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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas  
The Honorable David Caraker, PCR Action Judge  
2022-CP-32-00796, 2023-CP-32-03274

ROBERT GREEN, # 289351,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**NOTICE OF APPEAL**

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Robert Green appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable David Caraker, circuit court judge, on August 29, 2024, and was denied by written order issued filed on August 3, 2026. Applicant received notice of the judgement on August 3, 2026.

/s Chelsey F. Marto  
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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON ) ELEVENTH JUDICIAL CIRCUIT

Robert Rome Green, #289351, ) Case No.: 2022-CP-32-00796  
Applicant, ) 2023-CP-32-03274

v. ) ORDER OF DISMISSAL  
State of South Carolina, )  
Respondent. )

This matter comes before the Court by a *pro se* application for post-conviction relief on March 1, 2022 (2022-CP-32-00796) and identically refiled on August 28, 2023 (2023-CP-32-3274) by Robert Rome Green. Green challenges his convictions for attempted murder and arson in the first degree. The Applicant, through counsel Chelsey Marto, served an amended application on March 11, 2024.

On August 29, 2024, and evidentiary hearing was held before this Court. The Applicant was present and represented by his court-appointed counsel, Chelsey Marto. The Respondent was respresented by Deputy Attorney General Donald J. Zelenka. Testimony was received from the Applicant, and his prior counsel, Sarah Mauldin and Rob Madsen. This Court advised the parties of its initial intent to dismiss the application on September 11, 2024. After submission of a proposed order between parties, this Court enters an Order of Dismissal.

#### *Prior Procedural History*

Applicant, Robert Rome Green, is presently confined in the South Carolina Department of Corrections, pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was indicted by the Lexington County Grand Jury for attempted murder and arson in

the first degree. R. 740-742. The Applicant was represented at trial by Sarah Mauldin and Rob Madsen. The State was represented by Deputy Solicitor Suzanne Meyes and Assistant Solicitor LeAnna McMenamin. Applicant's trial was held before the Honorable Debra R. McCaslin and a jury from April 5-9, 2021. The jury found Applicant guilty on each count. R.p. 716, ll. 1 - 12. Judge McCaslin sentenced Applicant to thirty years imprisonment for attempted murder and a consecutive forty-years imprisonment for arson. R.p. 736, l. 14 - 737, l. 8. This was an aggregate seventy (70) year sentence with 599 days credit for time served.

#### *Direct Appeal*

The Applicant appealed his conviction to the South Carolina Court of Appeals. On appeal he was represented by Adam S. Ruffin of the South Carolina Division of Appellate Defense. On December 13, 2021, the appointed counsel filed an *Anders* Brief of Appellant and Petition to be Relieved as Counsel raising the following arguable issue pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967):

Whether the trial judge erred in allowing photographs of the alleged victim's burn injuries, where the photographs were extremely graphic and were not necessary to prove an element of either offense and the photographs only served the purpose of inflaming the passions of the jury and were unfairly prejudicial?

*Anders* Brief of Appellant, p. 1. On March 1, 2023, the South Carolina Court of Appeals issued its order dismissing the appeal and granting counsel's petition to be relieved. *State v. Robert Rome Green*, Unpublished Op. No. 2023-UP-077, S.C. Ct App March 1, 2023). The remittitur was issued on March 20, 2023.

#### ***Allegations for Post-Conviction Relief Before this Court***

In his original identical applications, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.
2. Prosecutorial Misconduct
3. Held information back that could have changed outcome.

(PCR App. at 3).

***Amended Application***

In the amended application dated March 11, 2024, the Applicant, through counsel Chelsey Marto, alleged:

1. Ineffective assistance of counsel for:
  - a. Failure to argue that there was no evidence of Applicant breaking into the alleged victim's house.
  - b. Failure to argue that the alleged victim's injuries are inconsistent with her narrative of what happened.
  - c. Failure to effectively cross-examine the fire examiner about how exactly the burn would have occurred.
  - d. Failure to effectively cross-examine the alleged victim.
    - i. Specifically, Counsel should have used the alleged victim's police statement to effectively cross-examine her.
  - e. Failure to successfully suppress photographs of the alleged victim's injuries.
  - f. Failure to request jury instructions on the law of accident.
  - g. Failure to investigate the alleged victim's narrative of what happened more fully.
  - h. Failure to file a motion to reconsider the sentence.
  - i. Failure to question Applicant about how he told the neighbor to call the police and how he assisted the alleged victim with her injuries.
  - j. Failure to investigate and subpoena a fire reconstruction expert.

### *Factual Summary from the Trial Record*

This case concerns an incident on August 20, 2019. The neighbors heard the Applicant declare “damn right. Take me to jail, I’m tired of this shit” in the front yard of the victim as neighbors at 3:30 am rushed to her aid. Evidence was that presented that moments before, the Applicant had doused the victim with gasoline and set her on fire. Remarkably, the victim survived the fire. The focus of the attempted murder charge<sup>1</sup> was the Applicant’s action in entering the victim’s home, dousing her with gasoline and setting fire to the victim. The focus of the arson in the first degree<sup>2</sup> was evidence that Applicant brought the gas can into the house, poured the gasoline, used a lighter resulting in the back bedroom of the home being set on fire. The Applicant’s actions caused “serious bodily injury” which was supported by the evidence at trial showing the serious injuries.

The trial record showed that Ardelia McDaniel arrived at her house on August 19, 2019, to find Applicant on her porch with one of her neighbors. McDaniel told applicant that he could not stay at her house which, according to McDaniel, caused Applicant to become angry. R.p. 268, l. 7 - 269, l. 8. Applicant and McDaniel were in an “on and off” relationship, and at times resided together. R.p. 264, l. 5 - 268, l. 3.

That evening, McDaniel went to sleep in her house and nobody else was inside of her home with her. According to McDaniel, Applicant did not have her permission to be inside her home. R.p. 269, ll. 9 - 24. McDaniel recalled that she woke up to find Applicant straddling her in

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<sup>1</sup> Attempted murder is set out in the statute as follows: “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder...” S.C. Code Ann. § 16-3-29.

<sup>2</sup> The arson charge is defined as: “A person who willfully and maliciously causes an explosion, sets fire to, burns, or causes to be burned or aids, counsels, or procures a burning that results in damage to a building, structure, or any property specified in subsections (B) and (C), whether the property of the person or another, which results, either directly or indirectly, in death or serious bodily injury to a person is guilty of the felony of arson in the first degree...” S.C. Code Ann. § 16-11-110.

her bed and pouring gasoline on her. R.p. 270, ll. 2 - 19. According to McDaniel, Applicant said “bitch, you don’t love me,” and then set her on fire with a lighter. R.p. 271, l. 1 - 273, l. 2. McDaniel fled out of the house while still on fire and ran next door for help. R.p. 274, ll. 4 -8.

During McDaniel’s trial testimony, she showed the jury some of the injuries on her body that were not covered by her clothing. R.p. 283, l. 17 - 284, l. 21. McDaniel also demonstrated to the jury how the mobility in her right arm had been diminished by the fire. R.p. 284, l. 22 - 285, l. 9. The State then sought to introduce nine photographs of McDaniel’s injuries “which [were] not visible due to [her] clothing.” R.p. 285, l. 19 – 286, l. 13.

Defense counsel Mauldin objected under Rule 403, SCRE. The judge overruled counsel’s objection and allowed the jury to see the photographs. R. 286, ll. 14 - 22; (State’s Exhibits 52, 53, 55 – 61). The State then asked McDaniel about each photograph, and she explained to the jury what each photograph showed. R.p. 289, l. 5 - 291, l. 19.

One of McDaniel’s neighbors, Maria Combs, testified and recalled being woken up by her husband screaming that “the lady across the street [is] on fire.” R.p. 366, ll. 5 - 11. Combs’ husband called 911 while Combs ran onto her front porch and saw McDaniel screaming and running across her yard engulfed in flames. R.p. 366, ll. 12 – 17. McDaniel ran into the house of another neighbor, Peter Messina, and Combs went to that house to render aid to McDaniel. Messina sprayed McDaniel with a hose from the kitchen sink to put the rest of the flames out. R.p. 366, l. 18 – 367, l. 1. Messina and Combs locked their doors and stayed with McDaniel until law enforcement and the paramedics arrived. R.p. 368, l. 19 – 369, l. 10.

Maria Combs also testified that she heard Applicant yelling in the yard to “send me to f’ing jail” and “call the f–king police.” R.p. 368, l. 10 - 18. Investigator Terrin Reel of Cayce Public Safety testified that she saw Applicant at the fire scene, and he claimed to her that he did

not know whose house it was and that he was just walking down the street. R.p. 218, l. 1 - 8. She testified that after she learned from the victim her claim that “he tried to burn me” after the victim came out of a neighbor’s home, she realized that the perpetrator was likely the person the investigator had spoken with earlier, but he was gone at that point. R.p. 219 - 221. Corporal Howard Powell of the Cayce Police Department testified that as he was arriving toward the scene looking for a fire hydrant, he saw a black male wearing no shirt and black and white shorts and the person stated, “that shit’s crazy.” R.p. 252, l. 2 - 11. This individual’s clothing was consistent with the person in the video at the other scene.

Contrary to the Applicant’s claims related to the evening, when Applicant was at the hospital, he denied currently being suicidal, but advised Dr. Hardy, the emergency doctor in a joking demeanor that he wanted to be admitted to the hospital and was tired of living and that his injuries were caused because he poured gasoline on his back leg and then used a lighter with his right hand to light it. R.p. 463 - 465. The Applicant did not report to the doctor anyone else being injured. *Id.*

#### *Applicant’s Trial Version*

Applicant testified at trial in his own defense. Applicant recalled that he and the victim were together for a large portion of the day and were drinking beer and liquor together at McDaniel’s house. R.p. 620, l. 4 - 624, l. 6. Applicant testified that Messina and Messina’s cousin Ricco also came over to drink with them. Applicant maintained that it was a good atmosphere and McDaniel never asked him to leave and never threatened to call the police on him. R.p. 624, l. 7 – 626, l. 8.<sup>3</sup>

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<sup>3</sup> Evidence was presented that Applicant indicated to Cayce Police Officers that he denied living in the home or knowing anything about the fire.

After Messina and Ricco left at around 10:30 or 11:30 that night, Applicant went to sleep in McDaniel's room. The next thing he remembered was McDaniel waking him up and "fussing" with him. R.p. 626, l. 9 – 627, l. 8. Applicant admitted that he was very intoxicated and began reflecting on how he was at a "rock bottom" point in his life. R.p. 627, ll. 9 - 16. It was at this point that Applicant decided he wanted to kill himself so he grabbed the can of gasoline that was in McDaniel's kitchen and poured gasoline on the bed. R.p. 627, l. 22 - 628, l. 25.

As Applicant was pouring gasoline on the bed, McDaniel was trying to grab the gas can out of his hand. Applicant pushed McDaniel back and she fell on the floor, and he lit the bed with his lighter and "everything caught on fire." R.p. 629, ll. 1 - 15. McDaniel then took off running out of the house which caused the fire to get worse. R.p. 629, ll. 15 - 21. However, Applicant maintained that he never poured gasoline on McDaniel and that he never wanted to hurt or kill her. He claimed that he never straddled her or poured gasoline on her. R. 630. Applicant claimed that he only wanted to hurt himself. R.p. 630, ll. 3 - 19. He testified that he was burned also and on fire at the time. R.p. 631. He testified that once he was out of the house and realized how large the fire had gotten, he became scared and fled the scene. R.p. 631, l. 19 - 632, l. 24.

Applicant testified that he walked to his cousin's house and got in the back seat of an unlocked vehicle there. R.p. 633. He stated that after his cousin found him in the car the next morning, Applicant's family was called because of the burns. Applicant ultimately got in contact with his mother and sister who took him to the hospital to be initially treated for his burns. R.p. 634, ll. 4 – 24.

### ***Summary of Post-conviction relief testimony***

#### ***Testimony of Applicant***

The Applicant testified that he was represented by Sarah Mauldin and Rob Madsen. He stated that charges were based upon a claim that he broke into the victim's home and set her on fire.

He contended that his lawyers held back evidence. He asserted that this included evidence that the victim was with Green that day. He stated that this was supported by cameras at the traffic lights, at the BiLo, and at the liquor store. He contended that this would have disputed her story.<sup>4</sup> He felt that there was no way possible that they weren't together at that time.<sup>5</sup> He suggested that he could not be in two places at once and indicated he was with the victim walking around in public.

Applicant claimed that he did not break into the house. He complained that they did not question the victim about how he broke into the house. He pointed out that he was not charged with breaking and entering. He stated that there were no pictures of any broken windows that he allegedly broke into. He stated that the home had storm windows and it would have been very difficult to break the glass.<sup>6</sup> Applicant asserted that there was no evidence on how he allegedly broke into the house.

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<sup>4</sup> The victim testified at trial that on August 19-20 their relationship was off. R.p.268.

<sup>5</sup> The Court notes that in the proffer testimony at trial concerning admission of an excited utterance to paramedic Jasmine Rankin, she testified that the victim indicated that when the victim was asked who threw gasoline on her and set her on fire that she indicated it was her "boyfriend". R.p.334, l. 11-21. However, she reviewed the notes and corrected it to "ex-boyfriend". R.p.335, l.5. The trial judge indicated that she would allow in the victim's statement that "he threw gasoline on me" and "set me on fire" but not the testimony about it being the boyfriend or ex-boyfriend. R.p.337. See R.p.343, l. 18-20. ("he set me on fire. He threw gasoline on me and set me on fire.").

<sup>6</sup> During the victim's cross-examination by counsel Mauldin, when asked if she had told investigator Dougall if she had nailed her window frame to keep Applicant out, she testified that "that window frame was nailed down at one time before," but did not recall telling him that Applicant might have broken a window to get in. R.p. 306-307. On redirect by Solicitor Mayes victim confirmed that she did not know whether he came in through a door or window. R.p.314. On cross-examination by counsel Madsen of SLED Agent Richard Lloyd of the arson investigation unit, he did not recall seeing any window nailed shut. R.p. 506, l. 1-3.

The Applicant also complained that counsel did not adequately explain to the jury that the incident was accidental and did not argue lack of intent. Counsel also did not hire a fire reconstruction expert.

The Applicant testified that the victim's narrative of her injuries was inconsistent with the State's theory. Applicant testified that the victim claimed that he straddled her, but he questioned how would he not get gas on himself and only have burns on his back. He claimed that the injuries to the victim did not match her own narrative. Applicant stated that he accidentally set her on fire while he was trying to kill himself. He claimed again that it was never his intention to kill her. He complained that counsel did not adequately argue about his lack of intent. He stated that it was a very tragic situation and that he was dealing with some personal stuff and getting high, but that his attempted suicide had nothing to do with her.

He testified that he tried to assist with her injuries.<sup>7</sup> He stated again that he did not recall talking with the other officer when he walked off and he was aware that at that time she was already being aided by her neighbors.

The Applicant complained that counsel did not cross-examine the victim adequately and should have used her police statement to impeach her. He also contended that the fire examiner and arson expert was not adequately impeached.<sup>8</sup>

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<sup>7</sup> The Court recognizes that his alleged attempt to aid was disputed by the neighbors, as well as the victim at trial. R.p.274 (victim) (did not aid victim or attempt to put her fire out), p. 400-401, 404-405 (Matthew Cox); p.412 (Sarah Bugden)

<sup>8</sup> SLED Agent Lloyd testified that vapors could spread to another individual and be ignited by an open flame in a vapor cloud. R.p. 480-481. He indicated that if he had gasoline on him and a person igniting it was three feet away, the person igniting the gasoline could be in a vapor cloud and have injury as long as in that cloud. R.p. 480-481.

The Applicant also contended that counsel failed to point out a lack of video or photographic evidence of Green at a Cayce gas station. He noted that it was approximately 3 AM when the fire happened and that there was no gas station open at that time.<sup>9</sup>

The Applicant also complained that counsel failed to suppress the photographs of the victim. The Applicant testified that they were not indicating that she was not injured.<sup>10</sup> The Applicant complained that the State kept putting the pictures of the injuries on display to the jury which he felt was misconduct. He also complained that there was a video shown of the victim stating Green broke into the house and set her on fire. He claimed that this was improper because he was never charged with breaking and entering.

He also opined that he should have gotten a charge on accident.<sup>11</sup> He opined that his sentence should be reconsidered because he tried to help the victim and that it was an accident.<sup>12</sup> He also stated that it was also wrong in her narrative because he claimed that he could not sit on her like that. Also, he claimed that he stayed at the scene until he knew the victim was going to receive medical attention. He also wanted it pointed out that the neighbor witness did not recognize Applicant initially when shown a lineup. Further, he stated that there was no evidence

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<sup>9</sup> In the victim's testimony, she identified the gasoline can as a red can that was hers. She indicated that it was normally kept beside her lawnmower. R.p. 272. She later identified State Exhibit 76 as her red gas can. Also R.p. 484 (State Exhibit 26) (Gas can located on side porch area). R.p. 295-296.

<sup>10</sup> The record shows that counsel Mauldin objected to the photographs of the victim's injuries that had been taken in the courtroom two weeks prior under Rule 403 and cumulative evidence to the presentation of the injuries visible on the victim in the courtroom. R.p. 285-286. Judge McCaslin overruled the objection and allowed admission. As noted earlier, the admission of the photographs was raised as an issue on appeal in the *Anders* brief.

<sup>11</sup> At trial, the Applicant claimed it was accident because he did not intend to hurt her at all. R. 650, l. 18-19. See also, R.p. 736. (mitigation statement). ("I just want to say sorry because I didn't mean for her to get hurt in no kind of way. I just want it to be known that it was an accident. I wasn't trying to hurt nobody. That's all I have to say.").

<sup>12</sup> The Applicant never disputed causing the fire intentionally, just the consequences of the fire being other than his own death.

presented about where he got gas at 3 am. He also indicated that he wanted his own fire expert to support his defense.

On cross-examination, the Applicant testified concerning details about the incident. He claimed that he was staying at the house where the incident occurred for a week and a half beforehand. He asserted on the night of the incident that he was drinking, smoking, partying the entire time while he was there.

Concerning the actual incident, he claimed that he poured gasoline on a blanket in the bedroom and wrapped it around himself while holding a lighter. He asserted that the victim tried to grab the lighter and she accidentally caught on fire. Similar to his trial testimony he claimed that victim ran through the house while on fire and that he tried to help her. He claimed that he ran to the neighbor's house and told them to call the police. He claimed that he only said, "Call the police" and nothing else. He stated he did not ask to call ambulance because he said that the police and ambulance were the "same thing and it doesn't matter." The Applicant denied that he ever said, "take me to jail" (as neighbor stated in their police report).

The Applicant claimed that he told his lawyer that he was in the house, got gas from inside the kitchen and took it to the bedroom to pour it on the blanket. He stated that he was flicking the lighter during this time.

On re-direct examination, he indicated that he stood by all of his testimony.

### ***Testimony of Sarah Mauldin***

The Respondent called trial counsel Sarah Mauldin. She stated that she has been working primarily in criminal defense since 2006. She stated that the Applicant's case was her first arson case that went to trial. She received this file in November 2019.

Contrary to the Applicant's testimony, Mauldin testified that she met with Green at least ten (10) times prior to trial. She indicated that Applicant's statements to her were consistent with his trial testimony. According to Mauldin, the theory of the defense was that Applicant acted without malice and that it was the only way to avoid the arson conviction. She testified that Applicant stated to her that he tried to get the water hose in the yard to help the victim after the fire. She noted that a neighbor who made a statement and testified did not fully observe the incident.<sup>13</sup> Counsel testified that she was unsure if she asked Green why he left the scene – but assumes it is because he was afraid.<sup>14</sup>

Counsel Mauldin addressed the allegation of whether they had failed to address inadequate evidence of breaking into the victim's home. Counsel pointed out that she cross-examined the victim, asking if Green had been at the house the entire time.<sup>15</sup> Counsel noted that the Applicant was not charged with burglary in this case.<sup>16</sup>

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<sup>13</sup> This Court finds that this was likely a reference to the testimony and statements made by neighbors Marie Combs, Matthew Cox (who called 911) and Sarah Bugden. All saw the victim after she was already on fire. R.p. 378, 403-404, 413-416.

<sup>14</sup> In her direct examination of the Applicant, counsel Mauldin did ask Applicant why he walked off and he indicated that he was scared. R.p.632, l. 15-23.

<sup>15</sup> The trial record supports this statement. The record shows that counsel Mauldin inquired of the victim whether she had told Investigator Dougall that the Applicant was in her home on that date. R.p. 305, l. 11-16. In addition, she questioned the victim about an alleged statement that she made to Investigator Dougall about Applicant immediately setting the fire after he broke in. R.p. 307-308. Counsel also pointed out that the victim had indicated that she did not recall the details of anything that happened prior to the fire. R.p. 308.

<sup>16</sup> There were brief discussions in a motion to suppress the victim's excited utterance about Applicant breaking in with the fact that he had not been arrested or charged with burglary. R.p. 157. In counsel Mauldin's closing argument, she stated the following:

There are also problems with what Ms. McDaniel herself told you about this and her story doesn't add up either. She claims that Robert broke into the house, and it is important whether they were only on the porch or whether they were inside because she's claiming that he broke into her house, that she saw them only on the porch. **Burglary is going into the home of another without permission and with the intent to commit a crime. If the police believed what she said, they would have arrested him for burglary. If the Solicitor believed what she said, she would have gotten an indictment for burglary. There is not one. They don't think that is true.**

Concerning the alleged failure to address the inconsistent injuries of the victim with her narrative, counsel Mauldin testified that her primary goal was to present Green's version of the facts. She stated that Green acknowledged the victim's injuries and their severity but asserted he did not intentionally cause the injuries. She stated that she did object to the entry of photographs showing victim's injuries – but photographs were allowed in by trial court over her objection.<sup>17</sup>

Concerning the failure to cross-examine the fire examiner about how exactly the burn occurred, counsel stated that the arson expert at trial was not qualified to answer questions regarding victim's burns (extent, how received, etc.) She stated that fire and arson experts are not qualified to do this and that a medical expert would have been the necessary expertise instead.

Concerning the failure to cross-examine the victim adequately, counsel stated the victim was present in the courtroom with severe burn injuries which allowed for jury sympathy. She stated that she did not want to cross the victim too hard. Mauldin stated that she did question the victim about her prior inconsistent statements. However, she said the victim deliberately gave evasive answers.<sup>18</sup>

Concerning whether she failed to present mitigating evidence, she noted that Green claimed that he attempted to assist the victim by grabbing the water hose outside.<sup>19</sup> However, Mauldin claimed Green failed to use the hose to aid victim and the victim ran to a neighbor's

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R.p. 681, l. 4-16 (emphasis added).

<sup>17</sup> The objection to the photographs occurred at R.p. 286. As noted previously the admission of the photographs were the subject of the *Anders* Brief in the direct appeal and will be addressed in further findings and conclusions in this Order at 1 (e).

<sup>18</sup> Counsel Mauldin's characterization is supported by the record. A review of the cross-examination R. 301-318 reveals that victim initially indicated that she recalled that "half the time I don't remember talking to them" and numerous responses that she did not remember when asked about her prior statements or that she was sedated at the time.

<sup>19</sup> The Applicant testified about seeking to get the water hose in his testimony. R.p. 631, l. 11-12. However, on cross-examination the Applicant admitted that he never turned the hose on. R.p. 646-648.

house for help while still on fire. In addition, she noted that a Ring doorbell camera picked up audio of Green saying, “take me to jail” with no mention of calling an ambulance.

Concerning any discovery issues, Mauldin testified that she reviewed all the discovery received from the State. She stated that she did not hire independent experts regarding burn injuries nor fire reconstruction. She said that there was no dispute as to who caused the fire. She stated that she did retain a forensic psychiatrist, Dr. Donna Maddox who performed an evaluation of the Applicant and provided a report. She stated that Dr. Maddox diagnosed Applicant with a major depressive disorder, depression. Counsel Mauldin stated this report was adequately presented prior to sentencing hearing to the sentencing judge.<sup>20</sup>

On cross-examination, Mauldin confirmed that Green was consistent in his statements given to Mauldin throughout her defense. She stated, however, that the victim gave inconsistent reports. Counsel Mauldin stated that she tried to point out these inconsistencies as well as she could during victim’s evasive cross-examination. Mauldin stated she also retained an investigator to do background checks on the witnesses. She stated that she did cross-examine the fire expert, but not as to the cause or extent of the victim’s injuries.

Concerning a motion to reconsider the sentence, Mauldin opined that there was nothing available to justify amending the sentence, so she did not ask for that based upon the mitigation request made at the trial.

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<sup>20</sup> This is supported by the record. In mitigation, Dr. Maddox testified virtually concerning her evaluation. R.p. 724-729. She opined about Applicant having a major depressive disorder even before the event. R.p. 728.

Despite the language of §24-21-410 for a sentence of not less than 30 years, counsel Mauldin asked the sentencing court to suspend the sentence to something lower on both that attempted murder and arson. R.p. 729. It should be noted that in a recent unpublished opinion of the Supreme Court, the Court recently found that a similar suspension of the sentence for attempted murder created an illegal sentence as a matter of South Carolina law. *State v. Reid*, App. Case # 2023-001910, 2026 WL 1587551, at \*1 (S.C. June 3, 2026).

In redirect examination, Mauldin testified that she did not seek instruction on the event being an accident, because the fire was not set lawfully nor with due care. She also did not recall Green asking her to review any camera footage from various parking lots. She did not investigate this and does not think the independent investigator did either.

### ***Testimony of Rob Madsen***

Counsel Rob Madsen testified that he obtained his law license in 1996 with primary practice in criminal defense. He stated that he was very familiar with attempted murder and arson cases. He confirmed that he did the cross-examination of SLED Agent Lloyd, the arson expert.<sup>21</sup> He stated that in his experience that an arson investigation role is generally limited to trying to find the source of the fire and determine if any accelerant was used. He stated that arson investigators are not experts on examining victims' burn injuries. He noted that arson investigation and injuries caused by arson do not depend on each other. He stated that an expert on arson could likely not explain the exact way the injuries occurred during the incident, just that the fire was the cause of those injuries in general.

Concerning a claim of a failure to cross-examine the expert, counsel Madsen stated that he did not think it would be helpful to ask the expert about the victim's injuries because it would not lead to anything favorable.

Concerning the assertion that they failed to retain a fire reconstruction expert, Madsen did not think this would have been helpful at the trial. He stated that he still believes it would have made no difference in outcome. Madsen noted that there was no assertion that victim had set herself on fire. He believed that there was no support from facts or any narrative.<sup>22</sup>

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<sup>21</sup> This is supported by the record. Counsel Madsen's cross-examination is set out at R.p. 504-507.

<sup>22</sup> It is noted that the trial judge upon the State's request gave an instruction concerning voluntary intoxication. R.p. 704, l. 18-p. 705, l. 1.

Further, as to the claim as to whether there was a burglary, Madsen noted that there was no assertion that a break-in or burglary was needed to occur for culpability for either the attempted murder or arson.

Concerning accident, Madsen opined that there was no accident defense because Green was acting unlawfully and recklessly by setting a fire inside the home.

Similar to counsel Mauldin's testimony, the defense made no attempt to have the sentence reconsidered because there was no justification to amend it.

Madsen testified that Applicant told him that the gas cans were kept in the kitchen, although the victim stated she kept gas cans outside with a lawn mower.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court reviewed the trial and appellate records and had the opportunity to assess the testimony of the Applicant and his trial counsel. The Court makes the following findings of fact and conclusions of law pursuant to S.C. Code §17-27-80. Based upon its review, the Court must deny post-conviction relief in its entirety.

#### **STANDARD OF REVIEW**

In his application, Applicant raises, among others, ineffective assistance of trial counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and

raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—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* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction or sentence. 466 U.S. at 687. To obtain reversal of a conviction, the applicant must prove that (1) their attorney’s performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the defendant of a fair trial (the prejudice prong). *Id.* at 690–95; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The defendant’s burden for proving both of these components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. *Strickland*, 466 U.S. at 690. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id.* at 700.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). 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.

*Strickland*, however, “does not guarantee perfect representation[—]only a ‘reasonably competent attorney.’” *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). 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. *Strickland*, 466 U.S. at 686. Just as there is “no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Harrington*, 562 U.S. at 110.

Accordingly, “[j]udicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Strickland*, 466 U.S. at 689. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Butler v. State*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, at 118, 386 S.E.2d 624, at 625 (1989).

A reviewing court “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed at the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.*

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 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. *Harrington*, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” *not* whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690) (emphasis added).

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the

proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695.

Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial*.” *Id.* at 687 (emphasis added). “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 668. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

**Counsel’s alleged failure to argue that there was no evidence of Applicant breaking into the alleged victim’s house**

In the Applicant's initial amended allegation (a), he contends that counsel failed to argue that there was no evidence that Applicant broke into the victim's house. This Court must find that Applicant has failed in his burden to prove either deficient performance or prejudice. The Applicant was charged with attempted murder<sup>23</sup> and arson in the first degree.<sup>24</sup> These crimes do not require proof of a breaking or entry or burglary as a matter of law, contrary to the assertion of the Applicant.

This Court finds that counsels Mauldin and Madsen were credible related to this issue. Counsel Mauldin acknowledged that that she cross-examined the victim related to her inconsistent statement made to Investigator Dougall concerning whether Applicant had broken into her home or whether she remembered anything before the fire. R.p. 307-308. The victim had testified that the Applicant did not have permission to be inside the home that night. R. 269, l. 9-24. Further, she presented testimony through the Applicant that Applicant went to sleep inside the victim's home that evening, suggesting that he was invited and did not break in. R.p. 626-627. In her closing argument, counsel Mauldin sought to discredit the credibility of the State's

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<sup>23</sup> The crime of attempted murder is defined as follows:

A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted.

S.C. Code Ann. § 16-3-29.

<sup>24</sup> The Applicant's crime occurred on August 20, 2019. At that time, the crime of arson in the first degree read as follows:

Section 16-11-110. (A) A person who wilfully and maliciously causes an explosion, sets fire to, burns, or causes to be burned or aids, counsels, or procures the burning of a building, structure, or any property specified in subsections (B) and (C) whether the property of himself or another, which results, either directly or indirectly, in death or serious bodily injury to a person is guilty of arson in the first degree and, upon conviction, must be imprisoned not less than ten nor more than thirty years.

1997 South Carolina Laws Act 113 (H.B. 3780).

case by pointing out under their evidence they could have charged Applicant with burglary, but the State did not do so, which indicated that State did not believe that version was true. R.p. 681, l. 4-16. Counsel Madsen similarly stated that there either crime required proof of a burglary for culpability of the offenses.

This Court finds that deficient performance was not proved on this issue. Counsel acted reasonably in seeking to use the information they learned to impeach the victim and challenge the credibility of the State's case. However, there were no steps or actions that reasonable counsel would have had an additional duty to perform where burglary was not charged within the standards of competence demanded of criminal lawyers.<sup>25</sup>

This Court further finds that the Applicant failed to prove 6<sup>th</sup> Amendment prejudice. Since the Applicant was not charged with burglary and whether he lawfully entered the home was not a condition precedent to either attempted murder or arson in the first degree, prejudice cannot be proven. This assertion must be dismissed.

**Counsel's Alleged Failure to Argue that the alleged victim's injuries were inconsistent with her narrative of what happened.**

In his second specification (b) in the amended application, the Applicant contends that his counsel was ineffective in failing to argue that the victim's injuries were inconsistent with her narrative of what happened. This Court finds that based upon review of the trial record and the credible testimony of defense counsel Mauldin; the Applicant has failed to prove deficient performance or prejudice under *Strickland*.

In his testimony at trial and in this proceeding, the Applicant claimed that counsel did not show that the victim's injuries were inconsistent with her version. He contends that her burn

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<sup>25</sup> This Court notes that defense counsel made a timely motion fore directed verdict of acquittal. R. 582, l. 7-14. 584, l. 6-p. 585, l. 1.

injuries were inconsistent with her being straddled while on the bed while he was pouring gas.<sup>26</sup> The victim had testified that when she woke up, he was pouring gasoline on her while she was in the bed and that he was straddling her. She claimed she broke free at one point, but she eventually ended up at the foot of the bed at the edge with Applicant sitting on her and he lit the lighter and she felt the burn on her face and hair. At that point she got away to ask for help while still on fire. R.p. 270-273.<sup>27</sup> During the defense cross-examination, counsel Maulding focused on the victim's inconsistent statements, such as when asked by law enforcement what caught on fire first, whether it was her clothing or her hair (R.p. 303, l. 10-15), whether she had stated that Applicant immediately set fire after he broke in (R.p. 307, l. 12-15), that she had woken up and that Applicant was straddling her and that they had tussled over the gas can, including that he threw it on her and she threw it back. (R.p. 309, l. 3-12).

In defense counsel Mauldin's closing argument, she pointed out that the victim's version "does not make sense." R.p. 682, l. 1-2. She pointed out that victim claimed that he held the lighter in his right hand and lit her left ear on fire, while he was still straddling her, but their injuries did not match that since her torso was burned to her hips, but not his own legs and thighs or his torso and face. R.p. 682, ll. 3-20. Counsel asserted that if they were that close together, there would have been injury to him from the torso up as well. *Id.* She also urged an alternate theory that if he wanted to kill her, he could have poured gasoline around the room and lit it in a

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<sup>26</sup> During the trial, the State also presented evidence from Dr. Stephen Ridley, an expert in emergency medicine, who treated the victim. R.p. 564-581. He treated the victim in the trauma unit on the night of the incident. He described the extensive burns from her head all the way to her waist. R.p. 569. He noted that she had 60% of her body burned and indicated that he was surprised that she was still alive. R.p. 572-577. At the conclusion of Dr. Ridley's direct examination, counsel Madsen did not ask any questions. R.p. 581, l. 13.

<sup>27</sup> The victim testified that the Applicant stated: "bitch, you don't love me" before igniting the lighter. R.p. 270, l. 12-13, p. 272, l. 12.

safer way for him, and it would have caught her on fire, and she would not have made it out. R.p. 683-684.

During the Applicant's trial testimony, he indicated that he was intoxicated that night and woke up in the victim's bedroom with the victim fussing. He claimed that he walked into another room and that she followed him. He stated that eventually he went into the bathroom and shut the door, but the victim busted the door open. At that point he claimed that he was getting tired of all this and went into the kitchen and grabbed the gasoline can, came back to the room and folded up a blanket and poured gasoline on it, claiming his intent was to sit on it, light it and kill himself. R.p. 627-628. He claimed that the victim tried to grab the can and they began to struggle and he pushed her back and she fell and hit the floor. He contended that he wrapped the blanket around his arm and then started to flick the lighter. He stated that when the lighter came on, she put her hand over the flame and the whole blanket, his arm, her arm and everything caught fire. He stated that at that point she took off through the house and when the door was open there was a boom and the whole thing went up. R.p. 629-630.<sup>28</sup>

This Court finds that counsel Mauldin's action fell within the standards of competence demanded of lawyers proacting criminal law. She challenged version given by the victim in a manner consistent with the Applicant's account through her cross-examination of the victim, her presentation though the Applicant's testimony and her closing argument. The fact that the cross-

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<sup>28</sup> During the State's case they presented testimony of Dr. Zachary Hardy, the emergency room doctor who treated the Applicant the next day. Dr. Hardy noted that the Applicant indicated to him the burn injuries to his back, leg and left hand were caused when he poured gasoline on himself on his back and leg and used a lighter to set himself on fire. R.p. 464. His injuries were not life threatening and was a 6% burn on his mid-back and 5% on his mid-thigh and 25 on his left hand. R.p. 471-472. On cross-examination, counsel Madsen confirmed that the Applicant had indicated that he had tried to kill himself the night before and that the burns were serious enough to have him sent too the Augusta burn clinic. R.p. 473. Counsel pointed out that if a person was in close proximity to someone on fire in the front, it would be weird to have burns on their back. R.p. 473-475.

examination was unsuccessful does not translate to ineffective assistance of counsel. *Bible v. Schriro*, 497 F.Supp.2d 991, 1046 (D. Ariz. 2007) (that a cross-examination tactic was unsuccessful does not translate to ineffective assistance), affirmed *Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009). Courts have recognized reasonable defensive strategies even if they are unsuccessful. *Flieger v. Delo*, 12 F.3d 766, 774 (8th Cir. 1993). An attorney's conduct is not deficient simply because another (appellate counsel) would do differently. *U.S. v. Chambers*, 918 F.2d 1455, 1462 (9th Cir. 1990). Speculation that a different lawyer, or the same lawyer using a different strategy or tactics, would have changed the result is an insufficient showing of prejudice. *Cooks v. Spalding*, 660 F.2d 738, 740 (9th Cir. 1991).

This Court finds that the Applicant has failed to prove any specific deficiency that trial counsel should have done. This is Applicant's burden of proof, and he failed to support his bare assertion with credible evidence. He failed to prove deficient performance.

Further, since his conclusory assertion in light of the record of counsel's actual performance was not proven, the Applicant also failed to show an omission, that supports any finding of Sixth Amendment prejudice under *Strickland*. The assertion must be denied.

**Counsel's alleged failure to effectively cross-examine the fire examiner about how exactly the burn would have occurred.**

In his third specification (c), the Applicant contends that his counsel failed to adequately cross-examine the fire examiner, SLED Agent Richard Lloyd of the arson investigation unit about how the burn would have occurred. This examination was done by defense counsel Madsen. This Court finds that based upon the trial record and credible testimony of defense counsel that the Applicant has failed to prove deficiency or the counsel's conduct was objectively unreasonable.

Under *Strickland*, trial counsel performs below constitutionally permissible levels only when she fails to act within “the wide range of professionally competent assistance,” as determined by “prevailing professional norms.” 466 U.S. at 690. While counsel has a duty to make “reasonable” decisions about defense strategy and cross-examination or impeachment, counsel's judgment on whether to pursue certain paths warrants “a heavy measure of deference.” *Id.* at 690–91. And it's the defendant's burden to “overcome the presumption that, under the circumstances, the challenged action [or omission] ‘might be considered sound trial strategy.’ ” *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Trial counsel is not ineffective just because she “did not spot, or did not choose to emphasize, every basis for undermining” a witness's testimony or credibility because “[t]he Sixth Amendment guarantees reasonable competence, not perfect litigation.” *United States v. Munoz*, 605 F.3d 359, 381 (6th Cir. 2010) (citation omitted).

SLED Agent Lloyd testified that he determined the area of origin of the fire to be around the foot of the bed and between the foot of the bed and the chest of drawers. R.p. 497, l. 20-24 He also testified that they located an accelerant, confirmed to be gasoline between the foot of the bed and in front of the chest of drawers in a red plastic can. R.p. 1-12. He further determined that it was an intentional act of applying an open flame to an ignitable liquid and/or combustible material. R.p. 488, l. 7-9. He further disused the possibility of a vapor cloud which would pose a threat to anyone in the proximity of the confined bedroom space. R.p. 504.

On cross-examination by counsel Madsen, it was confirmed that Agent Lloyd arrived at the scene about a half hour after the fire. Counsel developed that the expert did not recall any windows being nailed shut and found that the fire vented through the top of the window frames. R.p. 505-506. Further counsel developed that all the bedroom doors exhibited heavy fire damage

suggesting that the doors were open. Further he presented that the gas can was found under clothing in that room. R.p. 506.

“[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include ‘which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness could be cross-examined.’ *Abney v. State*, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (*citing Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998)). ‘Ineffective assistance of counsel complaints sometimes allege the failure to adequately follow-up cross-examination answers with more detailed questions further examining those answers. But a successful ineffective assistance complaint requires more than speculation that additional information would have had an impact on the outcome of the case.’ *Moze v. United States*, 963 A.2d 151, 165 (D.C. 2009).

Counsel Madsen testified that he did not cross-examine the arson expert about the victim’s injuries because he was of the opinion that it was beyond the expert’s qualification and area of expertise.<sup>29</sup> Counsel Mauldin testimony was similar in her belief that the arson investigator was not qualified in answering questions about the victim’s burn including the extent and how they were received.

The expert’s qualifications were set out in his direct examination that he had been employed by SLED since 2018 (trial was in 2021) and that his training had been multiple classes in a specific field of fire investigation.

This Court finds the Applicant in this proceeding made no showing that Agent Lloyd was qualified to give a professional opinion on how or where the victim’s injuries occurred. In his testimony Agent Lloyd spoke about vapor clouds caused by the ignition of a lighter which would

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be dangerous to any person in its vicinity, but nothing about the extent or location of where the victim was when she received the injury. See R.p. 480-481, 504. In addition, assuming he was qualified, the Applicant made no showing that his opinion would have benefited the Applicant.

The Applicant has failed in his burden of proof to show deficient performance in failing to cross-examine SLED Agent Lloyd concerning his opinion on the nature of the victim and Applicant's burn injury and how they were located when the injuries occurred. The Applicant's speculation is not sufficient to show deficiency.

Similarly, the Applicant has failed to show that had counsel made inquiry of Agent Lloyd of these matters, that there is a reasonable probability that the outcome on either the arson or attempted murder would have been different, particularly where Applicant indicated that he was attempting to start a fire by the use of gasoline in the bedroom to kill himself when the fire began.

#### **Counsel's alleged failure to cross-examine the victim**

In his fourth specification (d) in his amended application, he contends that counsel Mauldin failed to effectively cross-examine the victim, particularly using the victim's statements to the police. This Court previously addressed the similar claim above related to the victim's inconsistent narrative which is incorporated herein by reference. This Court finds that based upon a review of the trial record and counsel Mauldin credible testimony that the Applicant has failed to show deficient performance or prejudice in the manner of her cross-examination

Counsel Mauldin credibly testified that she did not want to cross-victim too hard because it was evident to the jury that she had suffered severe burn injuries and had obvious sympathy from the jury. However, it is evident from the trial record that counsel subtly developed points of impeachment and questioning the victim's version that she used in her closing statement.

Mauldin stated that the victim testimony on cross-examination was evasive, which is supported by the record. In her examination related to statements the victim made to law enforcement she declared that she did not remember the statement or that half the time she did not remember talking with them. R.p. 301-318. In counsel Mauldin's closing argument, she relied upon the victim's inconsistent responses to develop their theory to support the Applicant's narrative that he was only trying to kill himself and did not intend to hurt the victim. This Court further notes that other than his conclusory statement about the victim's prior statements, the Applicant failed to point to a specific statement or portion of a statement by the victim that counsel failed to address in her cross-examination. The Applicant further completely failed to present a credible proposed cross-examination that he contended counsel should have done.

This Court finds that counsel performed reasonably in her cross-examination within the standards of competence of a lawyer practicing criminal law. This Court recognizes that the breadth of cross-examination falls within counsel's reasonable strategic decisions. *See Gallo v. Kernan*, 933 F.Supp. 878 (N.D. Cal. 1996) (record showed tactical reason not to impeach crying assault victim witness with prior inconsistent statement, noting that impeachment is a matter of trial tactics, citing *Gustav v. U.S.*, 627 F.2d 901, 906 (9th Cir. 1980)). Cross-examination must be objectively unreasonable and not flawless; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000). In *Brown v. Uttecht*, 530 F.3d 1031, 1036 (9th Cir. 2008), the Court added that proposed cross-examination may have backfired, citing *Yarborough v. Gentry*, 540 U.S. 1, 7, 124 S.Ct. 1, 4, 157 L.Ed.2d (2003)(per curiam). The extent of the cross-examination of an upset witness is a matter of strategy. *Becker v. Luebbers*, 578 F.3d

907, 919 (8th Cir. 2009). This Court finds from its review of the record counsel's examination reveals a reasonable trial strategy.

This Court further finds for reason as set forth above that the Applicant failed to prove any Sixth Amendment prejudice related to the cross-examination of the victim. The Applicant's trial testimony revealed his intent to start that fire and consequently resulted in the injury to the victim. There is no reasonable probability revealed in this action that the result of the proceeding would have been different. It must be denied.

**Counsel's failure to successfully suppress the photographs of the victim's injuries.**

In his fifth specification (e), the Applicant contends that his counsel was ineffective in failing to successfully suppress the photographs of the victim's injuries. This Court finds that this ground is without merit. Counsel Mauldin objected to the photographs and the issue was raised in the *Anders* Brief of Applicant in the direct appeal without success. The Applicant failed to show credible evidence that the counsel was deficient in her objection to the admission of the evidence.

During the victim's direct examination. The victim revealed to the jury the visible injuries that she received because of the fire. These included showing the jury her loss of hair and injury to her scalp, that her ears were no longer intact, and that due to the injuries to her skin, she had lost mobility in her right arm. R.p. 283-285. She testified that she had further surgeries pending. The State next presented a series of photographs of her additional injuries taken earlier in the courthouse. These photographs depicted injuries that were not visible due to her clothing. R.p. 285-285. Counsel Mauldin objected to the photographs under Rule 403 and that they were cumulative to the injuries already revealed. R.p. 286, l. 11-17. The trial judge overruled the objection and admitted the photographs. R.p. 286, l. 18-23.

In the victim's testimony she described her injuries in the photographs. These photographs revealed injuries after skin grafting. State Exhibit 52 revealed the top of her head where she previously had hair. State Exhibit 56 revealed an ear on the left side of her face and noted that the left side caught fire first. R.p. 289-290. State Exhibit 55 showed the right side of her body. State Exhibit 57 showed her upper right arm. State Exhibit 59 showed her upper back. State Exhibit 60 showed her whole neck. State Exhibit 61 showed her left side. R.p. 290. The victim further revealed that the burns also went down from her waist. State Exhibit 53 showed the top of her chest. State Exhibit 58 showed her arm. R.p. 291. In addition, these exhibits were also used by Dr. Riley in his testimony describing the victim's injuries. R.p. 579-580. (state Exhibits 55,56,61, 87).

At the conclusion of the State's case, counsel Madsen renewed all the motions. R.p. 651-652. The motion was denied again. R.p. 652.

This Court finds that the Applicant has failed to prove deficient performance. In her testimony, counsel testified that she did object to the admission of the photographs which was overruled. The record shows that the objection was based upon cumulative evidence and Rule 403. R.p. 286. The Applicant has failed to allege or show a different basis for the objection that counsel should have made. This Court finds that counsel acted reasonably within the standards of competence demanded of criminal lawyers in making the objection. There is no ineffectiveness for failure to object where the record shows an objection. *McElvain v. Lewis*, 283 F.Supp.2d 1104, 1125 (C.D. Cal. 2003). The Applicant in this setting has been unable to show that the relevant photographic evidence was inadmissible under any other theory. The fact that the counsel was not successful in her objection does not prove that counsel was deficient. The

ground must be dismissed. He has failed to show credible evidence of deficient performance or prejudice under *Strickland*.

#### **Counsel's failure to request an instruction on accident**

In the sixth specification (f) in his amended application, the Applicant contends that he failed to request a charge on accident. As noted previously, the defense theory was to show that the Applicant acted without malice in the resulting injuries to the victim. However, his trial and PCR testimony revealed an intent to start the fire in the home with the alleged motive to kill himself.

“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). “The law to be charged must be determined from the evidence presented at trial.” *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (citations omitted); *Mattison*, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted) (stating that appellate courts should “consider the court's jury charge as a whole in light of the evidence and issues presented at trial”). When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. *Id.* at 101, 525 S.E.2d at 512–13 (citations omitted).

The defense of accident (sometimes called misadventure) protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. The defense has three elements: (1) the harm was unintentional, (2) the defendant was acting lawfully, and (3) due care was used in the handling of the weapon. *See State v. Commander*, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011); *see also State v. Brown*, 205 S.C. 514, 521, 32 S.E.2d 825, 828 (1945) (“If it be shown that the killing was unintentional; that it was done while the perpetrator was engaged in a

lawful enterprise, and was not the result of negligence, the homicide will be excused on the score of accident.”). If the harm was caused by accident, the defendant is not criminally responsible because of the absence of criminal intent. It is precisely this lack of intent that separates accident from self-defense, for self-defense “admits an intentional killing, and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional.” *State v. McDaniel*, 68 S.C. 304, 317, 47 S.E. 384, 389 (1904). The defense of accident sometimes surfaces in homicide cases, often alongside self-defense. Despite their varying levels of intent, accident and self-defense are not always mutually exclusive defenses. *See State v. White*, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018); *State v. Williams*, 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012). Of course, accident may appear in contexts far removed from self-defense. Blackstone gives the example of a man lawfully working with a hatchet when the head flies off and kills a bystander. 4 W. Blackstone, Commentaries. *See State v. Owens*, 427 S.C. 325, 330–31, 831 S.E.2d 126, 128–29 (Ct. App. 2019), aff’d, 433 S.C. 482, 860 S.E.2d 357 (2021).

The Applicant testified that his counsel failed to argue that the incident was accidental. However, counsel Mauldin credibly testified that she did not request an instruction on the event being an accident because the fire was not set lawfully or with due care. Counsel Madsen testified similarly that the defense of accident did not apply since Green was acting unlawfully and recklessly by setting a fire inside the home.

This Court finds that the Applicant failed to present evidence to show that counsel was deficient in not requesting an accident instruction. Trial counsel cannot be deficient in failing to request an instruction that he is not entitled to based upon the evidence. *Palacio v. State*, 333 S.C. 506, 514–15, 511 S.E.2d 62, 67 (1999) (finding counsel was not deficient for failing to make

futile argument); *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005) (Trial counsel was not ineffective for failure to request jury charges on lesser-included offenses because there was no evidence in the record to support jury charges for lesser-included offenses). *Magazine v. State*, 361 S.C. 610, 606 S.E.2d 761 (2004) (reversing PCR judge's grant of relief where the record was devoid of any evidence warranting a jury charge on the lesser offense). Cf. *Tisdale v. State*, 378 S.C. 122, 622 S.E.2d 410 (2008) (trial counsel was ineffective for failure to request a jury charge on accident or manslaughter when there was evidence that defendant and victim struggled over gun warranted instruction for involuntary manslaughter as lesser included offense of murder, despite evidence that victim was shot twice in back of head); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (counsel was not ineffective for failing to inform defendant about defense of accident where there was no evidence at trial to support the defense). The defense of accident protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. *State v. Commander*, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011). See, e.g., *State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999) (affirming the trial court's refusal to instruct the jury on the defense of accident where the evidence established that the defendant engaged in assault and battery and the defendant presented no evidence that he was acting in self-defense).

Here, there is no evidence that the Applicant was acting lawfully and with due care when under his version he poured gasoline on a blanket with intent to start a fire and kill himself in the presence of the victim. The Applicant has failed to prove neglect is failing to request this instruction.

Further, for similar reasons prejudice has not been proven. See *Jackson v. State*, 355 S.C. 568, 573, 586 S.E.2d 562, 565 (2003) (reversing the PCR court's grant of PCR, finding that

although counsel was deficient for failing to request a self-defense charge, the instruction would not have affected the outcome of trial given the overwhelming evidence presented of Jackson's guilt). Counsel may not be found ineffective for failure to request instructions in the absence of prejudice. *See James v. Borg*, 24 F.3d 20 (9th Cir. 1994). The evidence of the Applicant's own testimony reflects that the defendant was not acting lawfully, and due care was not used in the handling of the weapon in his use of gasoline and intent to set a fire within the victim's bedroom. The ground for relief must be dismissed.

**Counsel's alleged failure to fully investigate the victim's alleged narrative**

In applicant's seventh assertion (g), the Applicant claims that his defense failed to investigate the victim's narrative of what happened more fully. This Court recognizes that counsel has a duty to reasonably investigate the case but must conclude that the Applicant failed to prove that counsel failed to act as a reasonable counsel within the mandates required of defense lawyers practicing criminal law.

The *Strickland* Court recognized that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. 2052. "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.* "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation," but "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690–91, 104 S.Ct. 2052.

Under *Strickland*, “[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.” 466 U.S. at 691, 104 S.Ct. 2052. With respect to the duty to investigate,

what investigation decisions are reasonable depends critically on [information supplied by the defendant]. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

*Id.* Thus, “inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.”

In Applicant’s PCR testimony, the areas of investigation he focused upon were to impeach the victim on his relationship with her at the time of the incident, that they would have been seen together earlier that day at the grocery store and liquor store, and that there was no evidence that would show that he had gone to get gasoline that evening or at 3 am. These claims were in addition to contesting her version of the events with the Applicant’s version.

This Court finds that counsel Mauldin and Madsen’s testimony was credible in defeating his assertion of an inadequate investigation. Counsel met with the Applicant over ten (10) times prior to the trial. The version of the event that he gave to counsel was consistent with his testimony at trial and his testimony at the PCR hearing. This included his claim that he was at the for a week beforehand. Counsel were aware from their view of the discovery of the inconsistent statements the victim had given to law enforcement. From the discovery, the defense counsel were also aware of the Applicant’s action and comments to law enforcement, to the neighbor’s versions of Applicant’s actions that night in the yard and his inconsistent act of leaving the scene

rather than providing aid. Counsel were also aware, as revealed at trial of the medical information concerning the victim's and Applicant's burn injuries. Counsel also retained an investigator to complete background checks on the witnesses in this matter.

To the extent that Applicant claimed that counsel should have investigated that video or photographic evidence to prove that he was not at a gasoline station at 3 am, allegedly to buy gasoline does not support a claim of deficient investigation. The Applicant claimed the camera footage would have disputed all the evidence in the case. Counsel was aware from the Applicant's version that he got the gasoline can from the kitchen in the victim's home and began pouring it in the bedroom. Counsel was also aware from the discovery as shown at trial that a red gasoline can was recovered in the bedroom the victim identified as her can.<sup>30</sup> Although there was a dispute about its earlier location it was not unreasonable or deficient performance to not seek information from traffic or security cameras. In addition, this Court finds credible counsel Mauldin's testimony that she was not asked by Applicant to review camera footage from various parking lots. Based upon his client's version, it remains unclear why there was any need under the Sixth Amendment to further investigate collateral evidence concerning traffic or security cameras when Applicant's presence at the scene was not disputed by the Applicant.

Importantly, the Applicant failed to prove that any additional investigation would have proven beneficial to the Applicant's defense. He failed in his burden of proof to present either evidence or witnesses to suggest inadequate performance by his counsel. This Court finds that deficiency has not been proved.

Further, the Applicant has failed to present any credible information that counsel failed to present at trial that to a reasonable probability would have resulted in a not guilty verdict and

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<sup>30</sup> The victim claimed that somebody went and put gasoline in the can and it was not her. R.p. 314, l. 23-24. The record did not resolve when gasoline was put into the can. In his testimony, the Applicant denied that he left the house and went and bought gas anywhere. R.p. 628, l. 19-25.

undermined confidence in the verdict. He failed to prove Sixth Amendment prejudice under *Strickland*. The allegation must be denied.

**Counsel failed to move to reconsider the sentence**

In the eighth assertion in the amended application(h) the Applicant contends that counsel was deficient in failing to file a motion to reconsider the sentence. The Applicant claimed in his PCR testimony that it should have been reconsidered because he tried to help the victim and that it was an accident. The record shows that during the sentencing proceeding, as noted above, the Applicant presented testimony from forensic psychiatrist, Dr. Donna Maddox, concluding that prior to the incident the Applicant suffered from depression. R.p. 724-729. Counsel Mauldin also pointed out supportive family members present throughout the trial. R.p. 730. The Applicant's uncle, Charles Wheeler, made an impassioned statement in mitigation on the Applicant's behalf and requested leniency. R.p. 731-734. Counsel indicated that the Applicant was a man of faith. Counsel Madsen indicated that his client thanked him for working through the weekend on his behalf. R.p. 735. The Applicant made his own plea in mitigation in stating he was sorry because he did not mean for the victim to get hurt and claimed it was an accident. R.p. 736.

Counsel Mauldin testified that after he received his sentence, she felt that there was nothing to justify amending the sentence and she did not make the request. Similarly, counsel Madsen stated he did not attempt to have sentence reconsidered because there was no justification to amend it.

This Court finds that the Applicant has failed to prove that counsel was deficient in failing to move to seek reconsideration of the sentence. The sentence of thirty years for attempted murder and 40 years for arson in the first degree and the sentences to be consecutive were within the statutory mandates of S.C. Code §16-3-29 and §16-11-110. The Applicant failed

to show any basis that all reasonable counsel would have requested reconsideration of the sentence. Further, considering the circumstances of the crimes and the significant criminal history shown to the sentencing judge (R.p. 720), the Applicant alternately has failed to show a reasonable probability that the result of the sentence would have been different had counsel made the motion to reconsider. Sixth Amendment prejudice was not shown.

**Counsel failed to question Applicant about how he told the neighbor to call the police and he assisted the victim with her injuries.**

In the tenth amended application (i), Applicant asserts that his counsel was deficient in failing in her examination to ask him about how he called the police and help the alleged victim with her injuries. This Court has found credible counsel Mauldin's testimony that she met with the Applicant over ten times in preparation for the case. However, the Applicant testified that he was not adequately prepared for his trial testimony. This Court upon review of the trial testimony of the Applicant finds this statement by the Applicant is not credible. Counsel and the Applicant were well prepared in its presentation of Applicant's testimony.

Concerning the calling of the police, during the trial Marie Combs testified that that she heard Applicant yelling in the yard to "send me to f'ing jail" and "call the f-king police." R.p. 368, l. 10 - 18. When Investigator Reel of the Cayce Public Safety was arriving near the scene, she testified that she saw Applicant at the fire scene, and he claimed to her that he did not know whose house it was that was on fire and that he was just walking down the street. R.p. 218, l. 1 - 8. Corporal Howard Powell of the Cayce Police Department testified that as he was arriving toward the scene looking for a fire hydrant, he saw a black male wearing no shirt and black and white shorts and the person stated, "that shit's crazy." R.p. 252, l. 2 - 11. In his trial testimony, Applicant initially testified that he walked off because he was scared and heard sirens because

the police were coming. R.p. 632, l. 19-24; See also R.p. 637, l. 16-p. 638, l. 3. There was evidence of the porch cam video which indicated the Applicant stated “tell them the shit I did. Damn right. Take me to jail. I’m tired of this shit,” portions of which he denied saying on the witness stand. R.p. 642, l. 3-14.<sup>31</sup>

Concerning seeking to assist the victim with her injuries, the testimony at trial from the victim was that she claimed that she got away after being set on fire and denied that the Applicant ever rendered aid to her or attempted to put the fire out or knocked on the neighbor’s house for help. R.p. 274. See also R.p. 311-312. She denied that she ever went near the garden hose or that the Applicant ever brought the garden hose to her, and he never attempted to put the fire out with the garden hose. R.p. 299.

On direct examination, the Applicant claimed that after the victim caught fire she ran out of the house and he followed her out of the door. He claimed that she went to the ground and started rolling over the ground. R.p. 630-631. “So I’m telling her to keep on rolling” and claimed there was no one out there at the time and then the victim got up and went to a neighbor’s house. R.p. 631. The Applicant indicated that he was still on fire at that time, and he was trying to flick the fire out on his arm and indicated that he then ran to the hose. R.p. 631. He indicated at that time he realized it would not “fit around.” R.p. 631. At that point, the Applicant testified that the victim was still screaming.

On cross-examination of the Applicant, the State asserted that rather than aiding the victim, the Applicant came out and immediately put his fire out, although he claimed he never turned the hose on and did not get back there to turn it on even though his clothes with gasoline ended up by the garden hose. R.p. 646. In that examination, the Applicant claimed he was trying to pull the hose around the house because the victim was over on the driveway and claimed he

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<sup>31</sup> The victim confirmed it was the Applicant making this statement on the porch cam. R.p. 277-278.

never used it on himself. R.p. 647. The Applicant claimed at trial that when he left the neighborhood, he knew that she was inside the neighbor's house and safe but admitted he did not go there and check on her. R.p. 650.

In his PCR testimony, he claimed that he stayed at the scene until he knew the victim was going to receive medical attention. Like his trial testimony, Applicant claimed that victim ran through the house while on fire and that he tried to help her. He claimed that he ran to the neighbor's house and told them to call the police. He claimed that he only said, "Call the police" and nothing else. He stated he did not ask to call ambulance because he said that the police and ambulance were the "same thing and it doesn't matter." The Applicant denied that he ever said, "take me to jail" (as neighbor stated in their police report).

Counsel Mauldin testified that Applicant stated to her that he tried to get the water hose in the yard to help the victim after the fire. This was consistent with his trial testimony, albeit disputed. However, Mauldin claimed Green failed to use the hose to aid victim and the victim ran to a neighbor's house for help while still on fire. In addition, she noted that a Ring doorbell camera picked up audio of Green saying, "take me to jail" with no mention of calling an ambulance.

This Court finds that the Applicant failed to show that counsel was deficient as it related to the Applicant's claims that he sought for someone to call the police or that he aided the victim after he set her on fire. As shown above the evidence relating to these issues was presented at trial from the witnesses and the Applicant's own testimony. He failed to present a credible fact that was not presented to the jury for its consideration.

Further, the Court must find that Sixth Amendment prejudice was not shown. The Applicant did not show any credible evidence related to a request for police or aiding the victim

that to a reasonable probability would have resulted in a different verdict. His assertion must be denied.

**Counsel's failure to investigate and subpoena a fire reconstruction expert.**

In his eleventh assertion (j), the Applicant asserts that counsel was ineffective in filing to investigate and subpoena a fire reconstruction expert. In his testimony, the Applicant failed to indicate with any credibility what the expert would have concluded. The evidence reveals that trial counsel had reviewed the arson investigator report in discovery prior to the Applicant's testimony. This is reflected in counsel Madsen examination of SLED Agent Lloyd and reference to the report. R.p. 504,506, Counsel Madsen testified credibly that he did not think that the retention would be helpful at trial and did not think it would have made a difference in the outcome. Counsel Mauldin stated that she did not hire independent experts regarding burn injuries nor fire reconstruction because there was no dispute about who caused the fire.

The Court must find that Applicant failed in his burden of proof in showing counsel's performance was deficient. Counsel could reasonably act in making the decisions on what expert to hire, if any, based upon their conversations with the client. Here, Applicant indicated to them that he had started the fire in the bedroom using gasoline and a lighter. This location of the fire was consistent with the findings of the SLED arson investigator.

The Applicant failed to present any other credible evidence or witness related to the failure to call an expert, such as another fire reconstruction expert. Since this type of expert witness was not called at the PCR hearing, the claim must fail as a matter of law. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (noting our courts have "repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish

prejudice from the witness' failure to testify at trial"); *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant's mere speculation as to what the witnesses' testimony would have been cannot, by itself, satisfy the burden of showing prejudice); *Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (Ct. App. 2012) (holding an applicant failed to meet his burden of proof where he failed to present testimony from any of the witnesses he asserts should have been called at trial). The failure to consult with an expert, or call one to testify, can constitute constitutionally ineffective assistance of counsel—provided consultation with the expert would have revealed helpful information, to which the expert would have testified if called at trial. *See Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770 at 789–90 (2011) (“An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense.”). But 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.” *Richter*, 562 U.S. at 106 (*quoting Strickland*, 466 U.S. at 689) “Speculation about what an expert could have said is not enough to establish prejudice.” *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997); *see also Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (rejecting an ineffective assistance claim based on the failure to retain arson expert where the petitioner offered no evidence that an expert would have testified on his behalf at trial).

This Court must find that he failed to establish deficient performance or prejudice. This allegation must be dismissed.

**Counsel held evidence back that would have changed the outcome.**

In his original application and in his testimony, the Applicant claimed that his counsel held back evidence that would have changed the outcome of the case. However, it was unclear in his presentation what evidence this issue specifically concerned. To the extent that the Applicant

and the victim knew each other and had a prior relationship, evidence was presented related to that as stated in the earlier summary from the Applicant, the witness across the street who had seen him at the house before, as well as the victim. He claims that he could have been seen walking around with the victim previously. The Applicant appeared focused on developing that there was not a break-in and pointed to allegation as about camera footage, the lack of evidence of broken windows and that there was no evidence to show him purchasing the gasoline he admitted used to set the fire.

This Court finds as to these general assertions that he has failed to show deficient performance in the presentation. There is no dispute that Applicant knew the victim prior to the night of the incident. There is also no dispute that the Applicant was not charged with burglary, as stated previously in this order. There was no evidence at trial of any broken windows, as noted previously in this Order. There is no dispute that the Applicant started the fire resulting in the injuries to the victim. Considering these factors, the Applicant's assertions do not show Sixth Amendment prejudice. There is no reasonable probability that the result of the proceeding on attempted murder or arson would have been different considering the entire record before this Court.

#### **Prosecutorial Misconduct Claim**

In his initial application he raised a conclusory claim of "prosecutorial misconduct." During his PCR testimony, the Applicant asserted that the State kept putting the pictures of the victim and showed a video of the victim asserting that that the Applicant had broken into her house and set her on fire. His additional complaint about that evidence is that he was not charged with breaking and entering so the entry was improper. Neither of these claims reveal prosecutorial misconduct that is cognizable is a state post-conviction relief proceeding.

As set for previously, the photographs of the victim were admitted over defense counsel's objection. As such, their display to the jury was appropriate under the evidentiary rules. Similarly, the video of the victim's statement was admissible as an excited utterance after a hearing. R.p. 147-166. In Court Exhibit 6, the video indicated that "he broke into my house and started the fire." R.p. 157. Judge McCaslin admitted it as an excited utterance. R.p. 159. In the cross-examination by counsel Mauldin, she pointed out to the victim that she had indicated "he broke into your house" to law enforcement in an earlier statement that she claimed she did not recall. R.p. 301-302, 307. The State on cross-examination renewed inquiry about that same statement. R.p. 313.

These issues are not appropriate in a post-conviction relief setting. Under the doctrine enunciated in *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. S. C. Code Ann. § 17-27-20(b) (1985) of the Uniform Post-Conviction Procedure Act provides that post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal. *Peeler v. State*, 277 S.C. 70, 283 S.E.2d 826 (1981); *see also Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973); *Sellers v. Boone*, 261 S.C. 462, 200 S.E.2d 686 (1973). Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief, absent a claim of ineffective assistance of counsel. *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983).

Since one of these issues was raised in the *Anders* direct appeal and the other could have been raised in the appeal, this Court is constrained to deny relief. They must be dismissed as a ground for PCR relief.

### CONCLUSION

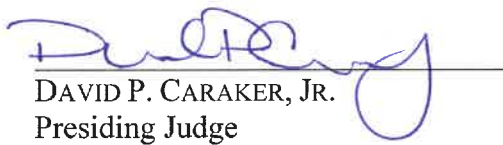
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application and vacate his conviction. Therefore, this application for post-conviction relief must be denied and dismissed 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), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if 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 the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant is returned to the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 30<sup>th</sup> day of July, 2026.

  
DAVID P. CARAKER, JR.  
Presiding Judge  
Eleventh Judicial Circuit

LEXINGTON, South Carolina