigation. (R.p.360, lines 18-24.) The gunshot wound to Victim's neck was not life-threatening. (R.p.250,

lines 1-13; p.251, lines 1-5.) However, the bullet that entered Victim's abdomen caused severe internal bleeding and damage to multiple organs as it passed through his body, eventually leading to his death. (R.p.251, lines 8-24; p.260, line 20 p.261, line 1).

While at the hospital, Applicant consented to a gunshot residue ("GSR") test of his hands. (R.p.361, line 1-p.362, line 7.) The results of the tests revealed the presence of particles associated and consistent with GSR, and a bullet that fell out of the victim's clothes at the scene was later matched to the .380 Lorcin handgun found in the yard. (R.p.148, lines 6-10; p.343, lines 1 1-20; p.368, line 1 1-p.369, line 1).

Present Application

In his initial PCR application filed January 15, 2019, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
 - a. Failure to properly prepare and investigate the case. (Including the failure to investigate and obtain evidence, surveillance video, police body cam video, cell phone records, cell phone video recordings, etc. that would establish a defense in the case.
 - b. Failure to obtain transcripts from court proceedings wherein potential witnesses had given previous testimony or to obtain records relevant to the impeachment of the testimony of any informants or state witnesses.
 - c. Failure to follow reasonable instructions or requests of the applicant.
 - d. Failure to properly present an adequate defense based on the facts and circumstances of the case.
 - e. Failure to properly conduct discovery in the case.
 - f. Failure to properly subpoena and call witnesses and present evidence in the defense of the case. Making improper stipulations or giving consent on issues before or during the trial which were adverse to the defense of the case.
 - g. Failure to move for appropriate suppression hearings and properly object to the testimony of witnesses and evidence in a timely manner.
 - h. Failure to properly and effectively cross-examine the State's witnesses.
 - i. Failure to raise and properly argue and preserve record and issues for appeal.

- j. Failure to make a proffer of evidence when warranted by the circumstances of the case and properly present and preserve issues for appeal.
 - k. Failure to make and preserve the record in cases of conferences at the bench and in chambers.
 - l. Failure of counsel to communicate all plea offers to the Applicant and to adequately discuss same in light of the evidence.
 - m. Failure to properly discuss the case and advise the Applicant on the applicable law and procedure and facts known or believed to exist. (Including the failure to meet with the applicant adequately and the failure to, in a timely manner, fully review and discuss the discovery material, evidence, law, and procedure so that the applicant would fully understand the charges, consequences and choices, including plea options.)
 - n. Failure to fully and timely explain the advantages of a guilty plea and the plea offers and the risks of trial. Failure to fully advise as to the right to testify and the associated risks.
2. Ineffective Assistance of Appellate Counsel
- a. Failure to raise and adequately brief the issues preserved at trial or for which there was a good faith argument as to preservation of the issue.
3. Discovery and Due Process Violations
- a. Failure of the State to produce discoverable material that would have aided in the defense of the case, including information in the possession of the State or not in the possession of the State but that the State could reasonably have expected to exist based on information in the State's possession such that the State should have disclosed the potential for such evidence.

Applicant subsequently amended his application on August 22, 2024, raising the following allegations:

- I. Ineffective Assistance of Trial Counsel
- 1. Trial Counsel failed to properly prepare for Applicant's trial.
 - a. Trial Counsel met with Applicant twice prior to trial, was admittedly missing material evidence, had not consulted with the appropriate expert witnesses, and failed to adequately communicate with him.
 - b. Trial Counsel failed to obtain and review all evidence with Applicant in preparation for trial.
 - c. Trial Counsel failed to share, discuss, and advise Applicant regarding the State's evidence, the elements of the offenses, his constitutional rights, and the sentencing ranges.

- d. Based on Trial Counsel's comments, Trial Counsel failed to prepare for the State to argue Applicant's guilt based on felony murder doctrine.
2. Trial Counsel failed to timely move for a continuance, resulting in prejudice to Applicant based on the Trial Court's comments and basis for denying the motion.
 - a. Trial Counsel was not prepared to proceed to trial and should have moved for a continuance upon receiving notice for trial.
 - b. Based on the untimely disclosure of the gunshot residue (GSR) evidence, Trial Counsel failed to consult with a qualified GSR expert and should have moved for a continuance upon receiving the GSR evidence.
 - c. Trial Counsel failed to consult with the appropriate medical doctors for removing the bullet from Applicant's body to have it examined by the South Carolina Law Enforcement Division (SLED) and should have moved for a continuance upon receiving notice for trial.
3. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.
 - a. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (holding "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.") (quotation citation omitted); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (finding "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State."); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994); *Peeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

4. Trial Counsel failed to file a supplemental motion for discovery or motion to compel disclosure of evidence to ensure all material and impeachment evidence had been disclosed by the State.
 - a. Trial Counsel failed to move for disclosure of all the BWC video recordings prior to trial. Prosecutor O. Warren Mowry, Jr., admitted in an affidavit that he did not collect all the BWC video recordings from the officers at the scene.
 - b. Trial Counsel failed move for the entire SLED file (GSR, ballistics, and latent prints) including but not limited to lab records, analyst records (training, proficiency, Disciplinary, hand-written notes), audit records, and communications with the prosecution and/or investigators).
 - c. Trial Counsel failed to personally review the Solicitor's file prior to trial.
 - d. Trial Counsel failed to request whether there were any promises or deals made with witnesses, including but not limited to Toris Moore and Kelly Ball, and whether any charges of these witnesses were dismissed or expunged after Applicant's trial.
 - e. Trial Counsel failed to request the cell phone extraction report.
 - f. *See Giglio v. United States*, 405 U.S. 150, 153-154 (1972) (holding *Brady* encompasses impeachment evidence); *Kyles v. Whitley*, 514 U.S. 419 at 442 n.134, 445-451 (1995) (finding due process requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks); *see Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) (holding "a *Brady* violation occurs when: (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.") (citation omitted); *see also Kyles v. Whitley*, 514 U.S. 419 (1995) (finding "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."); *State v. Gullede*, 326 S.C. 220, 227, 487 S.E.2d 590, 593 (1997).
5. Trial Counsel failed to consult with a qualified GSR expert and call that expert witness to testify at Applicant's trial to rebut the testimony presented by the State's expert witness at trial.
6. Trial Counsel failed to timely move to have the bullet extracted from his body for testing by SLED prior to trial.

7. Trial Counsel failed to interview critical witnesses who could have added to the credibility of Applicant's case and challenge the credibility of the State's witnesses when it was reasonable and necessary to do so in preparation for trial.
8. Trial Counsel failed to consult with a ballistics expert to review the SLED report and records and to determine whether to conduct independent testing on the untested items of evidence.
9. Trial Counsel failed to obtain all the BWC video recordings in preparation for trial.
10. Trial Counsel failed to obtain and conduct an extraction of the cell phone data and text messages in preparation for trial.
11. Trial Counsel failed to visit the incident location to determine the veracity of the witness statements and police investigation, and adequately confront witness testimony during the trial about the crime scene.
12. Trial Counsel failed to obtain witness Kelly Ball's mental health records in preparation for trial for adequate confrontation of this witness.
13. Trial Counsel failed to move for a hearing to challenge the suggestiveness of the identification. *See Neil v. Biggers*, 409 U.S. 188 (1972).
14. Trial Counsel failed to properly raise, argue, and preserve for appellate review whether Applicant voluntarily provided a statement to police. *See Jackson v. Denno*, 378 U.S. 368 (1964).
15. Trial Counsel failed to move for suppression of the hearsay statements made by the Decedent and failed to object to the admission of these statements during the trial. *See* Rules 801 and 802, SCRE.
16. Based on the Trial Court's denial of the request for a continuance due to the GSR issue, Trial Counsel failed to move for a mistrial when the State's GSR expert witness, Jennifer Stoner, testified that the particles found do not meet the scientific definition of GSR, but in her opinion, the evidence constitutes GSR.
17. Trial Counsel failed to adequately cross-examine witness, Kelly Ball, based on her mental health records, inconsistent statements, criminal history, and potential deals with the Government.
18. Trial Counsel failed to adequately cross-examine Toris Moore based on her criminal history and potential promises/deals with the Prosecutor and/or police.
19. Trial Counsel failed to properly object to the untimely disclosure of the photo lineup of his co-defendant Wells, particularly after there had been identification testimony.
20. Trial Counsel failed to move for redactions of the BWC video recordings to comply with the South Carolina Rules of Evidence.

21. Trial Counsel failed to object to the admission of the incident report into evidence when it contained unduly prejudicial, inadmissible hearsay, and any purported trial strategy would have been unreasonable. *See* Rules 403, 801, and 802, SCRE.
22. Trial Counsel failed to properly argue for a mistrial and to preserve that issue for appellate review (e.g., the untimely disclosure of the list of witnesses, undisclosed evidence by the State, untested ballistics evidence, the untested bullet in Applicant's body, not having GSR expert witness to rebut opinion testimony, etc...)
23. Trial Counsel failed to properly object to the Trial Court's jury instruction that malice may be inferred when "one intentionally kills another during the commission of a felony" as an unconstitutional charge on the facts.
24. Trial Counsel denied Applicant his right to present a full and complete defense.
 - a. U.S. Const. amends. V, VI, XIV; S.C. Const, art. I, §§ 3, 14.
 - b. *Crane v. Kentucky*, 476 U.S. 683 (1986) (finding "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense"); *State v. Mabe*, 306 S.C. 355, 358, 412 S.E.2d 386, 388 (1991) (citing *California v. Trombetta*, 467 U.S. 479 (1984) (finding "[d]ue process requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense."); *Id.* (emphasis added): *see also Town of Fairfax v. Smith*, 285 S.C. 458, 330 S.E.2d 290 (1985) (finding opportunity to present a full and complete defense includes "a defendant's privilege to request and obtain material evidence from the state.")).
25. Trial Counsel failed to contemporaneously object to inadmissible evidence and move to strike prejudicial testimony during Applicant's trial.
26. Trial Counsel failed to properly raise and preserve for appellate review the issue of whether the State unconstitutionally called his case for trial. *See State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).
27. Trial Counsel failed to present a reasonable trial strategy in Applicant's defense.
 - a. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions

as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges."").

28. All allegations raised by the Applicant in the prior pleadings filed in this action are hereby incorporated by reference as if fully set forth verbatim.
29. Based on the applicable issues, exhibits, and testimony of attorney Aimee Zmroczek (who represented co-defendant Johnny Saxon) referenced in the Order Granting Post-Conviction Relief for Applicant's co-defendant, Christopher J. Wells, the Honorable B. Alex Hyman found that the attorney who represented Wells provided ineffective assistance of counsel for failing to conduct an adequate investigation and failing to properly cross-examine witness, Kelly Ball, regarding her mental health records and inconsistent statements. Specifically, these allegations also apply to Applicant's PCR case and prove Trial Counsel provided ineffective assistance of counsel.
30. Trial Counsel failed to move for a dismissal or other appropriate remedy based on prosecutorial misconduct based on the discovery violations and resulting prejudice to Applicant.
31. Trial Counsel failed to properly move for a mistrial based on the discovery violations.
32. Trial Counsel failed to present evidence of the text messages from the cell phone that was in custody of the police. Specifically, text messages to the Decedent that could be considered threatening in nature.
33. Trial Counsel failed to visit the incident location to determine the potential visibility of the witness who purportedly identified the co-defendant.
34. Trial Counsel failed to adequately challenge the credibility of witness Kelly Ball during cross-examination based on her using drugs the day of the crime, providing multiple inconsistent statements, being on a call with her mother, BWC video recording contradicting her statements.
35. Trial Counsel failed to properly object and preserve for appellate review the State argument to the jury for a felony murder conviction when Applicant was not charged with underlying felony (i.e., not charged with armed robbery).
36. Trial Counsel failed to object to the Solicitor's improper comments regarding felony murder during the Prosecutor's opening statement.
37. Trial Counsel failed to timely and properly argue for a continuance by not consulting with ballistics expert prior to trial.
38. Trial Counsel failed to timely and properly argue for a continuance by not consulting with a digital forensic expert regarding the cell phone evidence prior to trial.
39. In connection with Trial Counsel's failure to timely move for a continuance upon receiving notice for trial, Trial Counsel failed to timely and properly

move for ex parte funding orders to obtain expert witness in the following areas: GSR, Ballistics, and Digital Forensics.

40. Trial Counsel failed to properly cross-examine Investigator Bryant Cheek regarding his investigation, the State's evidence, and his bias/connection with the Decedent.
41. The testimony presented by State's GSR expert was unduly prejudicial because Applicant was shot prior to the GSR test, according to the SLED Forensic Services Laboratory Customer Service Notice 2021-03 dated December 20, 2021, *Regarding Analysis of GSR Kits*, providing, relevant part: "Effective January 1, 2022, the SLED Trace Evidence Department will not longer routinely accept and analyze gunshot primer residue (GSR) kits collected from the following two categories of casework: - Shooting victims, to include suicides - Persons known/found to be in the possession of a firearm (to include police officers)."

II. Ineffective Assistance of Appellate Counsel

1. Appellate Counsel failed to raise on appeal the issue of whether the Trial Court erred in denying Applicant's motion for a mistrial.
2. Appellate Counsel failed to properly raise and argue on appeal the issue of whether the Trial Court erred in denying Applicant's motion for a continuance. Specifically, Appellate Counsel focused on the issue of Applicant being indigent and not having enough time to retain a GSR expert, arguing that it denied his right to equal protection and due process right to present a complete defense.
3. Appellate Counsel provided ineffective assistance in the event Trial Counsel properly preserved other meritorious issues for appellate review.
4. All allegations raised by the Applicant in the prior pleadings filed in this action are hereby incorporated by reference as if fully set forth verbatim.

A hearing was convened before this Court on March 2, 2026, at the Newberry County courthouse. At that hearing, Applicant proceeded only on the allegations of ineffective assistance raised in his most recent amended application, with the exception of issues 13, 14, and 40, which he dropped. Accordingly, the Court deems all other allegations abandoned.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Before the Court are Applicant's records from the South Carolina Department of Corrections, the transcript of

Applicant's trial, the records of the Laurens County Clerk of Court regarding the subject conviction and sentence, Applicant's appellate records, and Applicant's initial and amended applications for post-conviction relief. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Trial Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

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

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

Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

Counsel’s alleged failure to adequately prepare for trial

In his PCR application, Applicant claims Counsel was ineffective for failing to adequately

prepare for trial. At the PCR hearing, Applicant testified that Counsel only met with him twice prior to trial. He moved to have her relieved, but the motion was denied because he had already fired two attorneys before Counsel appointed. He testified that discovery was not completed until two days before the trial began, and he complained that Counsel did not have time to review it with him before trial. He also testified that Counsel never discussed witnesses, trial strategy, whether he should testify, potential defenses, or the elements of the crime.

Counsel testified that she was appointed three weeks before Applicant's trial began. She was the third attorney appointed to represent Applicant after he had fired Chip Howe and Bryan Abel. She got a funding order to hire an investigator, Jimmy Powers, and she recalled going to examine the scene of the crime with him on at least one occasion. She also got a funding order for an expert in gunshot residue ("GSR") analysis, but that expert became ill shortly before trial and Counsel could not get in contact with him. Counsel requested a continuance to allow her to retain a different expert, but the motion was denied. (R.pp.26–32). At the PCR hearing, Counsel could not remember exactly how often she met with Applicant in preparation for trial, but she testified she would be shocked if it was only twice. She also spoke with Applicant multiple times by phone. Counsel testified that she went to the solicitor's office on an almost daily basis to examine the State's evidence; and she reviewed all the discovery she had in her possession with Applicant. Counsel explained that she believed Applicant was going to testify, until the very first day of trial when Applicant unexpectedly moved to have her relieved as counsel and refused to participate in trial. (R.pp.7–8). Counsel was surprised by Applicant's outburst and testified that he refused to meet with her afterwards when she tried to visit him at the jail to discuss the ongoing trial.

Counsel explained that part of her trial strategy was to argue that Applicant had been shot by the same gun that shot the Victim—the Lorcin .380 found in the yard—which, if believed by

the jury, would have refuted the State's argument that Applicant was shot by the Victim in self-defense with the Victim's revolver, a Rossi .38 Special. This argument would have supported the defense's position that Applicant was merely present at the scene when some unrelated assailants showed up to perpetrate the attack on Victim. However, Counsel's motion for a continuance to have the bullet extracted from Applicant's neck so that it could be forensically examined was denied. (R.pp.40–52). In addition, Counsel's strategy relied upon Applicant's apparent willingness to testify, and Applicant's unexpected refusal to participate in trial made that impossible.

The Court finds that Applicant has not met his burden of proof as to these allegations. The record reflects that Counsel had only a few weeks to prepare for trial after she was appointed; however, this largely appears to have been the result of Applicant's own dilatory conduct and repeated demands to replace his appointed counsel. The trial court specifically noted that Applicant's "discussions at requesting a new attorney or hiring a new attorney is nothing more than an effort at delay on behalf of Mr. Walker. . . . Mr. Walker is attempting, as I said a moment ago, to game the system." (R.p.10, line 24–p.11, line 18). Furthermore, the Court finds credible Counsel's testimony that she met with Applicant multiple times before trial, spoke to him on the phone several times, and attempted to meet with him during trial, but Applicant refused to attend his trial and then refused to meet with Counsel when she came to visit him in the jail. Applicant cannot blame Counsel for any lack of preparation attributable to his own obstreperous conduct.

Furthermore, the brevity of time spent by counsel in consultation with a defendant is not, by itself, indicative of inadequate preparation. *Collins v. State*, 422 S.C. 250, 258, 810 S.E.2d 871, 875 (2018) (holding counsel's performance was not deficient, even though he represented his client for only six weeks and met with him only twice prior to trial); *Smith v. State*, 404 S.C. 493, 500,

745 S.E.2d 378, 382 (Ct. App. 2012) (holding counsel was not deficient, despite only meeting with applicant twice prior to his trial); *see also Harris v. State*, 377 S.C. 66, 74–75, 659 S.E.2d 140, 144–45 (2008) (holding PCR court’s finding that counsel’s meetings with applicant were “limited in number and duration” did not justify grant of post-conviction relief), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). In this case, despite the brevity of Counsel’s representation, she credibly testified that she was able to review with Applicant all the discovery she had received. She also testified that she was able to hire an investigator and attempted to hire a GSR expert. Counsel formulated a reasonable theory of the defense and attempted to prove it by moving to have the bullet extracted from Applicant’s neck for forensic analysis, but her requests for a continuance for that purpose were denied—again, largely due to the prior delays caused by Applicant’s own dilatory conduct. The Court finds Counsel’s performance in preparing for trial was not deficient; on the contrary, it was commendably diligent despite the limited time available.

In addition, to prove prejudice, the applicant must show a reasonable probability that additional time spent in preparation would have changed the outcome of his case. *Id.* at 259–60, 810 S.E.2d at 876 (citing *Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998); *Skeen v. State*, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997)). Apart from the additional evidence obtained by Aimee Zmroczek—discussed in further detail below—Applicant has failed to introduce any additional evidence that could have been discovered or developed by more thorough pre-trial preparation. Applicant complains that Counsel did not obtain a qualified GSR expert in time for trial; however, he failed to produce such an expert at the PCR hearing¹ to show

¹ Applicant informed the Court that he had moved for funding in order to retain a GSR expert in preparation for the PCR hearing; however, his motion was ultimately denied.

how additional expert testimony might have benefited his defense. Applicant also complains that Counsel did not succeed in moving to have the bullet extracted from his neck and examined; however, although the bullet has now been removed and examined by SLED, Applicant did not introduce the results of that examination at the PCR hearing. Applicant's claim that such additional investigation would likely have changed the outcome of his case is purely speculative. *See, e.g., Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 279–80 (2019) (holding a PCR applicant who claims trial counsel was ineffective for failing to call certain witnesses must produce those witnesses or their testimony at the PCR hearing); *Taylor v. State*, 258 S.C. 369, 378, 188 S.E.2d 850, 854 (1972) (holding a PCR applicant's allegation that his trial counsel failed to adequately investigate his case was unsupported where the applicant failed to point out any beneficial evidence which could have been discovered by further investigation).

Counsel's alleged failure to move for a continuance

Applicant's claim that Counsel failed to move for a continuance in order to retain a qualified GSR expert and to have the bullet in Applicant's neck extracted and analyzed is conclusively refuted by the record. As explained above, Counsel sought a continuance on both of those grounds, and the trial court denied her request. Furthermore, in the absence of any evidence showing that the GSR expert and forensic analysis of the bullet would have been helpful to Applicant's defense, Applicant has not met his burden of proving prejudice.

Allegations related to Aimee Zmroczeks' representation of Johnny Saxon

At the PCR hearing, Applicant relied extensively on the testimony of Aimee Zmroczek, the attorney who represented Applicant's co-defendant Johnny Saxon. Ms. Zmroczek explained the actions she took in preparation for Saxon's trial. Applicant argues that Counsel performed deficiently by failing to take the same actions in preparation for his trial. He further argues that he

was prejudiced by Counsel's performance because Saxon was ultimately acquitted of murder, while he was convicted.

There are several serious flaws with this argument. As an initial matter, Applicant and Saxon were not similarly situated defendants. The evidence against Applicant was far stronger than the evidence against Saxon: Applicant was found by law enforcement sitting wounded on Victim's front porch, whereas there was no direct evidence of Saxon ever being on the scene at all. Victim expressly told responding officers that Applicant was the person who had shot him; however, Victim did not say anything that would implicate Saxon. Ball also testified that the person on the porch after the shooting identified himself as "David" and that Victim told her, "Don't let him in. That is who shot me." However, nothing in Ball's testimony implied that Saxon was at the scene. The only evidence connecting Saxon to the crime in any way came from Toris Moore, and all she said was that Saxon was with Applicant and Christopher Wells *prior to* the shooting, when Applicant came to her house to ask her for a gun. (R.p.77, line 9-p.78, line 6). Although Moore said Saxon was with Applicant and Wells, she did not testify to Saxon saying or doing anything during this interaction.

Clearly, the evidence against Applicant was far stronger than the evidence against Saxon. In light of all this evidence, Counsel faced a different and much more difficult task in defending Applicant than Ms. Zmroczek faced in defending Saxon. The mere fact that Ms. Zmroczek took different actions or pursued different lines of investigation than Counsel did is not, by itself, probative of whether Counsel provided constitutionally adequate representation for Applicant. Ms. Zmroczek's actions do not constitute a "checklist for judicial evaluation of attorney performance." *Strickland* 466 U.S. at 688. As the United States Supreme Court recognized in *Strickland*:

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689. Much less, therefore, should different attorneys be expected to defend *different* clients, with materially *different* cases, in the same way.

In addition, Saxon was the last of the three co-defendants to be tried, *after* Applicant and Wells. Ms. Zmroczek testified at the PCR hearing that she had the advantage of already knowing the result of Applicant's trial at the time she was preparing her strategy for Saxon's defense—an advantage which obviously was not available to Counsel. "A fair assessment of attorney performance requires that every effort be made to eliminate the *distorting effects of hindsight*, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from *counsel's perspective at the time*." *Id.* at 689 (emphasis added).

Furthermore, the Court finds Applicant has not met his burden of proving prejudice as to any of these allegations. Even if Counsel *had* done the same things Ms. Zmroczek did, Applicant has failed to prove that those actions would likely have resulted in a different verdict.

First, Applicant criticizes Counsel for not obtaining body-worn camera ("BWC") footage from additional officers who responded to the crime scene. However, the Court has reviewed the additional footage and finds it was mostly duplicative of the testimony given by the responding officers and by Kelly Ball. Counsel cannot have been deficient, nor can Applicant have been prejudiced, merely by the failure to present totally cumulative evidence at trial.

The only issue Applicant identifies as being uniquely depicted on the additional BWC footage is an incident from Officer Sweat's BWC video, in which Sweat and another officer locate

the Lorcin .380 handgun in the grass and collect it as evidence. Ms. Zmroczek testified that, in her opinion, the video depicts the officer picking up the gun and wiping it down, potentially destroying fingerprints or other evidence. However, she admitted that, when she cross-examined the officer about it, he testified that he was simply racking the slide to make sure there were no bullets in the gun. Ms. Zmroczek admitted that the video does not clearly show that the officer was wiping down the gun, but she claimed that she could not hear the sound of the gun being racked and that, in her opinion, the officer's hands were moving too fast to be racking the gun.

The video in question was introduced as part of Applicant's Exhibit 17, a flash drive. There are three versions of the video, apparently one original and two so-called "enhanced" versions. The original is entitled "Sweat - lorcin 380 (no enhancements)" and the others are entitled "Sweat - lorcin 380 (audio enhanced only)" and "Sweat - lorcin 380 (audio and video enhanced)."

The Court has viewed all three versions of the video and finds that Ms. Zmroczek's characterization of the events it depicts is dubious, to say the least. The gun itself is almost entirely out of frame, but the officers' actions and statements while handling the gun are most consistent with racking the gun to make it safe for collection as evidence. The video begins with Officer Sweat walking toward another group of officers who are looking at something on the ground with a flashlight. Officer Sweat appears to crouch down to look at something in the grass, then he stands back up. At approximately 1:32, one officer asks, "Is it empty?" and another replies, "Yeah, it's empty," followed by a few words that are obscured by radio noises. The first officer then asks, "Is it locked out?" and the other replies, "No." Two officers can then be heard talking over each other for a few seconds, then one says, "Pull it all the way back; now push it up," at approximately 1:42. One officer can be seen leaning over, apparently examining something below the bottom of the frame. At approximately 1:47, one officer says, "It's hard to get it to work," and another says,

“Let’s fire it and see.” At approximately 1:52, another officer says, “Hey, set it down; *don’t handle it too much*,” and another immediately says, “*rack it back a couple times just to make sure*.” At this point, the camera points at an officer who appears to be holding an object in his hands just below the bottom of the frame. The officer moves his left arm three times in a short, back-and-forth motion; each time a mechanical sound consistent with racking the slide of a pistol can be distinctly heard. At approximately 2:05, an officer distinctly says, “Put it on safe for right now.”

Although the video is far from clear, the portions that can be seen and heard do not tend to support Ms. Zmroczek’s claim that the officers inexplicably decided to wipe the gun down. The video is far more supportive of the officer’s testimony at Saxon’s trial that they were merely racking the slide to make the gun safe.

The mere possibility of pursuing additional cross-examination based on the BWC videos is not sufficient to establish prejudice. *See Strickland*, 466 U.S. at 693 (The prejudice standard is *not* whether counsel’s alleged error “impaired the presentation of the defense”; such a standard would be “inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.”). Rather, the question is whether Applicant has shown a “reasonable probability” that additional cross-examination would have changed the result of his trial—and the answer is, he has not. Had Counsel pursued this line of cross-examination, the officer would likely have given the same innocuous response he gave to Ms. Zmroczek: he was not “wiping” the gun but simply racking the slide to ensure it was safe, in accordance with department policy.

This Court cannot see how Applicant could have been prejudiced by Counsel’s failure to obtain and present this footage. Moreover, even if the video had clearly shown that the officers mishandled the gun, that would not tend to exculpate Applicant. *Strickland* requires this Court to

“consider the totality of the evidence before the judge or jury,” and specifically to consider all the facts that were “unaffected by the errors.” *Strickland*, 466 U.S. at 695. In Applicant’s trial, the State did not rely on any fingerprints from the gun; rather, the State’s case was based primarily on Applicant’s undisputed presence at the scene of the crime, Moore’s testimony that Applicant had a gun and was planning to rob Victim earlier that evening, and Victim’s identification of Applicant as his assailant. Even if the BWC video contained clear and unambiguous proof that the officers mishandled the pistol, it would not have affected any of the damning evidence the State actually relied on at trial.

Next, Applicant argues he was prejudiced by Counsel’s failure to obtain “threatening” text messages from the victim’s phone. Ms. Zmroczek testified that she arranged for an expert to extract text messages from the victim’s cell phone. She pointed to three texts from the night of the murder, which she characterized as threatening. The three texts at issue state:

9:22 PM: Hey this is teresa you dont have to lie if you with your lil
ho kelly just be a man about it and tell me so dont be sacred love
you

9:38 PM: You going down

10:07 PM: The trueth will set you free love you and sick of the
games your playing with me

Applicant’s Exhibit #20 [errors in original]. The Court notes that none of these texts includes any express or even implied threats of violence. Two of them even include the words “love you,” which are not words typically included in a death threat. The most that can be said about them is that they convey a tone of annoyance, but that falls far short of threatening violence. Nevertheless, Ms. Zmroczek argued that the person who sent these messages—an individual she identified as “Teresa”—was threatening the victim.

Even in the unlikely event that a jury might have interpreted these messages as containing

veiled threats of violence, the Court finds Applicant has not proven the result of his trial would have been different. Applicant argues that the texts could have supported an inference of third-party guilt. But the test for admissibility of “third-party guilt” evidence is strict:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have [no] other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534–35 (1941). Under South Carolina law, evidence which merely permits a “conjectural inference as to the commission of the crime by another” is not admissible. *Id.* The text messages in question do not even come close to establishing “such a train of facts and circumstances” as to clearly point out Teresa “as the guilty party.” Other than the questionable characterization of the three text messages above as “threats,” there is no evidence whatsoever that Teresa was the person who robbed and murdered the victim. Even if Counsel had obtained those text messages, they would have been inadmissible as a matter of law.

Furthermore, even if Counsel had managed to introduce the text messages at Applicant’s trial, their effect on the outcome of the trial would have been nil. Applicant’s proposed theory of third-party guilt is impossible to reconcile with the facts of this case. Applicant was indisputably found at the scene of the crime by police, clearly having been wounded in a gunfight. The victim himself lived long enough to tell the police that Applicant was the man who shot him and that the motive for the shooting was a robbery. Toris Moore testified that Applicant was planning to rob the victim earlier that day. The idea that the shooting was actually perpetrated by this “Teresa,” and that the motive was something other than armed robbery, is totally unbelievable, especially

when the only evidence in support of that theory are three vaguely worded text messages.

Again, this Court must “consider the totality of the evidence before the judge or jury.” *Strickland*, 466 U.S. at 695. Applicant has not explained how his third-party guilt theory could possibly be reconciled with the rest of the evidence presented at trial.

Next, Applicant argues Counsel should have gone to the crime scene at night to examine for herself the lack of visibility, in order to impeach Ball’s testimony that she could see well enough to identify Applicant’s co-defendant, Christopher Wells, and his car. At the PCR hearing, Ms. Zmroczek testified that she went to crime scene around 1:00 in the morning and, in her opinion, it was too dark for Ball to have seen what she claimed to see.

Again, this Court finds Christopher Wells and Applicant are not similarly situated co-defendants. Unlike Applicant, Wells was *not* apprehended at the scene of the crime; the only direct evidence of Wells’s presence at the crime scene was the testimony of Kelly Ball identifying him as the person she saw standing in the driveway shortly after the shooting. Applicant, on the other hand, was undeniably present at the crime scene; law enforcement found him sitting on Victim’s porch, exactly as Ball claimed. It would have been pointless to claim that Ball’s identification of Applicant was unreliable, since there was no dispute that Applicant was present.

In addition, Counsel testified that she *did* go to the crime scene with her investigator to examine it for herself. And the Court’s own review of the BWC videos suggests that, although the night was dark, there was sufficient light from nearby floodlights to illuminate the porch and the area immediately in front of the house, such that it was not implausible that Ball could have seen both Wells and Applicant in the yard as she testified.

Next, Applicant criticizes Counsel for not using the recording of Ball’s 911 call to impeach Ball’s trial testimony. Ms. Zmroczek testified that she used the 911 call to expose inconsistencies

in Ball's statements during Saxon's trial. Specifically, Ms. Zmroczek referred to a portion of Ball's testimony during Saxon's trial where Ball stated that, after taking Victim inside and calling 911 following the shooting, she heard Applicant beat on the door of the trailer and threaten to kill her and Victim. Ms. Zmroczek claimed this was refuted by the 911 recording.

The Court notes that Ball never claimed Applicant made those threats *during Applicant's trial*. Obviously, it would have been impossible for Counsel to impeach testimony that Ball never even gave until *Saxon's* trial more than a year later.² Applicant has not pointed out any other alleged inconsistencies between Ball's testimony and the recording of the 911 call. The Court cannot perceive any way in which Counsel could have used the 911 recording to impeach Kelly Ball or otherwise weaken the State's case.

Next, Applicant criticizes Counsel for not obtaining mental health records for Kelly Ball to use for impeachment purposes. Ms. Zmroczek claimed she obtained copies of Ball's mental health records, which revealed that she had bipolar disorder. She also claimed Ball's mental health records included statements she made during her mental health treatment that were inconsistent with her testimony at trial. Applicant, however, did not introduce those records at the PCR hearing. Therefore, the Court finds he has failed to prove prejudice. To prove prejudice from counsel's alleged failure to procure or present evidence, a PCR applicant must present the omitted evidence

² In addition, the complete 911 recording was not provided to this Court to substantiate Ms. Zmroczek's claim that it is inconsistent with Ball's testimony. The flash drive presented to this Court contains only brief excerpts from the 911 call. In most of these excerpts, Ball's statements are difficult to understand; she is clearly experiencing extreme terror and appears to be trying to talk to the 911 operator, Victim, and her mother on another cell phone at the same time. However, there is one excerpt in which Ball appears to have heard a sound from the front door and yells, "Who is that? Who is it?" In another excerpt, Ball fearfully tells the 911 operator that someone is trying to get in the house. Although Walker's voice cannot be clearly heard in the excerpts provided to this Court, the Court is unable to perceive any obvious inconsistencies between the 911 recording and Ball's testimony. On the contrary, the provided excerpts from the 911 recording tend overall to corroborate Ball's account.

at the PCR hearing; mere speculation and conjecture by the applicant is insufficient to support a finding of prejudice. *Garren v. State*, 423 S.C. 1, 13–14, 813 S.E.2d 704, 711 (2018); *see, e.g., Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding PCR applicant failed to present any probative evidence of prejudice from counsel’s failure to obtain certain documents, where “the contents of these documents were never revealed at the PCR hearing.”).

In addition, the mere fact that Ball had been diagnosed with a mental health disorder would not be relevant for impeachment purposes absent some proof that her disorder actually affected her credibility. *C.f. State v. Galloway*, 443 S.C. 229, 240, 904 S.E.2d 866, 872 (2024) (holding testimony about a victim’s schizoaffective disorder “gives the jury nothing it can use to determine this victim’s credibility other than to guess”). Applicant has not offered any such proof. Nor has Applicant connected Ball’s bipolar disorder with any of the material facts to which she testified. *C.f. id.* (Unless victim’s schizoaffective disorder diagnosis is connected “to the facts of a particular case, the jury has no basis on which to use the knowledge except to speculate whether it could have played a role in the case.”).

Counsel’s failure to investigate whether prosecutors made deals with witnesses

Applicant claims that Counsel failed to investigate whether the prosecution made any deals or promises with Kelly Ball and Toris Moore in exchange for their testimony. However, Applicant provided no evidence of any alleged deals or promises at the PCR hearing. Accordingly, Applicant has failed to meet his burden of proof as to this allegation.

Counsel’s failure to request the “cell phone extraction report”

Applicant claims Counsel should have requested the “cell phone extraction report.” However, Ms. Zmroczek testified that the State had not performed a cell phone extraction by the time she took over representation of Johnny Saxon, which was after Applicant’s trial. Ms.

Zmroczek had to hire her own expert to extract the information from the victim's cell phone. Therefore, there was no cell phone extraction report at the time Counsel was preparing for Applicant's trial. Moreover, apart from the three test messages obtained from the victim's cell phone discussed above, no other information obtained from the cell phone was presented to this Court at the PCR hearing. Accordingly, the Court finds Applicant has not met his burden of proving prejudice as to this allegation.

Counsel's failure to object to the victim's "hearsay" statements

Applicant claims Counsel should have objected on hearsay grounds whenever witnesses at his trial repeated statements made by the victim. The Court finds, however, that Counsel was not deficient for failing to make any such objection. The victim's statements—which were given almost immediately after the shooting and shortly before the victim bled to death as a result of his wounds—were obviously admissible under the “dying declaration” or “excited utterance” exceptions to the hearsay rule. *See* Rule 803(2), SCRE; Rule 804(b)(2), SCRE. Any objection would have been futile.

Counsel's handling of the State's GSR expert

Applicant claims Counsel was ineffective for not seeking a mistrial after the State's GSR expert testified that, in her opinion, Applicant had particles consistent with GSR on his person even though her analysis did not detect all three particle components of GSR. (Trial Tr.p.379, lines 2–23). Applicant also claims the State's expert testimony on this point was unduly prejudicial because Applicant had been shot, and SLED has recently changed its policies so that it no longer performs GSR tests on shooting victims.

SLED's change of policy appears to be based on the fact that being shot with a firearm is highly likely to leave GSR on the person of the shooting victim, regardless of whether that victim

actually handled or fired a gun. However, the State's own GSR expert explicitly made this same point during Applicant's trial, stating "I cannot tell you if this is on his hand from him firing a weapon or from him being shot. Because if the gun was pointed at him and he has a bullet passing through him, that can put residue on your hands." (Trial Tr. p.380, lines 1-6). She further explained that she did not analyze Applicant's clothing because, "As I explained before, if someone is shot we expect to find gunshot residue on them. . . . I can't answer the question of whether or not they fired a weapon or were near a weapon when it was fired . . . So therefore, we do not analyze clothing of a shooting victim." (Trial Tr.p.380, line 24-p.381, line 7). In other words, the State's own expert made substantially the same point Applicant is now making on PCR: first, the particles found on Applicant's person were consistent with GSR but did not have all three components necessary to meet the technical definition of GSR; and second, the GSR found on Applicant could have come from his being shot with a firearm, rather than from his own use of a firearm on the night in question. As Applicant was indisputably shot during the incident, the presence of particles consistent with GSR on his person would have been expected. The State's own expert acknowledged that the presence of those particles alone could not establish whether Applicant used a gun that night. Based on the record, the Court is unable to discern any possible prejudice to Applicant resulting from Counsel's failure to more thoroughly challenge the conclusions of the State's GSR expert during trial.

Counsel's failure to object to the incident report

Applicant claims Counsel was ineffective for failing to object to the admission of the incident report into evidence, when the incident report contained hearsay and other prejudicial material. However, the transcript reflects that only one page of the incident report was admitted into evidence: the page containing a numbered list of the items collected from the crime scene by

Officer Taylor. (Trial Tr.p.227, lines 19–23). Counsel, who had already referred to that page of the incident report numerous times during her cross-examination of Officer Taylor, stated she had no objection. (Trial Tr.p.227, line 24). The Court finds Counsel had no ground to object to the single page of the incident report that was admitted into evidence, since she herself had opened the door by questioning Officer Taylor about it. Furthermore, since that page did not contain any hearsay or other prejudicial information, the Court finds Applicant was not prejudiced.

Counsel's failure to object to "inferred malice" instruction

Applicant claims Counsel was ineffective for failing to object to the trial court's instruction that "if one intentionally kills another during the commission of a felony, the inference of malice may arise." (Trial Tr.p.514, line 25–p.515, line 2). Applicant argues this instruction was an unconstitutional charge on the facts.

The Supreme Court has recently held this charge improper. *See State v. Brown*, 443 S.C. 196, 199, 904 S.E.2d 448, 449 (2024) ("We hold the trial court erred in giving the inferred malice instruction, for, in doing so, the trial court improperly elevated and commented to the jury upon a particular fact—the commission of a felony."). However, *Brown* was not decided until 2024—nine years after the conclusion of Applicant's trial. At the time of Applicant's trial, there was no precedent supporting an objection to the trial court's jury instruction. Counsel is not required to be clairvoyant and cannot be deemed deficient merely for failing to anticipate a future change in the law. *See, e.g. Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (holding trial counsel cannot be found ineffective for failing to object to a jury instruction at a time when no case law rendered the instruction improper per se); *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))),

overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

In addition, *Brown* itself held that the trial court's error was harmless because the defendant in that case did not "dispute that the armed robbery and murder of the victim occurred or that the victim's death was the result of malice." *Brown*, 443 S.C. at 200, 904 S.E.2d at 450. Likewise, in this case, Applicant does not dispute that the victim was killed with malice; he merely claims that he had nothing to do with the killing and was simply an innocent bystander. Even under the rule of *Brown*, therefore, the Court finds Applicant has failed to prove prejudice.

Counsel's failure to raise *Langford* issue

Applicant next claims Counsel was ineffective for failing to raise the issue of whether his case was unconstitutionally called for trial in violation of *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

In *Langford*, our Supreme Court found that control of the docket by the solicitor is unconstitutional as a violation of the separation of powers. *Id.* at 446, 735 S.E.2d at 484. However, the constitutional error committed by the executive branch in usurping the proper role of the judicial branch in the calling of cases to trial does not, on its own, violate any rights of the criminal defendants whose cases are so called. The Supreme Court therefore held that a defendant who alleges his case was unconstitutionally called for trial must demonstrate particularized prejudice resulting from the solicitor's control of the trial docket. *Id.* at 436, 735 S.E.2d at 479.

In this case, Applicant has presented no argument that he suffered any particularized prejudice caused by the control of the trial docket by the solicitor as opposed to the court. Accordingly, the Court finds there was no meritorious objection Counsel could have made, and Applicant suffered no prejudice.

Counsel's alleged failure to object to the trial court's charge on "felony murder"

Applicant next claims Counsel was ineffective for failing to object to the trial court's jury charge on the felony murder doctrine, on the ground that felony murder should not be charged where the defendant is not also charged with the underlying felony (in this case, armed robbery). Applicant cites no authority for this position, and the Court is not aware of any. Moreover, the transcript reflects that Counsel *did* raise this very issue, twice, during the trial, prior to the jury charge. (Trial Tr.p.463, lines 6–12; p.465, line 15–p.466, line 9). The trial court overruled the objection and proceeded to charge the jury on the felony murder doctrine. (Trial Tr.p.467, lines 10–14). *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (quoting *Dunn v. Coca-Cola Bottling Co.*, 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993)) (“So long as the judge had an opportunity to rule on an issue, and did so, it was ‘not incumbent upon defense counsel to harass the judge by parading the issue before him again.’”).

For all these reasons, the Court finds Applicant has not met his burden of proving either that Counsel’s performance was deficient or that there is a reasonable probability the result of his trial would have been different but for Counsel’s conduct.

Ineffective Assistance of Appellate Counsel

Finally, Applicant claims Appellate Counsel was ineffective for failing to raise certain arguments on appeal.

In applying *Strickland* to claims of ineffective assistance of appellate counsel, reviewing courts must accord appellate counsel the “presumption that he decided which issues were most likely to afford relief on appeal. A decision with respect to appeal is entitled to the same presumption that protects sound trial strategy.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993).

Although appellate counsel is required to provide effective assistance of counsel,

“appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). Indeed, “[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” *Jones*, 463 U.S. at 754.

“Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Smith v. Robbins*, 528 U.S. 259, 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In this case, Appellate Counsel raised two issues on direct appeal: first, whether the trial court erred in charging the “hand of one, hand of all” doctrine to the jury based on the facts of the case; and second, whether the trial court erred in denying Applicant’s motion for a continuance to obtain a GSR expert. While Appellate Counsel’s arguments on those two issues were ultimately unsuccessful in obtaining a reversal of his client’s conviction, the issues themselves were not frivolous and were diligently briefed. The question of which issues to pursue on appeal is a quintessentially strategic decision, and Appellate Counsel’s choice of issues will not be deemed unreasonable unless Applicant can point to “clearly stronger issues” that were inexplicably ignored. *Robbins*, 528 U.S. at 288 (quoting *Gray*, 800 F.2d at 646).

First, Applicant claims Appellate Counsel should have argued that the trial court erred in

denying Counsel's motion for a mistrial. During the trial, Counsel moved for a mistrial when the solicitor revealed there was a handwritten list of individuals at the scene that was inadvertently not turned over to Counsel in pre-trial discovery. (Trial Tr.p.232, line 17–p.233, line 5). The trial court denied the motion. (Trial Tr.p.233, line 21–p.234, line 25). Counsel renewed her objection the following day, with the same result. (Trial Tr.p.273, lines 15–18).

This Court finds that the mistrial issue was not “clearly stronger” than the issues actually raised by Appellate Counsel. The trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *State v. Benton*, 443 S.C. 1, 6, 901 S.E.2d 701, 703 (2024). “A mistrial should be declared cautiously and only in the most urgent circumstances for plain and obvious reasons.” *Id.* In this case, the trial court found that a mistrial would not be appropriate because the document was merely a list of individuals who responded to the scene of the crime and was not probative of any disputed issues. The State's inadvertent failure to discover this handwritten document prior to trial when reviewing law enforcement's files does not constitute “most urgent circumstances” justifying the drastic remedy of a mistrial.

Second, Applicant claims Appellate Counsel should have raised different grounds in support of his argument that the trial court erred in denying the motion for a continuance to obtain a GSR expert. However, Applicant has not explained what different grounds Appellate Counsel should have raised as to this issue. Accordingly, the Court finds Applicant has not met his burden of proving that Appellate Counsel's choice of arguments was deficient.

[conclusion and signature on following page]

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not met his burden of proof as to any of his allegations. Accordingly, his application for PCR 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), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That Applicant's Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 23 day of June, 2026.


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

Florence, South Carolina