

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

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S.C. SUPREME COURT

RICKY ESAW,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001407

APPENDIX

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claimed that she told him that she had moved and could not testify and make it. She claimed that counsel did not ask her to testify or subpoena her.

On cross-examination, Erica claimed that prior to trial she did not meet with the lawyers. She claimed that she was with the Applicant all day long on the day of the incident. She said that she was with his girlfriend, his mother, his son and her daughter. She stated that the girlfriend was there the entire time.

Erica claimed that Det. Moore kept harassing her which is one of the reasons she had moved to Georgia. She stated that she knew Wilfred Pitts. She described the Applicant as a parent with a two year old son who he would get every two weeks. She also stated at the time of the trial she was living in West Columbia.

Counsel Chehoski testified that they discussed and investigated and pursued a potential alibi defense because his client never indicated that he was guilty or at the crime scene to the defense team. Esaw brought up the potential alibi defense to them in a face to face meeting based upon the birthday party he was attending. Chehoski confirmed that the defense had hired investigators before he came on and they had found that there was a "window of time" period where the Applicant had left in his girlfriend's car. The defense had to address it as well as the girlfriend being a state's witness and the fact that the Applicant was picked out of a line-up. Counsel further declared an additional issue was that in his statement to law enforcement, the Applicant admitted to being at the scene as an accessory. Chehoski claimed these put them in a hole. Counsel testified that he did not call the mother because she was of no assistance. Counsel stated that an additional strategy was to challenge the voluntariness of his statements in the *Jackson*

v. *Denno* hearing because of the alleged threats and an expert witness for the jury to understand the effect of cross-racial identification.²⁰

Notice of Alibi and Sequestration at the Trial of Family

The record shows the defense made a notice of alibi on October 6, 2017 prior to the trial. In the list of potential witnesses, the defense included the Applicant's mother Patricia Reid and his sister Erica Esaw. Trial Tr.p. 22, ll. 20-25. The record supports that Applicant's mother was actually sequestered during a significant portion of the trial.

Trial Testimony of Luenetta Grayson

During the trial, the Applicant's girlfriend, Luenetta Grayson testified as a State witness that she lived with the Applicant at the time of the incident as his girlfriend. Trial Tr.p. 459-460. She testified that she owned a black Toyota Carolla. Trial Tr.p. 462. She testified that she gave a statement to law enforcement on August 17 after the Applicant had been arrested. She told them that there was a birthday party for the Applicant's niece at the Applicant's mother's apartment that began in the early afternoon. They went to the party in her vehicle, rather than the Applicant's car because his car was in the shop. At the party were the Applicant's sister, brother in law, his brother, his mother, his son, Mr. Pitts, a woman also named Patricia, and a couple of people she did not know. She testified that a person known as AJ was not there. Trial Tr.p. 466.²¹ She stated that the party was a cookout and they were outside and had played cards briefly before she went inside to

²⁰ During the trial, the defense presented the testimony of Wofford College psychology professor Dr. Dawn McQuiston, an eyewitness identification expert to testify about cross-racial identification issues. Trial Tr.p. 629-655. Dr. McQuiston acknowledged that she was not testifying about an opinion concerning the particular line-up identifications done in this case. Trial Tr.p. 646.

²¹ In the Applicant's statement to law enforcement, he claimed "AJ" was a participant in the robbery. During the trial, Arthur Gene Evans Jr., testified that he was not involved in the incident.

do work. She testified that the Applicant left the party on two occasions. On one occasions she stated he went to the store to buy meat to put on the grill and the second time he went to a convenience store, but she did not go with him either time. She had left her keys in the kitchen area of the home. She testified that it was possible that he could have left other times, but she was not sure because she was inside the home working. She testified that King Pitts was with him both times he left. She stated that he was gone about 15 or 20 minutes each time they left. She stated that they stayed at the party until 10 PM. She recalled that she was working inside the home for about three hours. She stated that she did not know what the Applicant was doing while she was working. She stated that when she left, she went with the Applicant Mr. Pitts and four year old Jeremy, the Applicant's son. Trial Tr.p. 467-468. The Applicant's son had a carrying bag with a cartoon character on it that was blue and white. Trial Tr.p. 467-69.

Luenetta testified that after they returned to their home she went inside her bedroom and finished up her work and the Applicant and Mr. Pitts were in the living room. *Id.* She testified that during the next week after the incident, she recalled both the Applicant and Pitts getting haircuts. Trial Tr.p. 469.

She testified that the Applicant never discussed the murder with her and he had never admitted to her that he was involved. She asserted that if he had done so it would have ended their relationship. Trial Tr.p. 471-72. Luenetta described a telephone call she received after the Applicant was in custody when the Applicant asked her to get rid of a green and white bag. She testified that she did not get rid of it, but instead informed the Applicant's relatives about the calls and she told him that she was not coming to see him anymore. Trial Tr.p. 473.

On cross-examination by the counsel Fullwood, she developed through Luenetta that the Applicant only wore a watch, but Pitts wore some rings and a bracelet. . She confirmed that Ricky

had left the party twice around 4:30 and came back with some meat. Luenetta testified the second time was around 6:00 pm and he returned with the items he went to buy while they were still eating food and playing cards. She testified that she went inside to work around 7:00 to 7:30. Trial Tr.p. 475.

Luenetta stated that her vehicle had not been cleaned or washed to her knowledge between the day of the party and when it was seized by the police to her knowledge. Trial Tr.p. 476. She also stated that when she went into the house during the party, she was in the living room working which was adjacent to the kitchen where her car keys were. However, she did not know whether her car was used after that because she could not see the kitchen area from the living room. She stated the Applicant came in about 10 pm and asked her if she was ready to leave. She said that his clothes were clean with no blood on his clothes, that he was not sweaty and that there were no marks on him. She said it was about a 20 minute drive to her home and Kiem (Pitts) was with them from that drive until August 12th. Trial Tr.p. 478-79. Grayson did not notice anything unusual about either Applicant or Pitts conduct. Trial Tr.p. 479.

Dispatched to Scene at 9:19 PM.

The record showed that law enforcement was dispatched to the crime scene at 9:19 pm. Trial Tr.p. 314-31, 326.

Esaw's Statements to Law Enforcement

In the Applicant's August 14, 2015 statement to police, Esaw stated that he was at a birthday party on August 9. He claimed that while he was talking with his brother, Pitts and AJ approached him to help them with something in Rolling Meadows. Esaw asserted that AJ stated to him that he had sold some marijuana to some Hispanics at the trailer park and they had a quantity of cash. The Applicant claimed that they wanted him to be the driver so they could rob the

individuals and take their money. The Applicant stated that the Hispanics were holding a party in from of their trailer at that time. Esaw said that he agreed to drive AJ and Pitts there to commit the robbery. The Applicant described to law enforcement the route they took before they stopped at the trailer park. The Applicant claimed that he knew people at the party had seen his face because he had been underneath the streetlights and close to everyone. He claimed he heard gunshots and then saw AJ and Pitts run back to the car. He stated that AJ told him that Pitts shot somebody and he saw Pitts fighting with someone when the gun went off. He further was told by AJ that he saw Pitts fighting with a Hispanic male and tell the Hispanic that he was going to shoot him before he shot at the son. The Applicant told them that they fled in the in the vehicle he was driving and threw the cellphone they has stolen out of the window. At that point the Applicant claimed: "I'm innocent, , at best I'm an accessory." "I know I'm an accessory." Trial Tr.p. 440. Esaw claimed that AJ had the .9 millimeter and Pitts had the .40 caliber. Although specific in describing Pitts role, he was less specific in describing AJ's role.

Det. Creech next described the fact that after Esaw gave his oral summary, they asked him to write it out which he did and it was introduced as State Exhibit 1. After providing the written statement, Esaw inquired of them if they would recall the charges against him because he had claimed to just be the driver.

Similarly testimony about the statement of Esaw was presented through Detective John Moore. Trial Tr.p. 513-524. Det. Moore testified that after the Applicant made his written statement, he expected to go home. Trial Tr.p. 522. On cross-examination of Moore, counsel Chehoski pointed out that in his report he did not indicate that Esaw had any scars, scratches, or injuries.

Arthur Gene Evans, also known as AJ testified that he had known Esaw for over a year. Trial Tr.p. 560-561. Evans also knew Pitts. Upon reviewing State Exhibit 1, Evans denied being involved in the murder and robbery. Trial Tr.p. 566-567.

Sequestration of Mother Ends Prior to Pitts Testimony

At that point of the trial after the Applicant's statements had been introduced and Luenetta Grayson and Artur Evans testified, prior to Wilfred Pitts testimony, the following occurred in removing the Applicant's mother as a potential witness in the case:

MR. CHEHOSKI: Another matter that we wanted to bring to the Court's attention, Your Honor: I know that Patricia Reid is on our witness list and wanted to -- and because of that she's not been allowed to be in the courtroom even though she's been here the whole time. We wanted to ask, if it's okay with the Court, that we either withdraw, either -- you know, again, stipulate to the Court that we will not call her so she can watch the proceedings.

THE COURT: If you're not going to call her, she's not subject to sequestration.

MR. CHEHOSKI: Right. That's what we're requesting.

THE COURT: All right. Ms. Reid is withdrawn as a potential witness for the defendant. She is no longer subject to sequestration and no longer subject to being called as a witness. Okay?

MR. CHEHOSKI: Thank you. That's all, Your Honor.

Trial Tr.p. 570, l. 23- p. 571, l. 17. At that point, it is clear that counsel wanted Ms. Reid to be able present in the courtroom while Wilfred Pitts testified and not present potential testimony about the party.

Pitts testified that he was at the Applicant's mother's home. He described that he went there with the Applicant, Luenetta and Applicant's son Jeremy in Luenetta's black Toyota. Trial Tr.p. 575-576. He stated that at the party there were the Applicant, the Applicant's brother, his mother, his sister and her kids, Patricia, Skip, DJ and Jeremy, Pitt's brother and his kids and wife. Trial Tr.p. 576. Pitts stated that they left the house about three times. Tr.p. 576. He state the first time

he left with the Applicant initially to go to Damitra's job to get her food stamp card to buy meat for the grill and then went to the store and then returned to the apartment. Trial Tr.p. 577. Pitts testified they left again together in Luenetta's car with the Applicant and Rashad with the Applicant driving to get beer and then returned back to the apartment.

Pitts testified that he left one more time with the Applicant supposedly to get more beer. Trial Tr.p. 578. However, rather than getting beer at a store, they traveled to the Rolling Meadows trailer park. Pitts claimed they rode around and the Applicant told him he was going to get "they ass" and Pitts stated that he told Applicant to take him back to the apartment. However, Esaw stated he was not taking him back and wanted him to help him rob a family he saw having a party. Trial Tr.p. 579. Esaw pulled out a gun from under the seat and then reached into the back seat and pulled out another gun and gave it to him. Trial Tr.p. 579. Pitts admitted that he had been with Esaw with guns two weeks before and learned that Esaw had kept the guns in a black and green Nike bag. When Esaw passed the gun to him, he told Pitts to get the man furthest to the left and that Esaw had the other ones. Esaw jumped out of the car first and Pitts stated he went around the car to go and rob the man. He admitted that he pointed the gun with his right hand at the man and grabbed his victim's wallet and phone. While he was robbing the man, Pitts admitted that his bracelet fell off. Trial Tr.p. 581-582. Pitts claimed he did not try to pick it up because he heard a gunshot, at which point he ran back to the car and entered the passenger seat. At that point, Pitts claimed he saw the Applicant in the back seat and Pitts thought Esaw was injured. Pitts stated he then fired a warning shot in the air and then he fired at the young man. Trial Tr.p. 583. Pitts stated they left and he threw the cellphone he stole out the window. They returned to the apartments and they both took off their white shirts and threw them in a dumpster. Trial Tr.p. 584-585.

Applicant Waives Right to Testify

Subsequently, after Pitts testified, after Pitts testified, the Applicant made a knowing and voluntary waiver of his right to testify.

No Alibi Instruction Request and Closing Argument

The Applicant at trial did not request an alibi instruction.²² In the defense closing argument, they relied upon absence of the Applicant's DNA on matters at the scene, and the absence of any injury to the Applicant. Trial Tr.p. 692. The defense also challenged the credibility and honesty of the statement given by Pitts that inculpated the Applicant. Trial Tr.p. 692-694. Counsel emphasized the lack of injury when the evidence was that the perpetrator was struck with a beer bottle that broke and a soda can, yet the Applicant's DNA was not located at the crime scene. The defense urged that the police did not see marks or bruises on the Applicant when he was interviewed. Trial Tr.p. 695. The defense then relied upon the testimony of the Applicant's girlfriend to reflect that shortly after the crime, the Applicant did not notice anything wrong with the Applicant, his clothes or anything. Counsel felt this was powerful. Trial Tr.p. 696. Concerning the Applicant's statement, the defense counsel argued that there was too much missing and he appeared to be taking the police narrative, just telling a story and hoping that they would leave him alone. Trial Tr.p. 696-697. Counsel Chehoski asserted that it was just not credible. Trial Tr.p. 697. Counsel also urged the jury to recognize the stress that Franklin was under in making a questionable identification, relying upon the expert testimony of Dr. McQuiston to support it. Trial Tr.p. 698-98.

Conclusion and Findings

²² A charge on the defense of alibi is not required when an accused person merely denies committing the criminal act; alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission. *State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980)

This Court finds that the Applicant did not meet his burden of proof in proving his counsels' investigation and preparation related to a potential alibi defense was deficient. The record supported by the testimony of counsel Chehoski was that the defense had hired an investigator to investigate the existence of an alibi defense prior to Chehoski's assignment to the case. The Applicant has not shown that the investigation was not reasonable.

The right to the effective assistance of counsel applies no less to the investigative stage of a criminal case than it does to the trial phase. Indeed, in *Strickland*, the court explained that the foregoing performance "standards require no special amplification in order to define counsel's duty to investigate [Simply stated] ... strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, at 690–91, 104 S.Ct. 2052. That is, counsel's decision to forgo or truncate an investigation "must be directly assessed for reasonableness in all the circumstances" *Id.*, at 691, 104 S.Ct. 2052. "In assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In addition, in contrast to our evaluation of the constitutional adequacy of counsel's strategic decisions, which are entitled to deference, when the issue is whether "the investigation *supporting* counsel's [strategic] decision" to proceed in a certain manner "was itself reasonable"; (emphasis altered) *id.*, at 523, 123 S.Ct. 2527; we "must conduct an objective review of [the reasonableness of counsel's] performance" (Citations omitted.) *Id.* Thus, "deference to counsel's strategic decisions does not excuse an inadequate investigation" (Citation omitted.) *Williams v.*

Stephens, 575 Fed. Appx. 380, 386 (5th Cir.), cert. denied, 135 S.Ct. 875, 190 L.Ed.2d 709 (2014). See, e.g., *Montgomery v. Petersen*, supra, 846 F.2d at 415 (“the jury might well have viewed the otherwise impeachable testimony of the [family alibi] witnesses who were presented at the ... trial in a different light had the jury also heard the testimony of this disinterested witness”).

Similarly, a decision by counsel to forgo an investigation or presentation into the possible testimony of a potentially significant witness is constitutionally impermissible unless counsel has a sound justification for doing so; speculation, guesswork or uninformed assumptions about the availability or import of that testimony will not suffice. Instead, counsel must seek to interview the witness to determine the value of any testimony that he may be able to provide. See, e.g., *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007) (“[c]onstitutionally effective counsel must develop trial strategy in the true sense—not what bears a false label of ‘strategy’—based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation”); *Pavel v. Hollins*, 261 F.3d 210, 221 (2d Cir. 2001) (defense counsel never contacted potentially favorable witness because counsel was “confident as to what [that] witness would say,” but “counsel’s anticipation [of that testimony] does not excuse the failure to find out” [internal quotation marks omitted]). In other words, “counsel’s anticipation of what a potential witness would say does not excuse the failure to find out; speculation cannot substitute for certainty.” *United States v. Moore*, 554 F.2d 1086, 1093 (D.C. Cir. 1976). In the same vein, when counsel’s failure to proceed with an investigation is due not to professional or strategic judgment but, instead, results from oversight, inattention or lack of thoroughness and preparation, no deference or presumption of reasonableness is warranted. See, e.g., *Carter v. Duncan*, 819 F.3d 931, 942 (7th Cir. 2016) (“[t]he consequences of inattention rather than reasoned strategic decisions are not entitled to the presumption of reasonableness” [internal

quotation marks omitted]); *Wilson v. Mazzuca*, 570 F.3d 490, 502 (2d Cir. 2009) (errors warranting determination of sixth amendment violation include “omissions [that] cannot be explained convincingly as resulting from a sound trial strategy, but [rather, that] arose from oversight, carelessness, ineptitude, or laziness” [internal quotation marks omitted]).

With specific regard to the duty to investigate a defendant's alibi defense, counsel is obligated to make all reasonable efforts to identify and interview potential alibi witnesses. *See, e.g., Towns v. Smith*, 395 F.3d 251, 259 (6th Cir. 2005) (“Without even attempting to interview [the witness], counsel simply decided not to call him as a witness. That decision was objectively unreasonable because it was a decision made without undertaking a full investigation into whether [the witness] could assist in [the petitioner's] defense.... By failing even to contact [the witness] ... counsel abandoned his investigation at an unreasonable juncture, making a fully informed decision with respect to [whether to have the witness testify] impossible.” [Citation omitted; internal quotation marks omitted.]); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (“[A]n attorney must engage in a reasonable amount of pretrial investigation and at a minimum ... interview potential witnesses and ... make an independent investigation of the facts and circumstances in the case.... [W]hen alibi witnesses are involved, it is unreasonable for counsel not to try to contact the witnesses and ascertain whether their testimony would aid the defense.” [Citations omitted; internal quotation marks omitted.]). Furthermore, a thorough investigation of an alibi defense is especially important when “the missing witness is disinterested in a case in which the other witnesses have a relationship to the defendant.” *Carter v. Duncan*, 819 F.3d 931, at 943 (7th Cir. 2016); see also *Blackmon v. Williams*, 823 F.3d 1088, at 1104–1105 (7th Cir. 2016) (explaining that unreasonableness of counsel's failure to investigate was compounded by “significant potential benefits of obtaining alibi testimony from witnesses unimpaired by family ties to [the petitioner]”);

Montgomery v. Petersen, 846 F.2d 407, 413 (7th Cir. 1988) (characterizing disinterested alibi witness who defense counsel unreasonably failed to identify and locate as “extraordinarily significant” when all twelve alibi witnesses were either relatives or close friends of petitioner).

Finally, courts have identified several nonexclusive factors to be considered in determining whether counsel's failure to investigate and present the testimony of an additional alibi witness or witnesses was reasonable under the circumstances. They include (1) the importance of the alibi to the defense; *see Gaines v. Commissioner of Correction*, 306 Conn. 664, 674–75, 51 A.3d 948 (2012); (2) the significance of the witness' testimony to the alibi; *see id.*, at 688, 51 A.3d 948; (3) the ease with which the witness could have been discovered; *see id.*, at 685–86, 51 A.3d 948; and (4) the gravity of the criminal charges and the magnitude of the sentence that the petitioner faced. *See id.*, at 684, 51 A.3d 948.¹⁵

“The Constitution does not oblige counsel to present each and every witness that is suggested to him.” *United States v. Berg*, 714 F.3d 490, 499 (7th Cir. 2013), *quoting United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005). Rather, counsel need only investigate possible lines of defense and make an informed decision. *Id.* “If counsel has investigated witnesses and consciously decided not to call them, the decision is probably strategic.” *Best*, 426 F.3d at 945. Strategic decisions like these, so long as they are made after a thorough investigation of law and facts, are “virtually unchallengeable.” *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

Counsel Chehoski was aware of the statements that Luenetta Grayson made about the Applicant only leaving in her car from the birthday party on two occasions that day. He was also aware in his understanding of the interview with his mother that she and her sister would be potential witnesses from the party as well. Based upon this, counsel made a Notice of Alibi prior

to trial consistent with the requirements, which caused the mother and sister²³ to be placed on witness list and sequestered from the trial.

As the trial progressed Luenetta testified about two occasions that Applicant and Pitts left in her car to get food and beer and was not aware of the Applicant ever leaving in her car after that, which did not coincide with the time the murder and robberies occurred. Further, the Applicant's statement came in when he admitted that he left the scene a third time as the driver and accessory to the crimes. He was also aware of his client's record and limited potential availability as a witness due to his prior record.

There is evidence to support that counsel made a reasoned decision to decide to not call the Applicant's mother as an alibi witness in the matter.²⁴ During the PCR hearing, his mother testified, as well as his sister that Applicant was at the party playing cards the whole time. These were clearly biased family witnesses subject to potential impeachment on that basis and his mother was present at trial and prepared to testify. However, counsel was aware that Grayson had already given favorable testimony that although the Applicant had left earlier in the day she was not aware that he had left at any other time and likely remained there until they were prepared to leave around 10

²³ Erica Esaw testified that she was not at trial, but she was one of the sequestered witnesses. There was no showing that she was present at the courthouse anytime during the trial while she was sequestered. However, no attempt to call her as a witness was ever done. However, the Applicant never asserted that her failure to be there as the reason that she was not called. It is apparent that neither was called after counsel made his decision to remove sequestration.

²⁴ The manner of proving an alibi has been stated: "The evidence of alibi must be addressed to the exact time when the offense was committed, and it must show, not merely the improbability of accused's presence at that time, but the impossibility thereof. If the evidence as to alibi, although taken to be true, does not cover sufficient of the time at or before the crime to render the presence of accused impossible or highly improbable, then it proves nothing, and is of no avail to him on that part of his defense, although it still remains in the case for all other purposes." 23 C.J.S. Criminal Law s 923, pp. 656-657. *Accord, State v. Nicholson*, 228 S.C. 300, 89 S.E.2d 876 (1955).

pm. This was after the crime had occurred according to the officers being dispatched at 9:19 PM. Grayson also gave favorable testimony that Applicant and his clothes did not have an appearance of being in a fight. The mother's testimony would have been inconsistent with Luenetta's in suggesting that Applicant never left the party which would questioned her and Erica's credibility and accuracy of both. This is particularly significant the Applicant's girlfriend Luenetta, and portions of Pitts testimony revealed the earlier departures for food and beer. It must be remembered that Reid was not in the courtroom and did not hear Luenetta's testimony or the summary of the Applicant's statement to law enforcement.

Further, the Applicant had also confirmed to counsel that he wanted them to testify and claimed that there were both present at the trial, although Erica appeared to dispute this at the hearing. Also the Applicant claimed that counsel and the defense had talked with Erica, though Erica also appeared to dispute this.²⁵ Further, the Applicant was aware that the trial decision was made to not call his mother when they concluded that they did not need her to testify prior to his own decision to not testify.

Viewing critical factors surrounding the mother's testimony was include (1) the importance of the alibi to the defense; (2) the significance of the witness' testimony to the alibi; (3) the ease with which the witness could have been discovered, this Court finds that deficient performance has not been proven. Supportive of the reasoned decision by counsel, as opposed to neglect, to not call Patricia Reid, counsel removed Ms. Reid from the sequestered witness list so she could return to courtroom. Concerning his sister Erica Esaw, she indicated in her PCR testimony that she told them that she could not testify. Her PCR testimony was similar to her mother's in that they were all there all day playing cards. This was a strategic decision on counsel's part evident in the record

²⁵ This Court as a finding of fact must question the credibility of Erica Esaw.

as it contrasted the credible and favorable testimony from Luenetta that Applicant only left on two earlier occasions that day.

This Court recognizes that issues related to a failure to present alibi or request an alibi charge when evidence has been presented is an issue in a series of PCR cases where ineffective assistance of counsel has been found. In *Ford v. State*, 314 S.C. 245, 442 S.E.2d 604 (1994), this Court held trial counsel's failure to request an alibi charge is deficient representation where there is evidence presented the defendant was in another place at the time the crime was committed. In *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995) the Supreme Court held trial counsel provided ineffective assistance by failing to request alibi charge in criminal sexual conduct prosecution, though trial counsel testified that he felt alibi testimony did not come off too well, and that he made tactical decision to focus jury's attention on state's failure to meet its burden of proof instead of on alibi testimony, where evidence against defendant was entirely circumstantial and solicitor disparaged accused's alibi during argument to jury. The *Roseboro* court found counsel's professed strategy was invalid under objective standard of reasonableness, and there was reasonable probability that result of trial would have been different had an alibi charge been requested. *See Riddle v. State*, 308 S.C. 361, 418 S.E.2d 308 (1992) (failure to give alibi charge, where sole theory of defense was alibi, was ineffective assistance of counsel).

Unlike *Roseboro*, this was not a case based entirely on circumstantial evidence. There was identification of the Applicant as the perpetrator by one of the victims. The Applicant's own statement to the police placed him at the crime scene. Further, his co-defendant Pitts placed him at the scene as an active participant in the crime.

In *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995), the Supreme Court found trial defense counsel's failure to contact alleged alibi witnesses did not prejudice defendant, absent

showing that witnesses' testimony would have established alibi defense. Here, there was evidence in the record that counsel had contacted the family members and had placed them on the witness list concerning the party. *See Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991) (counsel's concession that potential alibi witnesses alleged testimony "may have made a difference" supports grant of PCR).

In *Martin v. State*, 427 S.C. 450, 832 S.E.2d 277 (2019), the Supreme Court held that defense counsel's failure to elicit specific alibi testimony from defendant's mother constituted deficient performance which resulted in a grant of posit conviction relief. In *Martin*, the Court determined that defense counsel's failure to elicit alibi testimony from defendant's mother as to specific time that she dropped defendant off in Atlanta, Georgia, which testimony would have been relevant to show that defendant could not have been involved in robbery in South Carolina that formed basis of charges, constituted deficient performance. The Court found support for this decision especially since counsel admitted that it had mother's statement regarding timeline of events on day of robbery in his notes, and counsel's failure to elicit such testimony left defendant unable to establish alibi. In *Martin*, the Court found Sixth Amendment prejudice because, where the only evidence that placed defendant at robbery was testimony of three codefendants, two of whom conceded they testified in hopes of favorable deal with State and two of whom admitted lying to law enforcement during investigation in effort to exonerate themselves, the forensics team was unable to find anything of evidentiary value connecting defendant to crime, and the jury had asked during deliberations to rehear alibi testimony.

Again, unlike *Martin*, in addition to the co-defendant testimony, this Court finds that evidence that he was identified at the crime scene as a perpetrator, his own statement placed him

at the crime scene, his girlfriend's vehicle that he had possession of that evening was identified at the scene.

Important in this setting, the Court in *Martin* stated the following related to Sixth Amendment prejudice:

In some cases, there is “ ‘overwhelming’ [evidence] such that it categorically precludes a finding of prejudice.” *Smalls v. State*, 422 S.C. 174, 190–91, 810 S.E.2d 836, 844–45 (2018). However, “the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* at 191, 810 S.E.2d at 845 (internal alteration marks omitted) (*quoting Strickland*, 466 U.S. at 695, 104 S.Ct. 2052); *see, e.g., Franklin v. Catoe*, 346 S.C. 563, 574, 552 S.E.2d 718, 724 (2001) (finding there was overwhelming evidence where the evidence included the applicant's DNA on the victim's body, the victim's blood on the applicant's pants, and the applicant's bloody palm print on the murder weapon). Additionally, the strength of the State's evidence should be viewed in light of trial counsel's errors such that there “is no reasonable possibility [counsel's errors] contributed in any way to [the applicant's] convictions.” *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845 (*quoting Franklin*, 346 S.C. at 574–75, 552 S.E.2d at 725).

Martin v. State, 427 S.C. 450, 455–56, 832 S.E.2d 277, 280 (2019).

In *Weldon v. State*, 436 S.C. 69, 83, 870 S.E.2d 183, 190 (Ct. App. 2021) the Court of Appeals found counsel was deficient in failing to call alibi witnesses. In *Weldon*, the appellate court found that trial counsel admitted at the PCR hearing that he did not know why he failed to elicit Petitioner's alibi from at least one of the available alibi witnesses. The Court noted although trial counsel hypothesized he did not call the witnesses so that Petitioner could have final argument, he agreed “that calling alibi witnesses would have been a much more favorable strategic decision versus not calling alibi witnesses and trying to get the last argument.” On cross-examination, trial counsel reiterated he did not know why he did not call the witnesses. But he thought that if it had been an issue, he “would have had a discussion with [himself] and made a conscious choice” not

to present their testimony. In *Weldon*, the appellate court also concluded that Sixth Amendment prejudice was shown because overwhelming evidence had not been proven. The Court found that the presence of the defendant's DNA on a piece of duct tape recovered from the robbery victim was not overwhelming evidence of guilt that precluded a finding of prejudice. The only additional evidence linking defendant to the crimes was his possible acquaintance with co-defendant, defendant had not been a person of interest until the DNA hit, and defendant challenged DNA evidence at trial.

In contrast to the evidence in *Weldon*, the evidence here is significantly more powerful and overwhelming. Here, unlike *Weldon*, the defendant's own statement connected him to the crime, the location and his co-defendant. Here, unlike *Weldon*, a victim-witness identified Applicant as the killer. Unlike *Weldon*, his co-defendant identified him as the accomplice in the crimes. This is direct evidence of his involvement. Unlike *Weldon*, circumstantial evidence also pointed to the Applicant. He had access and possession of the similar vehicle – his girlfriend's – used in the crime.

Assuming arguendo that deficient performance had been proven, under *Martin*, this Court must also find that Sixth Amendment prejudice has not been shown by the failure to call either Reid or Erica Esaw. When defense counsel's performance fails the reasonableness test, a new trial is required if there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington, supra*, 466 U.S. at 694, 104 S.Ct. 2052. The question, therefore, "is whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt." *Id.*, at 695, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694, 104 S.Ct. 2052.

It is also clear, however, that “a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case”; *id.*, at 693, 104 S.Ct. 2052; because “[t]he result of a [criminal] proceeding can be rendered unreliable, and [thus] the proceeding itself unfair, even if errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.*, at 694, 104 S.Ct. 2052. The defendant must establish, instead, that counsel's constitutionally inadequate representation gives rise to a loss of confidence in the verdict. In evaluating such a claim, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Id.*, at 696, 104 S.Ct. 2052. Of course, a reviewing court does not conduct this inquiry in a vacuum. Rather, the court “must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.” *Id.*, at 695–96, 104 S.Ct. 2052. Furthermore, because our role in examining the state's case against the petitioner is to evaluate the strength of that evidence and not its sufficiency, this Court does not consider the evidence in the light most favorable to the State.

see also Tice v. Johnson, 647 F.3d 87, 110 (4th Cir. 2011) (“We are not bound ... to view the facts in the light most favorable to the prosecution. The familiar [evidentiary sufficiency] analysis centering on whether a reasonable jury could have [found] an adequately represented defendant [guilty] is considerably more deferential than the Strickland test for prejudice in an [ineffective assistance] case, which seeks only to discover whether the absence of error would have given rise to a reasonable probability of acquittal, such that confidence in the verdict is undermined.”). Rather, we are required to undertake an objective review of the nature and strength of the state's case.

There is no reasonable probability the result of the proceeding would have been different. As stated above, Luenetta Grayson testimony was very supportive of the Applicant's lack of involvement in the case. She testified that he left earlier in the day on two occasions to get food and beer with Pitts in her car. She testified that her keys were left on the kitchen table and she was working after 7- 7:30 PM. She declared that her keys were on the kitchen counter during the time period, but recognized that there was a possibility he could have left. However, she had him there when they left at 10 PM and did not have an appearance of injuries or being in a fight. He was wearing a white shirt that day according to Luenetta and he was still wearing the clean clothes when they left together at 10.

Further, the State had also presented evidence from the Applicant that he was present as an accessory and the driver of the vehicle, which undermined the unused evidence that he was playing cards. Corroborating testimony also came from Pitts who acknowledged that he was at the same party and left with the Applicant three times in Luenetta's vehicle, including the time the robbery was committed with Applicant. Further, there was no dispute that Applicant was at the party or that the Applicant left the party with around 10 PM with his girlfriend and Pitts. The evidence

presented by Luenetta was consistent with the testimony of the mother and sister that Esaw did not wear jewelry or bracelets, that his own car was broken down, that he was at the party. However, the evidence was overwhelming related to his actual guilt for the reasons set forth previously.

This allegation must be dismissed.

Allegation that Applicant's counsel Jason Chehoski and Elizabeth Fullwood, failed to provide a copy of the evidence to Applicant. (Amended Application, allegation 6)

In his amended application, the Applicant contended that his counsel failed to provide a copy of the evidence to the Applicant. During the hearing, the Applicant testified that his counsel did not meet with him and go over the discovery. This Court finds that the Applicant has failed in his burden of proof of either deficient performance or prejudice under *Strickland*.

Contrary to his assertion, counsel Chehoski stated that they went over the discovery and the state's evidence. Counsel testified that they anticipated Pitts testifying against him at trial. He indicated that it also may have already been provided by counsel Fullwood before he got on the case. He stated that the Applicant understood the nature of the state's case against him.²⁶ Counsel Fullwood also testified that she went over the discovery with him.

This Court finds based upon the credible testimony of both counsel that the counsel meet with the Applicant and went over the discovery that they had received from the State. Counsel cannot be deemed deficient because this Court finds that they did go over the discovery. In addition, the Applicant failed to assert by any credible evidence that there was evidence as part of the discovery that had not been disclosed to him. This allegation must be dismissed.

²⁶ Chehoski testified that they were served with written notice of the State's intent to seek life without parole on September 13, 2017 and the trial was a month later. The Applicant had also received a plea offer from the State of a plea to murder with a 30 year sentence, which the Applicant rejected immediately.

Allegation that Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to Applicant appearing in front of the jury in a jail uniform and in restraints. (Amended Application, allegation 7)

In his amended application, he alleged that the Applicant appeared in front of the jury in his jail uniform and restraints. Esaw testified at the hearing that he was in his detention uniform and restraints in front of the jury during jury selection and claimed he did not wear civilian clothes until the next day. The Applicant's mother, Patricia Reid, testified that counsel asked her to bring his clothes. However, she did not see what he was wearing because she was sequestered and not in the courtroom.

Contrary to the Applicant's testimony, counsel Chehoski testified that he had no knowledge of the Applicant ever appearing in front of the jury in prisoner clothes or visible restraints. He stated that he was dressed in civilian clothes during jury selection. Chehoski testified that Esaw was then required to be put in jail clothes after court when he was return to the jail, but no jurors were present. He noted that Esaw may have been wearing jail clothes during the pretrial hearing, but no jurors were present at that time. He testified that the Applicant may have been wearing clothes in court from the Public Defender's Office clothes closet if he had not received the clothes from Applicant's mother yet. Counsel Fullwood testified similarly. She affirmatively stated that Esaw did not appear in front of the jury at any time in jail clothes. She, like Chehoski, stated that as is normal, after jury selection when pretrial motions are heard, the defendants usually wear jail clothing but no jurors are present at that time. She recalled that Esaw was wearing normal clothes during jury selection, in addition to the jury trial.

When ineffective assistance of counsel is alleged as a ground for relief, a PCR applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v.*

Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland* as the standard for judging ineffectiveness). It is “generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing.” *Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001), abrogated on other grounds by *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019); see also *Estelle v. Williams*, 425 U.S. 501, 512, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (holding an accused may not be compelled to be tried before a jury in identifiable prison clothes); *Brooks v. Texas*, 381 F.2d 619, 624 (5th Cir. 1967) (“It is inherently unfair to try a defendant for crime while garbed in his jail uniform....”); *Ring v. State*, 450 S.W.2d 85, 88 (Texas Crim. App. 1970) (“(E)very effort should be made to avoid trying an accused while in jail garb.”). “Nevertheless, ... to prevail in [a] PCR action, the *Strickland* analysis applies and [the] petitioner must establish prejudice.” *Id.* At 337-38, 548 S.E.2d at 865. See *Ryals v. State*, 439 S.C. 230, 234–35, 886 S.E.2d 239, 241–42 (Ct. App. 2023).

This Court must find that the Applicant failed in his burden of proof. First, this Court finds credible the testimony of counsel Chehoski and Fullwood that the Applicant never appeared in front of the jury in jail clothes. This Court rejects the testimony of Esaw on this point as not credible. The record additionally supports this finding because there was a lunch break after the jury selection where the jurors were advised to report at 9:30 the next day. Trial Tr.p. 65-66. Since the condition precedent for his claim of wearing jail clothes has not been proven, there is no deficient performance shown on the part of either counsel. The Applicant additionally failed to present any credible evidence that he was wearing visible restraints in front of the jury at any time.

Alternately, this Court further finds that the Applicant has failed to prove deficient performance or prejudice under *Strickland* related to his wearing on the prison clothes during non-

jury motion hearings. Since no jury was present, the Applicant has failed to show that the failure of counsel to object to the wearing of the jail clothes or shackles at that motion hearing was unreasonable under the standards demanded of lawyers practicing criminal law.²⁷ He failed to prove deficiency where he failed to an error must be so egregious that no reasonably competent attorney would have acted similarly. *See Wood v. Allen*, 542 F.3d 1281, 1309 (11th Cir.2008). Similarly, Sixth Amendment prejudice has not been shown when the clothing and restraints presented only before trial judge.

Allegation that Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to the statement of Christy Vasquez being placed into evidence by the state (Trial Tr. p.266, Lines 1-6, State Exhibit 10), as cumulative and hearsay. (Amended Application, allegation 8

In this allegation, the Applicant alleged the defense erred in failing to object to the written statement of Christy Vasquez being put into evidence as exhibit 10. This Court must find that the Applicant failed to prove deficient performance or prejudice.

During the trial, the victim's wife, Christy Vasquez testified as a state witness. Trial Tr.p. 246-266. She testified about the day leading up to her husband's death. While she was inside the trailer during her neighbor's baby's baptism party, she heard gunshots and immediately handed the baby to someone else and started to walk to the door, but was initially stopped and told not to go outside because they had guns and were shooting. Trial Tr.p. 250. However, she still went outside because her husband and Rafael were outside. She saw her husband being held by a black man struggling and being slouched over. The individual hold her husband told her that if she came closer, he would shoot her, but she kept walking. She saw that her husband was bleeding, but later

²⁷ The record supports that Esaw was wearing shackles during the motion hearing when counsel Chehoski moved to have one hand released at the outset of the motion proceeding before Judge Cooper.

saw her son. She kept approaching her husband as she was being threatened. The black man laid her husband down and got into the driver's side of the dark four door sedan. Trial Tr.p. 252-253. Unable to get her cellphone to work, she got her husband's cellphone and called 911 after the car drove off. Trial Tr.p. 254-255. During her direct testimony the 911 call tape was introduced subject to the objection of the defense. Trial Tr.p. 255-56. She testified that her husband told her to let him go, but she had declared she could not because he had to help her raised their children. On the 911 she could also be heard yelling to Franklin to not leave, but he left for 5 minutes. She saw blood on Franklin, but at that time thought it was a ricochet. Trial Tr.p. 257.

In the direct examination, Christy Vasquez testified that she gave a written statement to the police, but she stated it was not a full and complete statement because what she wrote down because she wanted to get to the hospital to see her husband. Trial Tr.p. 258. She described going to the hospital to check on her husband and son. Trial Tr.p. 259.

Christy testified that she saw Detective John Moore at her cousin's home in Little Mountain the next morning. She indicated to Det. Moore that she was not sure if she could identify the man that held her husband. She described being shown some line-ups by Det. Moore but she was unable to identify anyone in the line-up that she was shown. Trial Tr.p. 261. She was also present when Franklin was shown the same line-ups. Trial Tr.p. 263.

On cross-examination at trial by counsel Fullwood, Christy acknowledged speaking with law enforcement for about 30 minutes at the scene before she left for the hospital. Trial Tr.p. 263-264. She admitted that she wrote the statement in her own hand and indicated in it that there was more than one robber involved. Trial Tr.p. 264. Counsel Fullwood had that the following inquiry about the statement:

Q. ...So tell me if this sounds right to you. Did you write: A black man with a gun, he told me that if he got any closer he was going to kill me. And then he left and I saw my son had a shot burn to his legs.

A. Yes, ma'am.

Q. Okay. So you used the words "they" at the time?

A. Yes, ma'am.

Trial Tr.p. 264, l. 23- p. 265, l. 6.

On redirect examination, Christy identified State Exhibit 10 as the document she wrote and gave to the police. When asked whether it had every detail from that night in it, she responded: "[I]t has just the basic stuff." Trial Tr.p. 265. The written statement was offered into evidence specifically without objection by defense counsel Fullwood. Trial Tr.p 266.

During the PCR hearing, counsel Chehoski recalled that the State put the statement into evidence. However, he was unclear of a basis for an objection under the Best Evidence Rule, or prior consistent statement. In addition, he did not recall the strategy surrounding the introduction. Counsel Fullwood who did the cross-examination of the witness opined that one reason to examine her about the statement was to show how she had cleaned up the statement from her testimony. In addition she questioned the admissibility of the entire statement under the Rule of Completeness, SCRE Rule 106.

This Court must find that defense counsel was deficient in failing to object to the admission of the written statement of Christy Vasquez, State Exhibit 10. The focus of counsel Fullwood's cross-examination of Christy was to show that in her contemporaneous written statement she represented that there was more than one person involved in the event by the use of "they" in her statement, whereas in the direct examination by the State she made no mention of seeing a second perpetrator. This Court cannot find that the strategy conclusively revealed in the trial testimony by

the trial testimony by the defense was not sound strategy or that no reasonable competent counsel would have acted similarly.

This Court must conclude that there was no appropriate objection that could have been made to evidence that the defense had already admitted concerning the written statement given to the police. First, by mentioning the language in the statement directly, defense counsel had opened the door to the later admission by the State admission of the written statement. A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction. *State v. Young*, 364 S.C. 476, 486-87, 613 S.E.2d 386, 391-92 (Ct. App. 2005). *See also State v. Curtis*, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) (“Given that [defendants] maintained that [the company] did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry.”); *State v. White*, 361 S.C. 407, 415–16, 605 S.E.2d 540, 544 (2004) (ruling expert could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim); *State v. Dunlap*, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003) (holding defense counsel's opening statement “opened the door to the introduction of evidence rebutting the contention that [defendant] was merely an addict”); *State v. Taylor*, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) (“[B]ecause appellant opened the door about his relationship with his wife, the solicitor was entitled to cross-examine him regarding the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction.”).

Second, the admission of the full written statement was then authorized under Rule 106, the rule of completeness. South Carolina Rule of Evidence Rule 106 provides:

When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 106 is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context. *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004). Where, as here, the defense elects to use a witness to elicit portions of a writing made by a witness, the rule of completeness requires the state be permitted to inquire into the full substance of that statement.

The Court of Appeals addressed a similar issue in *State v. Patterson*, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006). There, the circuit court admitted an entire police statement on redirect. *Id.* at 225, 625 S.E.2d at 242. After eliciting testimony from the victim's friend "regarding how careful she was in giving police a correct depiction of the events that led to [the victim]'s murder," the defendant insinuated that the victim's friend's statement was incomplete. *Id.* at 227, 625 S.E.2d at 243. The appellate court found the defendant put the victim's friend's "statement to police at issue, and fundamental fairness required that the entire statement be admitted into evidence." *Id.* at 227–28, 625 S.E.2d at 243. The appellate court continued:

Patterson would have us construe Rule 106 in such a way that inquiries that probed at alleged omissions from a statement would not open the door to the admission of the statement. The purpose behind Rule 106 would be frustrated if the rule's application in a given case depended upon whether an alleged oral assertion was or was not in a written statement. We find the rule of completeness applies to insinuations, innuendos, and omissions. Thus, the trial judge properly admitted [the victim's friend]'s statement.

Id. at 228, 625 S.E.2d at 243.

Once the Applicant's defense counsel posed questions challenging the sufficiency and accuracy of her police statement as compared with her testimony at trial, the State was free to question her regarding the previously excluded details in the written statement that supported Smith's testimony or introduce the entire statement itself. *See State v. Cabrera-Pena*, 361 S.C. 372,

379, 605 S.E.2d 522, 525 (2004) (explaining Rule 106 is based on the rule of completeness and attempts to avoid the unfairness inherent in the misleading impression created by taking matters out of context); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (“The scope of redirect rests in the discretion of the trial court.”). *See State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) (“It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.”). *Accord*, *State v. Hawes*, 423 S.C. 118, 140–41, 813 S.E.2d 513, 525 (Ct. App. 2018) (same). Counsel was not deficient in failing to object where no reasonable attorney would have objected after opening the door to its admission.

This Court further finds that the Applicant has failed to show 6th Amendment prejudice. He has failed to allege or show in any manner the admission of the entire written statement prejudice his case with any specificity. Therefore this Court must conclude that he has failed to show that a reasonable probability that the result of the proceeding would have been different had counsel objected. Confidence in the outcome of the case has not been undermined.

Allegation that Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to the statement of Rafael Izaguirree being placed into evidence by the State (Trial Tr. p.272, l. 17-20), EX: 12), as cumulative and hearsay. (Amended Application, allegation 9)

In this allegation, similar to the allegation above, the Applicant contends that counsel should have objected to the admission of state witness Rafael Izaguirree’s written statement to the police at the scene and State Exhibit 12. This Court must find that the Applicant has failed in his burden of proof to show a Sixth Amendment violation.

The State called Rafael Izaguirree to testify about the robbery committed upon him that night. He testified that a four door black vehicle pulled up and two black men came out with guns. The men took his cellphone and wallet. Trial Tr.p. 268. One man came toward him and the other

went toward Hector Vasquez. At the time, Rafael only recalled that he and Hector were in the area. Hector was near the front of the car and Rafael was at the back. After his wallet was taken, Rafael stated he went away from there. He heard gunshots after he walked away. *Id.* He returned to the scene where Hector was and saw Hector on the ground. He stated that he was focused on the gun when the gun was pointing at him and did not recall seeing Franklin Vasquez until afterwards.

On cross-examination by counsel Chehoski, Rafael again confirmed that he only remembered seeing Franklin after the incident. Rafael stated that the police came to his home during the week after the incident. He asserted that he told them that he did not recognize the faces or the gun. He only recalled the make of the car as a black car. Trial Tr.p. 271.

On re-direct, the State introduced State Exhibit 12, the written statement of Rafael Izaguirree. The prosecutor pointed out that the defense had just asked him whether he had talked with law enforcement that night. Rafael looked at the exhibit and confirmed that it was given on August 9, 2015, the date of the incident. After confirming the document had not been changed, it was introduced into evidence, expressly *without objection* by counsel Chehoski. It was published in the record through the interpreter: "They pointed the gun at me and took my phone and wallet, a small black car with two African Americans." Trial Tr.p. 273, l. 11-13.

This Court finds that the Applicant has failed to prove deficient performance by credible evidence. As with the statement of Christy Vasquez, the defense referred to the written statement in their cross-examination. In the allegation, the Applicant contends that counsel should have objected to the written statement as hearsay and cumulative. This Court finds for the same reasons as the Christy Vasquez statement that the Applicant's counsel "opened the door" to the admission by the inquiry of the same evidence about the actual written statement on cross-examination. The defense elicited similar information as the statement, but additional information that Rafael told

the police that he had not recognized the faces. However, in the written statement, Rafael had stated that “they pointed a gun at me,” but did not include information about their faces and clarified that he met with the police on the day of the incident. Further, under the rule of completeness, SCRE, Rule 106, the actual statement was admissible. Deficient performance has not been shown due to a failure to object to the actual statement on the basis of either hearsay or cumulative evidence.

As above, the Applicant has also failed to prove Sixth Amendment prejudice under the *Strickland* test.. The same or similar evidence was introduced about the Rafael’s recollection of the event. Had counsel objected, there is no reasonable probability that the result of the proceeding would have been different. Similar evidence had been presented prior to the admission of the written statement. He has failed in his burden of proof on this allegation. Confidence in the verdict was not undermined.

The allegation that Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to the statement of Franklin Vasquez being placed into evidence by the state (p.289, Lines 8-12, State Ex. 13), as cumulative and hearsay. (Amended Application, allegation 10).

In this allegation, similar to the allegations above, the Applicant contends that counsel should have objected to the admission of the statement of state witness Franklin Vasquez statement police at the scene as State Exhibit 13. Unlike the above, the State placed this exhibit in evidence in its case in chief. This Court finds that the Applicant has failed to prove deficient performance or prejudice by the failure to object to its admission. Trial Tr.p. 277-313.

During the trial, Franklin Vasquez, the son of the deceased victim Hector Vasquez, testified about seeing Rafael talking with Hector. He described seeing a black four door sedan stop after saying something to his father. Franklin stated that the driver came towards him pointing a gun at him and telling Franklin to empty out his pockets and to give its contents to him. Trial Tr.p. 280.

Franklin described the passenger having a gun in his hand as he got out of the car and went toward Rafael. Trial Tr.p. 281-82. When the driver asked Franklin to empty his pockets, his father stepped between them and asked the driver what his problem was. The driver then pointed the gun at his father and tried to shoot him, but the gun initially jammed. Trial Tr.p. 282. Franklin described that his father then hit the driver with a beer bottle and they started to struggle over the gun. Franklin described that he grabbed a soda can and threw it in the driver's face and kicked him in the face while the driver and his father were struggling on the ground. Trial Tr.p. 283. Franklin stated that at that point the gun was fired and his father was shot. Franklin stated he next saw the passenger come around the car and enter into the passenger seat. At that point the passenger fired his gun and it grazed Franklin. Trial Tr.p. 284-285. According to Franklin, he next ran up to the house to get his car keys in order to chase the perpetrators. While running up to the house, he passed his mother who was running toward the incident telling him to stay, but he did not do so. Trial Tr.p. 285. Franklin claimed he did not get a good look at the passenger who shot him, but said that the driver was smaller than the passenger. Franklin next described that he drove through the area in the chase and waved down a police officer. The officer asked Franklin to show him where the incident occurred and what happened. Franklin stated it was two black males. The officer checked Franklin to see if he was hurt and sent him to the hospital. Trial Tr.p. 286-287. Franklin then clarified that he returned to the scene with the officer before he went to the hospital. Franklin also corrected his statement he gave about the color of the vehicle stating it was a grey, dark color.

Franklin clarified that the written statement was given while he was in the hospital. Trial Tr.p. 287-288. The prosecution presented Franklin written statement as State Exhibit 13 which Franklin described as the statement he gave in the hospital. Trial Tr.p. 288-89. After Franklin confirmed that it looked like the statement he had given at the hospital with his signature and date,

the State moved for its introduction as State Exhibit 13. Counsel Fullwood expressly stated “no objection.” Trial Tr.p. 289.

The State inquired about the description that he gave law enforcement that day and Franklin responded that he described it as grey, but that he meant dark grey and that with the taillights it looked like a Toyota Corolla or Camry. Trial Tr.p. 289. Franklin then identified a photograph (State Exhibit 14) as the black car he saw that night.

Franklin described meeting Detective Moore for the first time at his uncle’s house in Little Mountain. Franklin confirmed that at that time he described the driver as being about the same size and build as his father who was five feet seven inches and weighed 160. He claimed to be able to pick the driver out in an instant from the line-up, describing the series of line-ups he was shown. Trial Tr. p. 291-292. This positive identification was made on August 13, 2015, about four days after the incident. Trial Tr.p. 293 – 295. However, he could not identify the passenger in any of the line-ups he was provided.

Counsel Fullwood cross-examined Franklin. Trial Tr.p. 302-313. During the cross-examination, counsel Fullwood also inquired about the discussions he had at the scene with Detective Branden Steen when he described the car as a dark car and a later statement given to Detective Edmonson at the hospital that that the two men were in a dark car and that the second guy was a fat black male. Trial Tr.p. 308.

Counsel Fullwood also inquired about the written statement he gave that night when he wrote that the car was grey, although he now claimed he actually meant a dark color but did not write “dark grey”. Trial Tr.p. 308. Counsel specifically used this challenged statement in her own examination and had Franklin read the last sentence: “then the passenger driver had shot gun inside

the car and it grazed me and hit the white truck. The passenger driver was the fat guy.” Trial Tr.p. 309-310.

Franklin then corrected the statement claiming that he meant the passenger, not the driver when he wrote “passenger driver”. Franklin confirmed the next day he met with Detective Moore and gave his most detailed description of the driver as about five-seven and 160 pounds similar in size and build with his father and that he had a beard. Trial Tr. 310. When asked whether Detective Moore had told him that the shooters were in the photo arrays shown to him on the 13th, Franklin denied that he had been told that by Det. Moore. Trial Tr.p. 311. Franklin demonstrated how his father struck the man, but then declared he did not know where his father hit the man because Franklin was focused on looking at the shooter. Trial Tr.p. 313.

This Court finds that the record reflects a sound strategic reason to not object to the introduction of Franklin’s written statement when it was offered by the State. It is clear that the strategy by the defense was to show the evolving written and oral statements that Franklin gave. In particular counsel Fullwood focused in her cross-examination on the precise words that Franklin used in describing his shooter being the “passenger driver” from the written statement. Trial Tr.p. 309. In their closing argument counsel Chehoski emphasized the testimony of Franklin and asserted Franklin’s ability to perceive the event was questionable and noted that the testimony by Franklin was not meshing and that “there was a reason to question his testimony.” Trial Tr.p. 698-699. The defense’s intent to seek to question the witness on his written statement was sound strategy to question the reliability of the series of statements he made. Since it was obviously a planned inquiry by the defense, the failure of counsel to object to Franklin’s written statement being presented by the State was not deficient because it is apparent that counsel Fullwood would have introduced it in the cross-examination had the State not already introduced it.

This Court must also find that the failure to object was not prejudicial under the second prong of *Strickland*. There was no prejudicial evidence presented within the statement that had not been presented through the testimony. Since it was merely cumulative to Franklin's testimony there was a complete failure on the Applicant's part to prove that confidence in the outcome was undermined by State Exhibit 13. The Applicant has failed to show how its admission impacted the result in any way to the detriment of Applicant. He failed in his burden of proof in showing that the counsel's failure to object to its admission as hearsay or cumulative that there is a reasonable probability that the result of the proceeding would have been different.

Allegation that Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to testimony regarding a Crimestoppers tip as hearsay from Sgt. Miles Rawl (p.344. Lines 1-7), despite making this objection later in trial (Trial Tr. p. 377). (Amended Application, allegation 11)

In the allegation, he complains about defense counsel's initial failure to object to evidence being introduced initially through Sgt. Miles Rawl about a Crimestoppers tip when the defense attempted a later objection to the evidence. This Court finds that he has failed to show ineffective assistance of counsel related to this assertion.

During the trial, Lexington County Sgt. Miles Rawl testified about his involvement in the investigation of the incident. In particular, he testified without objection as follows:

Q. What did you do next?

A. The following day, Detective Moore and I - or basically, a Crimestoppers tip came in. Detective Moore had the Intel run some information regarding two possible suspects, at which time we responded to Newberry County to attempt to locate one of the suspects.

Q. And who was that suspect?

A. William Akeim Pitts, Jr.

Trial Tr.p. 343, l. 25 – p. 344, l. 8.

Later during the trial in the testimony of Detective Barry Sowards of the Lexington County Sheriff's Department the following occurred:

Q. And at the beginning of the case, were there any known suspects?

A. No.

Q. And at some point were suspects developed?

A. Yes .

Q. And how did this come about, if you know?

A. I do. It was approximately Wednesday morning around 2:29 a.m. I was informed I'm one of the recipients of Crimestoppers, and it's a tip line that comes in via email to my email. And it gave a tip in reference to the crime that we're here for –

MS. FULLWOOD: Your Honor –

MR. CHEHOSKI : Your Honor, objection. This is hearsay.

THE COURT: All right. The existence of the tip is not hearsay; the content of it may very well be.

MS. MARTIN: Your Honor, do we need a sidebar at this moment?

THE COURT: I'll be glad to.

MS. MARTIN: Thank you, Your Honor.

THE COURT: I'm the only one here who doesn't know what he's going to say next, so maybe I ought to hear you.

(Sidebar conference.)

BY MS. MARTIN:

Q. As a result of any Crimestoppers tip, where did your investigation lead you?

A. Based upon the tip, the investigation – I began to investigate particular information in the tip that all led me to different law enforcement programs and things like that, led me to Woodbine Apartments in West Columbia.

Q. Okay. Well-, let's back up a bit. Based on your investigation, were you particularizing all of your Intel on one people, two people, three people?

A. Two individuals in reference to this you know, my investigation, based upon the tip.

Q. And did anyone at the sheriff's department search social media for these people?

A. Yes . When I received the tip, I asked Detective Travis, who is in our crime intelligence unit , to begin to use social media to try to locate individuals based-upon the tip.

Q. And based upon the tip as well, before you ended up in West Columbia, did you go anywhere else?

A. I did. At one point we were in Newberry.

Q. And when you say we, who went to Newberry?

A. It was Detective Moore and I and sergeant -- now Sergeant Miles Rawl .

Q. And in Newberry, who were you searching for? What address and - -

A. We responded to an address in Newberry in reference to Wilfred Akiem Pitts. The address in Newberry County -- I don't have it directly in front of me.

Trial Tr.p. 376, l. 19- 378, l. 23.

During counsel Chehoski's cross-examination of Detective Sowards, counsel inquired about the tip and developed that the tip did not include either the incident date or the location of the incident, after having Det. Sowards review the actual tip to refresh his recollection. Trial Tr.p. 404-405. Counsel further referred to the substance of the tip and the information Sowards had received referring to the vehicle as a 2005/2006 Toyota Corolla which Sowards confirmed he had gleaned from the tip in his investigation. Trial Tr. p. 410, l. 1-11.

On re-direct by the State of Det. Sowards, Assistant Solicitor Martin addressed the nature of the Crimestoppers tip again stating that Crimestoppers tips are entered in various ways. He

confirmed he received the tip at 2:27 am on Wednesday and that it gave him a starting point for the investigation to develop suspects. Trial Tr. p. 421.

Q. And did the tip itself name any particular suspects?

A. It did, via social media monikers, in that it said specifically Facebook information on King Pitts and then backslash Ricky Esaw, one word.

Q. And did the tip involve a particular type of crime?

A. It did. The tip came out, which was why it -- it came out to my attention as is in reference to a shooting that shot and killed an individual.

Q. Okay. Is there a difference between a tip and a witness statement?

A. Sure .

Q. Okay. And based on your tip, that led you to Mr. Esaw; correct?

A. Yes .

Trial Tr.p. 420-421. Counsel Chehoski on re-direct followed up with the tipster stating that they did not know their names, but that the Facebook information was King Pitts backslash Ricky Esaw one word. [kingpitts/rickyesaw]. Trial Tr.p. 422.

Judge Cooper addressed his decision to admit related to an earlier sidebar. He stated:

THE COURT: Madam Court Reporter, at sidebar I ruled admissible the follow-up questions about the tip. Mr. Chehoski had cross-examined Mr. Sowards about the inaccuracies or the incorrect nature of the tip itself.

And the questions were: Did the tip contain the correct date of the incident? And the answer was, no, it was incorrect. And was the location of the incident correct or incorrect? It was incorrect. Was the name of the victim correct or incorrect? Incorrect.

A jury listening to that line of questioning could be rightfully wondering, well, if none of that information was right, neither the date, the name of the victim, or the location, then how in the world would this -- the officers have a right to rely on anything in there to follow up the investigation? And, of course, it was this tip, as we know from the testimony, that headed the investigation in a more finite direction than it had been before. Out of a sense of fairness and completeness then,

I allowed the rest of the information, which was just gotten out on redirect examination, obviously, over objection of defense counsel.

Trial Tr.p. 423, l. 17-p. 424, l. 15.²⁸

This Court must conclude that the Applicant failed in his burden of proof to show deficient performance on the part of counsel. During the PCR proceeding, counsel acknowledged that he did not object at the initial mention of the Crimestoppers tip until he made the hearsay objection at Trial Tr.p. 377. It is evident that the trial judge limited its use during the first discussion to preclude the substance of the tip. The problem with Applicant's assertion is that the initial reference to the tip did not include the substance of the tip so a hearsay objection would not be appropriate because there was no evidence introduced for the truth of the matter asserted at that point. *See State v. King*, 422 S.C. 47, 66–67, 810 S.E.2d 18, 28 (2017) (“we believe it is necessary to caution prosecutors against using “investigative information” as it appears this is an attempt to circumvent the rules against hearsay”).²⁹

²⁸ The record reflects further references to the Crimestoppers tip. See, Trial Tr.p. 427-428 (testimony of Detective Adam Creech referring to the Facebook name search based upon the information from the tip and the names given); Trial Tr.p. 485-486 (Investigator John Moore referring to the tip and Facebook search); Trial Tr.p. 532 (cross-examination by defense counsel Chehoski of Investigator Moore referring to the fact that the tipster did not know the real names and referred to the Facebook names and the tip was a little off in referring to the date as August 11 (crime happened on August 9) and asserted the victim's name was Alonzo (rather than Hector Vasquez)).

²⁹ Courts have addressed reference to a Crimestoppers tip similarly as the trial court did. See *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009) (police officer's testimony regarding Crimestoppers tips received by police in murder investigation was not hearsay; state's questions asked whether and when police received any Crimestoppers calls, officer mentioned Crimestoppers call only to explain why he had investigated defendant, and prosecutor never presented statement from Crimestoppers caller to jury; questions did not call for oral or written assertion made by out-of-court declarant, and content of calls was never explicitly divulged); *State v. Jefferson*, 2019-0522 (La. App. 4 Cir. 7/22/20), 302 So. 3d 567, 576, writ denied, 2021-00028 (La. 3/9/21), 312 So. 3d 562. (Where an investigating officer testifies concerning events leading to the arrest of a defendant, statements are not hearsay if offered merely to explain the officer's actions and not for the truth of the matter asserted. In other words, where the officer

This Court finds that the failure to initially object to the State's mention of the Crimestoppers tip was deficient because it did not waive his right to make a later objection, contrary to the assertion by the Applicant. What occurred was that due to the opening of the door by counsel's inquiry about the substantive inaccuracies within the statement, the defense allowed the additional information from the anonymous tip to be presented as it related to the further investigation from the tip. The trial court recognized that an objection had been made in a sidebar and overruled the objection, not based upon any alleged deficiency in a failure to object previously, but on what the Court decided occurred as a result of defense counsel's inquiry which opened the door, essentially under Rule 106 and fundamental fairness.

This Court further concludes that counsel's failure to object to hearsay related to Sgt. Rawls testimony was not proven to meet the prejudice prong of *Strickland* because the admission of that evidence did not undermine confidence in verdict to a reasonable probability. This Court has not been shown otherwise by credible evidence or argument.

Allegation that Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to hearsay by Sgt. Barry Sowards, "I called him up on the phone and asked him if he knew Ricky Esaw and he said he did" (Trial Tr.p. 381, ll. 5-7). (Amended Application, allegation, 12)

In this allegation, he contends that counsel should have objected to limited testimony from Sgt. Barry Sowards concerning his investigative steps to find the location of the Applicant when he called a person Sowards knew and asked him if he knew Esaw. Trial Tr.p. 381. This Court finds

does not testify regarding the substance of what he was told, but with regard to what he did in response to that information, the testimony is not considered hearsay).

that the Applicant has failed to prove either deficient performance or prejudice related to this testimony.

During Sgt. Sowards testimony, the State inquired of the course of the investigation in its quest to find the location of Ricky Esaw. Sgt. Sowards testified that he had learned that Esaw lived with his girlfriend. He stated that he had researched the history of Esaw to help to find his location. He determined that Esaw had been working at one point at Palmetto Point Apartments, now called Legends.

I knew an individual that worked up there on the maintenance team and I called him up on the phone and *asked him if he knew Ricky Esaw and he said he did. . . .* Based upon this information, it led us to another apartment where Ricky was said to be living with the female known as Net...”

Trial Tr.p. 381, ll. 4-12. (*emphasis added*). No objection was made to this testimony.

This Court finds that the Applicant has failed to prove deficient performance. First, the fact that the worker knew Esaw was insignificant evidence unrelated to his guilt in the case. Although an objection to hearsay could have been raised, the Applicant has failed to prove that “no reasonable attorney” would have failed to object to this statement that the worker knew Esaw. In addition, the Applicant has thoroughly failed to prove 6th Amendment prejudice. To do so, the Applicant would have to show if counsel objected to the arguable hearsay evidence that the worker declared that he knew Esaw, that there is a reasonable probability that the exclusion of the evidence would have resulted in a not guilty verdict. This passing evidence about knowledge of an individual does not undermine confidence in the verdict under the *Strickland* standard. It must be dismissed.

Allegation that Applicant’s counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to testimony regarding Applicants alleged confession. (p.437 - p.439). (Amended Application, allegation 13).

The Applicant contends that counsel erred in failing to object to the testimony introduced about his confession. In his PCR testimony, he claimed that his counsel did not object to evidence about his confession and that there was no *Jackson v. Denno* hearing on the admissibility of the confession being was coerced based upon threats against his girlfriend. The Applicant failed in his burden of proof as to either prong of *Strickland*.

Contrary to the claim before the Court, there was a *Jackson v. Denno* hearing held on the admissibility of the Applicant's statement to law enforcement at the outset of the case. Trial Tr.p. 68-131. The record shows that the Applicant actually testified at the hearing, including asserting that threats to prosecute his girlfriend were made. Trial Tr.p. 109-126. Counsel Chehoski moved to suppress the statement given by Esaw. He asserted it was given under duress due to a promise to withhold prosecution against his girlfriend who he feared was going to be charged as an accessory to the crime. Trial Tr.p. 128-129.

Judge Cooper at the conclusion of the hearing made specific findings of fact and conclusions of law related to the admission of the statement:

Suffice it to say that I find the officers' testimony more credible on the issues of voluntariness of this, the fact that he was advised of and informed of his rights. He said they were never read to him, but he initialed every one of them. He said he understood the statement that he had made, but it's not true. If that, in fact, is the case, that's a matter for the jury's determination. The fact is that he acknowledged those statements. According to the officer, he made those statements himself and put them down in his own handwriting.

I find that he was advised of his rights prior to any interrogation, that he had a right to remain silent, that he had a right to have an attorney, that he have one appointed if he could not afford one, that he had the right to have the attorney present with him and could stop questioning at any time that he wanted to if he wanted to have his attorney with him, and that he was not threatened nor coerced in any way to make the statements.

I find that the State has met its burden of proving that by a preponderance of the evidence and still has to prove that to a jury beyond a reasonable doubt. But,

nonetheless, the statement is entitled to being admissible for the jury's consideration. Respectfully, the motion to suppress is denied.

Trial Tr.p. 130-131. The August 14 2015 statement was published to the jury as State Exhibit 1 during Adam Creech's testimony. Tr.p. 436-442. It was also discussed during Detective John Moore's testimony. Trial Tr.p. 513-522. When the State moved to introduce the written statement, State Exhibit 1, into evidence the trial court admitted it *subject to the previous objection*. Trial Tr.p. 514, l. 7-14.

This Court finds that counsel was not deficient concerning a lack of objection to State Exhibit 1. First, the defense argued at the conclusion that it should not be admitted as a coerced statement in the *Jackson v. Denno* hearing. Trial Tr.p. 128-129. The Applicant has not pointed to any evidence that was presented at the trial subsequent to the *Denno* hearing prior to the publishing of the statement which supported a reconsideration of either his factual or legal ruling. Further, when it was admitted as State Exhibit 1, it was admitted subject to the previous objection. The Applicant has failed in his burden of proof.

Further, the Applicant has failed to show 6th Amendment prejudice by any alleged failure to object. First, counsel objected at the *Denno* hearing. Although there is no objection on the record during the Creech testimony, which the State later moved the document into evidence, the Court notes that it was done subject to the previous objection. Trial Tr.p. 514. He has failed to show assuming a failure to object during the Creech testimony about the statement, that had he objected, that there is a reasonable probability that the result of the proceeding would have been different. His allegation is without merit.

Allegation that Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to testimony regarding DNA evidence connecting evidence to co-defendant Pitts who was a State's witness. (Trial Tr.p. 494-495). (Amended Application, allegation 14)

This Court finds that the Applicant has failed to show that counsel was deficient in failing to object to the admission of evidence related to the DNA results on the bracelet found at the scene. In his testimony, the Applicant complained that his counsel did not object to the DNA evidence or the chain of custody. He claimed that the State was claiming the bracelet was his, but that there was no DNA of his on it because he does not wear jewelry.³⁰ In addition his mother Patricia Esaw and his sister Erica stated that the Applicant did not wear jewelry. However, counsel Chehoski testified that there was DNA on a bracelet worn by Applicant's co-defendant Pitts. This Court finds that counsel's actions related to the bracelet at the scene and the alleged DNA result was reasonable and based upon the appearance of a reasonable strategy to show the bracelet belonged to Pitts and not Applicant, particularly when he was aware that Pitts would be testifying against his client.

A review of the record reveals that a gold two piece bracelet was recovered at the crime scene. Trial Tr.p. 323, 334-338, 340-41, 427, State Exhibits 17, 21.³¹ It was apparently very easy for the investigators to locate the Facebook page under the name King Pitts where they saw a similar looking bracelet being worn by him. Trial Tr.p. 446-447. The investigators were very interested in the bracelet at the scene and took a buccal swab from Pitts after he consented. Trial Tr.p. 387-88, 416. The Applicant's then girlfriend, Luenetta Grayson testified that on the day of the incident Esaw was not wearing any jewelry and Pitts had on some rings and a bracelet. Trial Tr.p. 474.

³⁰ There was no evidence at trial by the State that actually claimed the bracelet belonged to Esaw or was in his possession at the incident. There was some evidence in statements made by co-defendant Pitts that he had given the bracelet to Esaw. Trial Tr.p. 626. However, Pitts recanted those statements. *Id.* Pitts also admitted during the trial that his bracelet fell off when he was getting the wallet from Rafael. Trial Tr.p. 612.

³¹ The investigators were following the Crimestoppers leads and went on Facebook and saw the bracelet on the co-defendant in a post. Trial Tr.p. 217-218.

Detective Moore testified, without objection, that Wilfred Pitts DNA was on the bracelet based upon a swab that was taken from Pitts. Trial Tr.p. 494. In Esaw's statement, he indicated that Pitts had a gold bracelet, but had lost it. Trial Tr.p. 521-522. During counsel Chehoski's cross-examination of Det. Moore, he again developed that he received reports that DNA was collected from the bracelet. He further developed that the DNA result came back connected to Pitts and not Esaw. Trial Tr.p. 454. Counsel Chehoski also developed that as they interviewed Pitts, he had originally been asserting an alibi. He was confronted with a Facebook photograph of him wearing the bracelet. Trial Tr.p. 548.

Wilfred Pitts testified that gave an initial statement that "almost everything" was a lie. Trial Tr.p. 589. He claimed that when he was initially asked about the bracelet he stated that he let Ricky hold the bracelet, which he then retracted because it was a lie. Trial Tr.p. 589. Pitts testified that he agreed to give the State the buccal swab sample because he knew that they were going to find out that the bracelet was his because he remembered the bracelet was left there. Trial Tr.p. 591.

This Court must find that counsel was not deficient in failing to object to the introduction of the DNA result. The defense theory was that while Pitts was involved in the incident, that Esaw was not. The introduction of the DNA result on the bracelet connecting it to Pitts and not Esaw was supportive of the theory. More importantly since Pitts testified that the bracelet was his and that he had been at the scene, the evidence was supportive of the defense theory and strategy. Independent of the DNA evidence was the Facebook photograph with Pitts wearing the jewelry and Pitts actual testimony arial admitting the bracelet was his.

For similar reasons, had counsel objected and the DNA result left out of the evidence to the jury, the Applicant failed to show prejudice. There was remaining uncontradicted evidence that the bracelet recovered at the scene belonged to Pitts and Pitts recalled leaving it at the scene.

Placing the bracelet with Pitts and not Applicant was consistent with their defense. The Applicant failed to prove absent the failure to object to the DNA result tying the bracelet to Pitts and not Applicant, that there was a reasonable probability that the result of the proceeding would have been different. This allegation must be dismissed.

THE REMAINING ALLEGATIONS IN THE ORIGINAL *PRO SE* APPLICATION

Ineffective Assistance and Jury Selection and Voir Dire (1)

In his *pro se* application, he asserts that his counsel did not prepare him for voir dire and jury selection. The record reflects that the Applicant was present for jury selection. Trial Tr.p. 11-66. Voir dire and jury selection proceedings constitute a critical stage of the trial. *See, e.g., Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989); *James v. Harrison*, 389 F.3d 450, 456 (4th Cir. 2004). The process of jury selection inherently falls within the expertise and experience of Trial Counsel. *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). In *Palacio*, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. *Id.* at 516, 511 S.E.2d at 68. The court in *Palacio* further noted that “a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” *Id.* at 516, 511 S.E.2d at 68.

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence counsel met with Applicant in preparation for trial and there is no evidence additional preparation on the part of counsel with the Applicant on jury selection and *voir dire* would have affected the outcome at trial, counsel cannot be said to have been ineffective. *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

“[B]revity of time spent in consultation, without more does not establish that counsel was ineffective.” *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980).

The Applicant failed to present any evidence before this Court as to how he needed to be prepared for jury selection or voir dire by counsel differently. In his *pro se* application, he claims that he was dressed in jail clothes before the jury. In the earlier portion of the Order, this Court found as a fact that the allegation lacked credible merit and is incorporated herein. He has failed to prove deficient performance by credible evidence related to his counsel’s conduct in jury selection or with him in preparing for that portion. Likewise, he has failed to show 6th Amendment prejudice. His conclusory allegation must be dismissed.

Ineffective assistance and Speedy Trial Issue (2)

In his *pro se* application, the applicant complained that trial counsel erred in failing to request a speedy trial. He claimed it was only after he wrote Judge Keesley that a trial was eventually scheduled. In his application, Esaw stated that he had notified Judge Keesley on August 3, 2016, that he had been in jail for a year and that counsel Fullwood was not assisting him and he was ready to proceed to trial. He claimed he personally made repeated requests for a speedy trial and that on July 25, 2017, Judge Keesley instructed trial counsel and the Solicitor to either set the case for trial or provide an explanation as to why it cannot be scheduled. The trial was set for the October 2017 term. The record reflects that the Applicant’s arrest warrants were dated on September 16, 2015. The indictments were true-billed on January 19, 2016. A notice of alibi defense was made on October 6, 2017 and the case was tried beginning October 16, 2017. The record reflects that no motion for speedy trial was made through counsel. However, Esaw complained that counsel Fullwood on an unspecified date stated to him that she would not move for a speedy trial in the matter. This Court finds that the Applicant has failed to show a Sixth

Amendment violation, particularly lacking a showing of prejudice under *Strickland*. There is no reasonable probability the result of the proceeding would have been different.

South Carolina does not have a state statutory speedy trial rule. A criminal defendant is guaranteed the right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14. This right “is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.” *United States v. MacDonald*, 456 U.S. 1, 8, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). Deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). In determining whether a defendant has been deprived of the right to a speedy trial, the court must consider four factors: 1) length of the delay; 2) reason for the delay; 3) the defendant's assertion of the right; and 4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense. *Id.*; *State v. Brazell*, 325 S.C. 65, 71, 480 S.E.2d 64, 68 (1997).

The inquiry into the length of the delay functions as a trigger mechanism for the analysis of the three other factors. *Barker*, 407 U.S. at 530, 92 S.Ct. 2182. Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary or unreasonable. *State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978). Additionally, a delay may be so lengthy as to require a finding of presumptive prejudice, and thus trigger the analysis of the other factors. *Id.*

Once the defendant has established that the delay is sufficient to warrant analysis of the other factors, the court must consider the reason for the delay. The ultimate responsibility for the trial of a criminal defendant rests with the State. *Barker*, 407 U.S. at 531, 92 S.Ct. 2182. Therefore, the court should weigh heavily against the State any intentional delays to impede the defense. *Id.* Where the reason for the delay is more neutral, the court should weigh it less heavily against the State. *Id.* A valid reason presented by the State may justify an appropriate delay. *Id.* However, the Court must also consider and weigh the defendant's contribution to the delay in determining whether the defendant's Sixth Amendment rights have been violated. *Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (holding defendant's contribution to the delay of the trial militated against a finding of a violation of the right to a speedy trial).

Next, the Court must consider the actions of the defendant in asserting the right to a speedy trial. "The defendant's assertion of his speedy trial right ... is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531, 92 S.Ct. 2182. However, the defendant's failure to assert the right, although not conclusive, makes it more difficult to show that the right was violated. *Id.*

Finally, the Court must determine whether the defendant has suffered any prejudice as a result of the delay. The United States Supreme Court has said that the most serious interest to be protected by the guarantee to a speedy trial is the possibility of impairment of the defense. "[C]onsideration of prejudice is not limited to the specifically demonstrable ... and affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett v. United States*, 505 U.S. 647, 654, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). In fact, an unduly excessive delay can be presumptively prejudicial. *Id.* at 655, 112 S.Ct. 2686. However, regardless of whether the defense is able to show particularized prejudice or the delay warrants a finding of presumptive

prejudice, prejudice remains only one of the four factors to be considered in a speedy trial analysis. *Id.* at 656, 112 S.Ct. 2686. *Accord State v. Pittman*, 373 S.C. 527, 548–50, 647 S.E.2d 144, 155–56 (2007) (Speedy trial right of defendant, charged with two counts of murder for the shooting death of his grandparents when he was 12 years old, was not violated as a result of three year delay between his arrest and trial); *State v. Reaves*, 414 S.C. 118, 777 S.E.2d 213 (2015) (trial court did not abuse its discretion in denying defendant's motion to dismiss based on claimed speedy trial violation arising from nearly 39-month delay between arrest and trial).

At the time of the October 16, 2017 trial, this Court can take judicial notice that the trial docket was under the control of the judicial branch. The Solicitor was not responsible for unilaterally continuing or calling cases during the period in 2017. *See State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012) (ruling S.C. Code Ann. § 1-7-330(2005) violative separation of powers and subsequently causing the Chief Administrative Judges of the Circuit Courts to oversee the disposition and reconciliation of pending General Sessions cases); see also *Re: Reconciliation and Disposition of General Sessions Cases Statewide and Appointment of Committee Members*, 2013-002484, S.C. Sup. Ct. Order dated Jan. 7, 2014) (issued after Applicant's trial).

While two years passed between arrest and trial in this case, the constitutional guarantee of a speedy trial affords protection only against unnecessary or unreasonable delay. *State v. Chapman*, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) (citing *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978); *Wheeler v. State*, 247 S.C. 393, 147 S.E.2d 627 (1966)). “[A] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and

unnecessary delay.” *State v. Langford*, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012), reh'g denied (Dec. 20, 2012) (citing *Wheeler*).

The record reflects that the defense counsel Fullwood at some unknown time, affirmatively advised the Applicant that they would not file a motion for a speedy trial.³² The Applicant is correct that a date for the trial was set after the Applicant made inquiry of Judge Keesley according to the Clerk records.

Even if we assume that that counsel was allegedly deficient in failing to move, the Applicant has failed to show that the trial would have been tried sooner than October 2017. Further, the Applicant has failed to show prejudice under *Strickland* by the failure to request a speedy trial. As noted above, the Applicant was making a claim of alibi in preparation for his trial. Counsel indicated that they had investigated alibi with the defense investigators, but found that there were gaps in his time period. Counsel, at the time of the trial, had included on their witness list the Applicant's mother, Patricia Reid³³ and sister Erica Esaw (also Erica Esaw claimed to not have

³² Although Applicant speculates that if his counsel would have moved for a speedy trial that would have affected the outcome of his case, Petitioner's own conclusory opinion is insufficient to show that his counsel was ineffective. While the decisions of trial counsel are always subject to being second guessed with the benefit of hindsight, tactical and strategic choices made by counsel after due consideration do not constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel's conduct during trial was within the wide range of reasonable professional assistance, and this Court should not scrutinize counsel's performance by looking at the decisions made in an after the fact manner. *Id.* at 688–689; *Bunch v. Thompson*, 949 F.2d 1354 (4th Cir.1991), cert. denied, 505 U.S. 1230 (1992); *Horne v. Peyton*, 356 F.2d 631, 633 (4th Cir.1966), cert. denied, 385 U.S. 863 (1966); *Burger v. Kemp*, 483 U.S. 776 (1987); see also *Harris v. Dugger*, 874 F.2d 756, 762 (11th Cir.1989), cert. denied, 493 U.S. 1011 (1989) [An informed decision by trial counsel should not be second guessed by a reviewing court.].

³³ The record shows that Patricia Reid was present at the trial and was included on the sequestered witness list. Trial Tr.p. 22, l. 20-25. However, while the trial proceeded, counsel Chehoski made a decision that they were not going to use Patricia Esaw as a witness and had her sequestration ended and removed from the witness list so that she was able to be in the courtroom. Trial Tr.p. 570-571. This decision was made immediately prior to Wilfred Pitts

been present at the trial). Counsel had also filed a notice of alibi. During the PCR proceeding counsel failed in his burden of proof in showing any prejudice from the delay in the trial, which is his burden under *Strickland*.

The Applicant gave no indication at the PCR hearing how the delay caused him to suffer any prejudice in his case, such as lost evidence or any other matter which resulted from his prolonged incarceration or the State's failure to schedule his trial sooner than when it took place. *See State v. Hunsberger*, 418 S.C. 335, at 351, 794 S.E.2d 368, at 376 (2016) (allowing an accused to “assert actual prejudice or presumptive prejudice as the result of the State's violation of his right to a speedy trial”); *id.* (“Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.”). When a defendant alleges he or she was prejudiced by trial counsel's failure to properly assert the defendant's speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland*.

The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different, had that evidence been lost or unavailable due to the delay.

In summary, a reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason

testifying and after the Applicant's girlfriend Luenetta Grayson testified about the Applicant leaving the party in her vehicle and the Applicant's statement to law enforcement had been introduced. Trial Tr.p. 466-468 (noting that Esaw and Pitts left the party on two occasions that night in her car to go to a store to meat and another to go to a convenience store. On cross-examination, Luenetta testified that she went inside the house around between 7 and 7:30 to work and did not know if her car was used after that. She stated Ricky around 10 PM asked her to be ready to leave the party and she did not see any blood on his clothes or injuries to his face. Trial Tr.p. 478.

for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); see also *State v. Brazell*, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. “Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.” *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155. Therefore, this Court finds that there has been no neglectful delay prejudicial to Applicant to any great degree other than the fact in and of itself there had been a delay. Counsel was not ineffective in failing to accede to his client’s request for then to file a speedy trial request. Esaw has failed to show that had a request been made that there is a reasonable probability the result of the proceeding would have been different. This allegation is denied and dismissed.

Ineffective assistance and failing to object to superseding indictments (3)

In this *pro se* allegation, the Applicant complains that counsel erred in failing to object to the superseding indictments. This issue was previously addressed above in the ground and is incorporated herein by reference.

Ineffective assistance and failure to adequately cross-examine State’s witnesses (4)

In his *pro se* application, Esaw contends that counsel failed to adequately cross-examine state witnesses. In the application, he complained that counsel failed to inform the jury that co-defendant Pitts was also charged with “obstruction of justice.” The Applicant speculates that had the jury been made aware of this, they could have inferred that the State had manipulated the witness to fabricate his testimony.

The record reflects that Wilfred Pitts testified as a witness for the State. At the outset of his testimony, the State asked Pitts what he was charged with. Pitts responded: “murder, attempted murder, three armed robberies, and obstruction of justice” and possession of a weapon during a violent crime. Trial Tr.p. 572, l. 22- p. 573, l. 2. Contrary to the allegation, on cross-examination, counsel Chehoski also brought out the fact that Pitts was charged with obstruction of justice. Trial Tr.p. 600, l. 15-21. There was other evidence in the record before the jury that Pitts had been charged with obstruction of justice. Trial Tr.p. 391, l. 8-9 (Sowards testimony); P. 497, l. 2-5 (Moore testimony).

This Court finds that the Applicant has failed in his burden of proof. Counsel did inform the jury that Pitts had been charged with obstruction of justice. The allegation must be dismissed.

Ineffective Assistance in failing to object to the hand of one hand of all instruction (5)

In his *pro se* allegation, the Applicant asserts counsel’s failure to object to the instruction allowed the Applicant to be convicted without an element of intent to kill. This issue was essentially addressed earlier in the Order related to attempted murder and the initial ground for relief in the second amended application as it relates to attempted murder. The Applicant is correct that counsel did not object to the “hand of one, hand of all” instruction as noted previously. However, the failure to object was not deficient nor proof of prejudice under the *Strickland* standard. . For the reasons set forth there, this ground must be dismissed.

If it is the Applicant’s position that this ground relates to the murder charge, his ground is still without merit. See *Butler v. State*, 435 S.C. 96, 866 S.E.2d 347 (2021) (under the “hand of one is the hand of all” theory of accomplice liability, when two people join together to commit a crime, and during the commission of that crime one of the two commits another crime, both may be criminally liable for the unplanned crime if it was a natural and probable consequence of their

common plan to commit the initial crime). The jury on the murder count was properly charged on the element of malice aforethought that was required to be proven beyond a reasonable doubt. *See, State v. Sellers*, 442 S.C. 140, 898 S.E.2d 116 (2024) (evidence supported finding that defendant and accomplice mutually agreed to burglary and robbery, thus supporting jury instruction on doctrine of “the hand of one is the hand of all”); *State v. Harry*, 420 S.C. 290, 803 S.E.2d 272 (2017) (evidence was sufficient to create jury question as to defendant's accomplice liability for murder); *State v. Davis-Kocsis*, 443 S.C. 127, 903 S.E.2d 491 (2024) (defendant could be convicted as an accomplice for any unplanned crimes that might naturally have occurred in the course of the planned burglary). Here, the evidence from the Applicant’s statement introduced at trial was that he was involved as the driver about an agreed robbery plan. Trial Tr.p. 516. The Applicant at trial pointed out evidence in the record that Applicant’s accomplice claimed Pitts had shot the murder victim. Trial Tr.p. 400, 516-517, 519 (Esaw statements about Pitts).

This Court finds that counsel was not deficient in failing to object to the accomplice liability instruction based upon the existence of some evidence to support it. Further, since there was a basis for the instruction, as it related to the murder charge, prejudice has not been shown under *Strickland*. The allegation must be dismissed.

Ineffective Assistance of Counsel and failure to investigate the circumstances of the death of the death (6)

This issue was raised above in the fifth ground asserted in the amended application. In this pro se ground, the Applicant contended a conclusory claim concerning a failure to investigate. This Court finds it was essentially raised withing the earlier allegation in the amended application set forth above related to the failure to investigate and call his family as witnesses.

Ineffective Assistance of Counsel and failure “to object to the prosecutor’s vouching for the State witnesses credibility and all possible grounds to inflammatory and irrelevant evidence presented by the prosecution.” (7)

This Court finds that the Applicant failed to present any evidence or any specificity to the allegation in his *pro se* application. In the proceeding before this Court, he wholly failed to point out any evidence or argument related to his *pro se* allegation and it was not presented in any of his further amendments. The State in its original Return and Motion to Make More Definite Statement dated September 9, 2020, specifically related to this ground:

III. Response to Allegations of Ineffective Assistance of Counsel
A. Motion for a More Definite Statement

The State submits Applicant's claims of ineffective assistance of counsel are without merit. However, it is impossible for the State to adequately respond to Applicant's allegations because Applicant has completely failed to provide any specific facts to support such claims. For example, Applicant contends Counsels were ineffective for failing to object to the hand-of-one hand-of-all charge; **failing to object to the solicitor's alleged improper vouching of the State's witnesses**; and failing to adequately cross-examine the State's witnesses. **However, Applicant fails to specify what Counsels should have objected to**, who Counsels failed to adequately cross-examine, and on what basis Counsels could have objected to the hand-of-one hand-of-all charge. The State is therefore unable to adequately respond to these claims.

"[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the [applicant] that he was deprived of adequate and effective assistance of counsel is insufficient." *Coardes v. State*, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974); *see* S.C. Code Ann. § 17-27-50 (2014) (requiring an applicant to "specifically set forth the grounds upon which the application is based"); *see also* Rule 8(a)(2), SCRPC (requiring all civil pleadings to include "a short and plain statement of the facts showing that the pleader is entitled to relief"); Rule 71.1(d), SCRPC ("Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.").

Accordingly, the State moves for Applicant, through counsel, to amend his application to provide a more definite statement of his allegations of ineffective assistance of counsel pursuant to Rule 12(e), SCRPC and the Post-Conviction Procedure Act.

Esaw v. State, Return and Motion for More Definite Statement, p. 5-6, dated September 9, 2020.

This Court is in no better position to survey the entire 749 page record and determine what the Applicant is specifically referring to as either improper vouching or inflammatory statements. During the hearing there was no specification of these areas by the Applicant.

This Court must conclude that the Applicant has failed in his burden of proof in showing evidence where counsel should have objected to evidence or argument that was not objected. The PCR Act requires factual specificity of the allegations as opposed to conclusory statements. The Applicant failed in his burden of proof in showing a deficiency on the part of counsel to object to any particular testimony or comment as vouching or inflammatory. Similarly, he has wholly failed to prove Sixth Amendment prejudice by the alleged failure to object to unidentified matters. The conclusory allegation must be dismissed.

In addition, in light of this failure or proof or clarifying amendment prior to the evidentiary hearing, this Court is also constrained to conclude that the Applicant abandoned the conclusory allegation. For that alternative reason, this Court finds that it should be dismissed.

Sentencing Phase Ineffective Assistance where counsel is alleged to fail to investigate, develop and present mitigating evidence. (10(b); 11(b)).

In his initial *pro se* application, the Applicant alleged that counsel failed to present and investigate mitigating evidence for the sentencing portion of the trial. This Court finds that the Applicant was served on September 12, 2017 with a notice for a life without parole sentence pursuant to S.C. Code §17-25-45³⁴ on the violent offenses if a conviction occurred including murder, attempted murder and armed robbery. The sentence upon conviction for those offenses was mandatory.

As set forth at trial, the mandatory sentencing requirement had been met. The Solicitor presented the trial judge with the following information about the Applicant's qualification for the mandatory life sentences:

Solicitor Patterson : In 1993 he has a grand larceny of a vehicle, petit larceny; 1999, a possession of a pistol by an unlawful person; in 2001, he has a burglary second, armed robbery, and an assault and battery of a high and aggravated nature, two counts, which I would like the Judge to know that I did research on

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those cases, and those cases involve robbing Hispanics in mobile home parks in Jasper County. It was six incidents, Your Honor, and the Solicitor's Office down there made a recommendation of a 12-year sentence. So he did that back in '01.

... THE COURT: Thank you. I have before me the copy of the notice of the State to intend to seek life without parole filed September 12th of this year. I have attached to that certified copies of the County of Jasper sentence sheet for the crime of armed robbery, sentence imposed on March 19th of 2001 for armed robbery, the most serious offense in the eyes of the law. The prerequisite requirements of 17-25-[45](a) seem to have been met in that regard.

Trial Tr.p. 745-746.

The defense at trial made an argument in mitigation that Esaw was 42 with a 10th grade education from Jasper County and was working on his GED. Chehoski described him as a father of four children, who had worked in temporary services and outside work with a good work ethic. He stated he was skilled in building and construction work. Counsel Chehoski pointed out that his mother, Patricia Reid, had been present at the entire trial, as well as other family members were present, including his brother, who was present for a majority of the trial. Trial Tr.p. 747. Counsel Chehoski indicated that he became involved in the case in September 2016 and that Esaw had never indicated to him that he had committed the crime. The Applicant declined to make a statement.

This Court finds that the Applicant has failed to show that counsel was deficient in the sentencing portion of the case. The Applicant was subjected to a mandatory life without parole sentence. The sentencing presentation fell within the reasonable standard of criminal defense lawyers faced with the mandatory life sentence situation. Similarly, 6th Amendment prejudice has not been shown because there is not reasonable probability that the result of the sentence would have been different since it was mandatory as a matter of state law.

Cumulative Error Argument

Finally, Applicant contends the cumulative effect of counsels' errors "are significant enough to undermine the reliability of the results at trial." The Applicant cited *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006). The Fourth Circuit Court of Appeals has rejected the cumulative error analysis stating "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively." *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998).

In *Smalls v. State*, the Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. 422 S.C. 174, at 194, 810 S.E.2d 836 at 864 (2018) ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* at 188, 810 S.C. at 844 (internal citations omitted).

Here, the Court has assessed each allegation individually and deemed each had failed in its burden of proof to prejudice under *Strickland*. The further request to assess them collectively is without merit in this setting.

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.

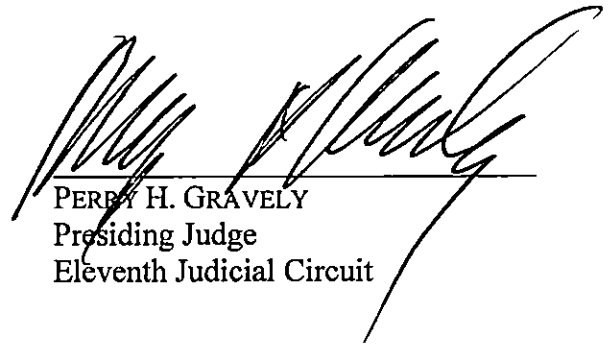
appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, 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.

May 21, 2025.



PERCY H. GRAVELY
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jul 16 2025

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2020-CP-32-01009

Ricky Esaw, #273842, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Ricky Esaw, appeals the order of the Honorable Perry H. Gravely, filed on or about June 6, 2025, and received by the undersigned on July 14, 2025.

July 16, 2025



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