



ALAN WILSON  
ATTORNEY GENERAL

January 2, 2014

The Honorable David Hamilton  
York County Clerk of Court  
P.O. Box 649  
York, South Carolina 29745

**Re: Berry S. Bolin, #317414 v. State of South Carolina**  
**2010-CP-46-0436**

Dear Mr. Hamilton:

Enclosed please find the original **Order of Dismissal** in the above-captioned case for filing in your office. By copy of this letter we are serving opposing counsel with the Order.

Sincerely,

Salley W. Elliott  
Senior Assistant Deputy Attorney General

SWE/ab

**Enclosure**

cc: T. Micah Leddy, Esquire



Greeley. He also presented the testimony of Roger Nivens, and Eric Brown. Also testifying at the hearing were Deputy Solicitor Willy Thompson and Rodney Nivens. In addition, this Court also had before it a copy of the transcript of Applicant's trial, the transcript of the motion hearing in this case held in July 2012 before Judge Alford, the records of the York County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the briefs and opinions from the direct appeals, the exhibits introduced into evidence at the hearing, and pleadings and letters submitted by the parties to this Court.

### PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the May 2006 term of the Grand Jury for York County for murder (2006-GS-46-1595), discharging a firearm into an occupied vehicle (2006-GS-46-1600), two counts of assault with intent to kill (2006-GS-46-1598 and 1599), assault and battery with intent to kill (2006-GS-46-1596), possession of a weapon during the commission of a crime of violence (2006-GS-46-1597), and possession of a pistol by a person under the age of twenty-one (2006-GS-46-1601). He was represented by Leland Greeley, Esquire. Applicant proceeded to trial on August 28, 2006 to September 6, 2006, before the Honorable John C. Hayes, and a jury. Judge Hayes granted Applicant's motion to quash as to the charge of possession of a pistol by a person under the age of twenty-one and denied Applicant's motion to quash the remaining indictments pursuant to the Protection of Persons and Property Act. Applicant was acquitted of possession of a weapon during the commission of a crime of violence and was found guilty of voluntary manslaughter as the lesser offense of murder, guilty of two counts of assault of a high and aggravated nature as

lesser offenses of assault with intent to kill, assault and battery of a high and aggravated nature as the lesser-included offense of assault and battery with intent to kill, and discharge of a firearm into a vehicle. He was sentenced to confinement for thirty (30) years for voluntary manslaughter, ten (10) years for the remaining charges, concurrent, and restitution of \$31,000.00.

A timely notice of appeal was filed on the Applicant's behalf and an appeal was perfected. The State also appealed the trial court's decision quashing the indictment for the charge of possession of a pistol while under the age of twenty-one. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences, State v. Bolin, 381 S.C. 557, 673 S.E.2d, 885 (Ct. App. 2009). The South Carolina Supreme Court affirmed the trial court's decision to quash the indictment for the charge of possession of a pistol while under the age of twenty-one. State v. Bolin, 378 S.C. 96, 662 S.E.2d 38 (2008).

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
  - (a) "due to counsel's failure to adequately advise applicant to accept the state's plea offer made during trial"; and
  - (b) "due to counsel's failure to challenge the imposition of restitution in the amount of \$31,000 without adequately considering the factors set forth in S.C. Code Sec. 17-25-322 (B)."

In his First Amended Application for Post-Conviction Relief, Applicant also alleges:

2. Ineffective assistance of trial counsel in that:
  - (a) trial counsel failed to "call several witnesses who were present at the scene who would

testify that they saw gunfire coming from the alleged victims' automobile, which would have bolstered Applicant's claim of self-defense . . .";

(b) trial counsel failed "to subpoena or otherwise obtain the videotape surveillance from the location where the alleged victims stopped their vehicle on the way to the police station, even though it was Counsel's contention at trial that they disposed of weapons at the stop";

(c) "trial counsel was deficient in his efforts to get (Applicant) to accept the guilty plea offer of 15 years to manslaughter" and "in failing to attempt to get the plea offer reinstated after the trial judge ruled that the 'Castle Doctrine' statute did not apply to the case because the statute was prospective in its application only."

3. Ineffective assistance of appellate counsel in that counsel failed to file a petition for writ of certiorari to the South Carolina Supreme Court.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

I.

**Ineffective Assistance of Trial Counsel**

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441. 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).


A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. at 668. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Where counsel articulates a valid reason for employing a particular trial strategy, counsel’s conduct will not be determined ineffective assistance of counsel Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006);

Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006).

**A. Failure to Call Witnesses**

Applicant contends he received ineffective assistance of trial counsel for counsel's failure to call witnesses he claims were present at the scene and could testify that they saw gunfire coming from the victims' automobile to support his claim of self-defense. Applicant asserts counsel's inaction allowed the State to argue in closing that Applicant had no witnesses to corroborate his theory of defense.

In support of his allegation, Applicant presented the testimony of Eric Brown. Mr. Brown testified that he has known Applicant since childhood and has been around Applicant and Applicant's family his entire life. He testified that he was present when the incident occurred. Brown stated that he was initially inside the house but stood on the front porch after learning the victims were in front of the house. Brown observed the victims' car and a second car in front of the house and saw gunfire coming out of the second car. He stated that Applicant and co-defendant Lee Owens returned fire. He testified that the person who fired the first shot from the second car looked like Jeff Buck. He admitted that he did not provide this information in his first statement to officers because he was uncertain that the person he saw was Jeff Buck. He also admitted that Buck is dead now and that he would like to see Applicant get a new trial. He further admitted that he was a "fighting" person and had prior convictions for fraudulent checks and failure to stop for a blue light. Brown denied that he and Christine Moss hid under a jeep but said he stood in place in the face of the gunfire. Brown stated that he was interviewed by the prosecutor and an investigator for Applicant's attorney before trial and told them he saw gunfire from a car before anyone from the house began shooting.

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Brown testified that he appeared at trial pursuant to subpoena and submitted to a polygraph examination the day of trial but was not called as a witness after the polygraph examination. He denied telling the polygraph examiner during the pre-test interview that he was uncertain that he saw a gun in the second car and that what he thought was gunfire from that car might have been reflections of flashes. He admitted he never saw flashes from the victims' car but only from a second car. He also testified that Applicant shot at the wrong car.

Applicant did not call Samantha Eason as a witness but introduced the statements provided by Eason to law enforcement officers right after the incident and also shortly before trial. In the first statement handwritten by Ms. Eason on February 19, 2005, Ms. Eason stated that "I was at the party, when a car pulled up outside. When I walked outside Lee Owens started shooting a gun. He shot the gun in the back window of the car. Then the people in the car started firing shots back towards us. So Barry (sic) had no choice but to fire back." (Applicant's exhibit 1). In an e-mail from Deputy Solicitor Willy Thompson dated August 21, 2006, Applicant's counsel was notified that Eason's version of the events was constantly changing and that she asked to provide a new statement. (State's exhibit 1). In a second statement dated August 11, 2006, Eason stated that the victims' car pulled up outside. She indicated that a second car also pulled up and that Jeff Buck started shooting at them from the second car. She stated that Lee Owen fired two shots in the air but Jeff Buck continued to fire. She also stated that Berry Bolin fired at Jeff Buck in self-defense. She indicated that the person who shot into the victims' car was not Owen but an unknown "short guy with dark hair." (Applicant's exhibit 2).

Deputy Solicitor Willy Thompson testified that he and former Solicitor Pope worked together on this case. Thompson testified that he was provided with the statements given by


witnesses and produced those statements along with other discovery material to Applicant's trial counsel on an on-going basis as information was discovered or provided, including discrepancies or conflicts between earlier statements provided by witnesses to officers and information given in later interviews with the individuals. Thompson communicated with trial counsel orally and by email. (See also State's exhibit 1).

Respecting Eric Brown, Thompson testified that Brown failed to appear for several scheduled meetings but that he ultimately spoke with Brown after discovering him at another witness' home. Thompson indicated that the statements and information provided by many of the witnesses about what happened at the scene changed wildly such that he had the witnesses testify as to the version which suited them at trial and then examined them on the inconsistencies between their trial testimony and earlier statements provided to officers. Deputy Solicitor Thompson testified that Brown agreed to take a polygraph on the first day of trial after failing to appear for a polygraph scheduled at an earlier time. The information provided by Brown in the pre-polygraph interview and as reflected in the polygraph report conflicted with the earlier statement Brown provided shortly after the incident, including equivocation as to whether he saw a gun and whether he <sup>saw</sup> reflections or gunfire. Brown indicated in the pre-polygraph interview he would have returned gunfire to the second car from which the shots were fired, and that the wrong car was fired upon. Thompson testified that he provided information to trial counsel about the results of the polygraph and the discrepancies between the information provided by Brown during the pre-polygraph interview and the prior statement given by Brown to officers, including uncertainty about whether he saw a gun and whether he saw reflections or gunfire as well as

Brown's comment that "they" shot at the wrong car because the gunfire did not come from the victims' vehicle.

As to Samantha Eason, Thompson stated he provided Applicant's attorney with the first statement Eason wrote for officers in which she stated she observed a car pull up in front of the house, Lee Owens shoot into the back window of the car, the car return gunfire, and Applicant firing a gun. Thompson stated that he had difficulty speaking with Eason before trial but was ultimately able to do so. When Eason was interviewed, she provided completely different information from that contained in the statement she prepared for officers. She asked to prepare a written statement at that time and was permitted to do so. Thompson indicated that Eason's subsequent statement conflicted significantly with her earlier statement. He provided the statement to Applicant's attorney and confirmed the fact of the discrepancy in an email to counsel. Thompson testified that, at the time of the incident, Eason had been dating Robert Beverly who testified at trial but was dating co-defendant Owens by the time of trial. Eason altered her subsequent statement to say that the individuals in a car were shooting and Owens responded.

Thompson acknowledged that Bradley Deal and Robert Beverly indicated they saw gunfire coming out of a car and that Beverly recanted that version of the facts. Thompson stated that despite recantations about that fact, the jury was presented with the evidence that at some point more than one witness said they saw gunfire coming from a car. Thompson elected not to present Eason and Brown as State's witnesses because he was able to establish the pertinent facts without them and preferred to cross-examine them on the inconsistencies in their statements, difficulty interviewing them and possible bias arising from their close relationships with the

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individuals involved.

Trial counsel testified respecting his vast experience in the trial and appeal of criminal matters as a prosecutor and defense attorney. He stated he was retained to represent Applicant the week following the incident. Counsel testified that he initially conferred with the Applicant about Applicant's version of the facts and surrounding circumstances, including the statements Applicant provided to officers and the identity of individuals present at the scene who might have been witnesses to the incident. Counsel discussed the pending charges and the elements necessary for the State to meet its burden of proof. He also discussed possible defenses for trial and reviewed all of the discovery material with Applicant, including witness statements, photographs of the victims' car, 911 recordings, diagrams, the autopsy, ballistics and gunshot residue reports, and admissions from Applicant during telephone conversations with his father. Counsel conducted an independent investigation into the ballistics evidence and hired a private investigator to assist in the investigation of this case, including contacting and interviewing witnesses. Counsel discussed the results of counsel's investigation with Applicant, including the shifting versions of the facts provided by potential witnesses. Counsel testified that the defense at trial was an attack upon the State's case and presentation of the defense of others. Counsel testified that he was aware of all of the evidence the State planned to present and discussed the evidence and State's case with Applicant prior to trial.

The individuals identified by Applicant as present at the scene and as noted in the discovery material received from the State were independently interviewed. Counsel determined that some individuals at the scene provided different versions from each other and from their own prior statements. Prior to trial, counsel identified potential defense witnesses but as time

passed, the potential witnesses equivocated about what transpired at the scene and became unconvincing. Counsel determined that Bradley Deal would be called as a defense witness. However, the State called Mr. Deal as a witness and the information necessary to the defense was elicited from Deal without the necessity of calling him as a defense witness. Applicant admitted to counsel that he fired the gun and never told counsel that he saw a second car.

Counsel testified that he did not call Eric Brown as a witness because the purported shooter in the second car, Jeff Buck, died of a drug overdose approximately six weeks after the incident and counsel's investigation did not support Brown's claim that there was a second vehicle at the scene. Counsel also did not call Brown as a witness because counsel did not want to elicit testimony that a defense witness saw shots being fired from a second car without also testifying that shots were also observed coming from the victims' car. Further, counsel did not want the jury to hear Brown's statement that Applicant shot the wrong car as conveyed by Brown to the polygraph examiner and testified to by Brown during the post-conviction relief hearing. Counsel also stated that the other information Brown could offer was cumulative to evidence elicited at trial. Counsel further stated that he would have not have presented Brown to testify at trial in the same manner as Brown testified at the post-conviction relief hearing because it would have destroyed any reason for Applicant to shoot at the victims' car if shots were fired from a second car that was not that of the victims.

Counsel stated Samantha Eason was under consideration as a defense witness until he conferred with counsel for Applicant's co-defendant in early August and learned that she was equivocating in her version of the facts and was not reliable as a defense witness. It was counsel's testimony that the Brown and Eason lacked credibility and would reflect negatively

upon Applicant if called as witnesses for the defense. Counsel testified that he made a strategic decision not to call Brown and Eason as witnesses for the defense and the decisions were based upon the facts of the case, counsel's investigation and experience, the manner in which Brown and Eason would come across to the jury, the testimony they would offer, their believability, and whether they would be tied to the Applicant in a negative manner.

The record reflects that Bradley Deal testified that he saw an arm extend out of the front passenger side of the victims' car followed by three muzzle flashes. Other witnesses presented by the prosecutor admitted giving prior statements indicating that someone was firing from the car. It was counsel's testimony that, in addition to the testimony offered by Bradley Deal and admissions from other witnesses about their prior statements, other circumstantial evidence was developed to support the fact that someone in the victims' car was shooting a gun, including the examination of Travis Falls, forensic evidence respecting the bullet holes and the location of the victims in the car, and Holly McCarter's testimony that she pulled the victims' car over at American Auto to change drivers but was still driving the car when it arrived at the Clover Police Department. It was counsel's defense theory that the victims stopped at American Auto to dispose of the gun. The fact that Holly McCarter was driving the victims' car when it arrived at the Clover Police Department and that the victims were uncooperative was established through the prosecutor's direct examination of Sergeant Trabue and was later emphasized in counsel's cross-examination of Sergeant Trabue. Moreover, three law enforcement officers testified that individuals present at the scene reported that shots were fired from the victims' car.

This Court finds that Applicant failed to establish that counsel's failure to call Eric Brown and Samantha Eason as defense witnesses constituted ineffective assistance of counsel.

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First, this Court finds that Applicant failed to present Eason to testify at the post-conviction relief hearing. Therefore, any claim of prejudice for failing to present Ms. Eason as a defense witness is purely speculative. See Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (stating any finding of prejudice is purely speculative in a claim counsel was ineffective for failing to present a witness at trial where the applicant fails to present the testimony of the witness at the post-conviction relief hearing); see also Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (same); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (same). Mere speculation as to what Ms. Eason's testimony might have been is insufficient to satisfy the Applicant's burden of showing prejudice. "In a post-conviction relief action, the Applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective." Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701, FN 2 (2006). This Court refuses to engage in speculation particularly in view of Ms. Eason's widely divergent prior statements. Applicant can only speculate what Ms. Eason might have said when called to testify under oath. Moreover, counsel considered Eason's version of the facts to be even more inconsistent than that of Eric Brown. Eason's wildly inconsistent versions of the facts would cause the jury to question Eason's credibility in a manner that might be negative to Applicant's defense. The claim respecting Ms. Eason is without merit.

Second, this Court finds that trial counsel employed a reasonable trial strategy of eliciting evidence that shots were fired from the victims' car through the testimony of Bradley Deal, law enforcement officer testimony and other evidence rather than using the ever-shifting, recanting, and unreliable witnesses now suggested by Applicant. This Court notes counsel's concern that Eric Brown's version of the facts was not consistent, that his testimony regarding a "second car"

would have conflicted with Applicant's theory of the case, and his testimony that Applicant shot the wrong car would have been harmful to the defense. This Court agrees and so finds. Deputy Solicitor Thompson testified that he was not surprised that counsel declined to call either of these witnesses.

This Court finds that counsel employed a trial strategy of using evidence other than the testimony of Brown and Eason to corroborate testimony that shots were fired from the victims' automobile. This Court finds counsel's trial strategy in this respect to be reasonable based upon the facts of the case, counsel's investigation, and counsel's experience in the trial of murder cases. Eric Brown and Samantha Eason were potentially harmful to Applicant's defense and counsel was able to present the necessary evidence in a manner that was more favorable to Applicant. See Simpson v. Moore, 367 S.C. 587, 603, 627 S.E.2d 701, 709-710 (2006) (stating where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (same). McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (same). This Court finds that counsel's action respecting these witnesses fell within the range of expected professional norms and was neither deficient nor prejudicial. Rather, it was a matter of reasonable trial strategy. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Applicant's allegation respecting counsel's failure to call Eric Brown and Samantha Eason as defense witnesses is without merit and is denied.

#### **B. Failure to Subpoena or Obtain Videotape**

The Applicant next complains that counsel provided ineffective assistance of counsel for counsel's failure to subpoena or otherwise obtain a videotape from surveillance cameras located

at American Auto Sales to support the defense theory that the victims disposed of a gun at that location. He complains that counsel's inaction resulted in the loss of the evidence.

Applicant presented the testimony of Roger Nivens, the owner of American Auto Sales in Clover, South Carolina. Nivens testified that he had a surveillance system at American Auto at the time of the incident. He stated that unidentified county officers were aware of the surveillance system because officers obtained a video from him in the past when a driver backed into the building there. Roger Nivens testified that no one asked him for the video from the surveillance equipment for the night of the incident and that he would have provided it if asked. He described the property as having a long drive-way leading to a sales lot. He stated that the surveillance cameras were focused on car lot. He admitted that he never reviewed the videos and does not know whether the cameras were functioning properly or recorded anything on the night in question. He also was unaware that a search of his business and surrounding area was later conducted by law enforcement officers. He admitted that he is not always present at the business and stated that his son is present as is Applicant's co-defendant, Lee Owens, who worked for the business at the time of the incident. He admitted that Owens would have known about the existence of the surveillance cameras and that Owens never requested the recordings from the surveillance equipment. He admitted he knew of co-defendant Lee Owen's "trouble" when it occurred and that Owens returned to work for him after Owens was released from prison. He also did not recall speaking with the prosecutor's investigator about the surveillance video or recording and believes the system automatically recycled every thirty (30) days. He indicated the system was discarded when he moved the business in 2010.

Deputy Solicitor Willy Thompson testified that the initial information received about the

American Auto Sales location was from the female victim who advised that she stopped there on the way to the Clover Police Department to change drivers. Thompson stated that the sheriff's department also received a call from Applicant's investigator advising that a gun purportedly used by the victims was possibly discarded by the victims at that location. Thompson directed the sheriff's department to search the area. Several months later, Thompson directed a detective to inquire whether American Auto had surveillance equipment but learned that a video or other recording was not available. Thompson visited American Auto Sales and the surrounding area prior to trial. Thompson understood that the victims' car, if it stopped to change drivers, did so at the edge of the parking lot, barely off of the road. Thompson testified that he recently sent his investigator to American Auto to speak with Rodney Nivens about the existence of a video surveillance on the night of the incident and the information provided by Nivens to the investigator and to Thompson in the courtroom on the day of the post-conviction relief hearing differed with the testimony Nivens offered at the hearing.

Thompson testified that the ballistics evidence established that the shots fired into the victims' car occurred as the car was pulling away from the scene and refuted the defense theory that a gun was being fired from the victims' vehicle. The front passenger window was closed when the car was fired upon; otherwise, it would have broken when bullets entered the middle of the front passenger door and the window was found in an upright and undamaged condition. The window was found rolled up with blood smears on the interior side which could not have happened if the window was rolled down and recessed into the door frame to allow shots to be fired. The smears also lined up with smears on a portion of the window that could not be rolled down. Also, the configuration of the back passenger compartment would have made it extremely

difficult for someone to point and fire as alleged by the defense. The person shooting out of the car would have to lean out considerably and aim back at an angle, all of which was inconsistent with the location of the blood on the interior of the car. Also, no shell casings were found for the rounds allegedly fired from the victims' car and no bullets were imbedded in the homes or cars parked in the line of fire. Lastly, Applicant, in his statement to officers, admitted he never saw gunfire from the victims' car and admitted in a telephone conversation with his father that he did not see a second car and did not recall anyone shooting except himself and his co-defendant, Lee Owens.

Thompson also stated that the fact that some of the individuals present at the scene reported gunfire from the victims' car was presented to the jury even if the witnesses attempted to recant certain versions of their earlier statements. The earlier statements clearly presenting these facts were explored in testimony during trial. Bradley Deal testified to that fact and did not recant.

Trial counsel testified that he asked his investigator to begin witness interviews in March after the February incident. At some point thereafter, counsel's investigator received information that the victims stopped at American Auto on the way to the Clover Police Department. A video was not mentioned. Counsel directed the investigator to go to the area of American Auto to search for a gun. The investigator contacted the sheriff's office and deputies conducted a search for a gun in the area of American Auto as well. A gun was not located. Counsel was uncertain when the investigation of American Auto occurred but indicated it would have been at some point after the investigator was contacted for investigative services on March 3 but likely in May. Counsel testified that Applicant also told him the victims stopped at American Auto but did so

after it had been discovered by counsel's investigator. At some point counsel explored the possibility of obtaining a video from the surveillance cameras but counsel was not successful. Nevertheless, counsel developed a trial strategy for establishing that the victims had a gun through cross-examination of officers, testimony about the location of Travis Falls' wound, evidence indicating the victims were aware guns were present at scene before the victims traveled there, Holly McCarter's statement indicating that she traded drivers at American Auto when other evidence revealed she was driving upon arrival at the Clover Police Department, the failure of officers to test the victims for gunshot residue, and the absence of a large stick.

Rodney Nivens testified that he manages American Auto for his father. Rodney Nivens testified that in 2006, American Auto had one video camera located to record the parking area in front of the building, two other cameras facing the car lot, and another camera inside the building. He testified that he reviews the surveillance recordings only when an issue arises with the property or one of his cars. Rodney Nivens vaguely recalled that officers visited the property. He did not reveal the existence of the surveillance equipment to officers and conceded that there were areas of the property that would not be captured by the surveillance equipment. He also stated that the recording from the surveillance cameras recycled approximately every 28 or 29 days. He acknowledged that Lee Owens worked for him at the time of the incident, was charged as a co-defendant in this case, was aware of the existence of the surveillance equipment at the time, and did ask for access to the recordings. The evidence reflects that Eric Brown also worked at American Auto.

This Court finds that Applicant failed to establish that counsel's failure to obtain surveillance camera footage of the victims' alleged stop at American Auto Sales constituted

ineffective assistance of counsel. Specifically, this Court finds that Applicant failed to establish the requisite prejudice - that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668 (1984). Other than by pure speculation, Applicant failed to establish that the surveillance equipment was in working condition, that it produced a video or other depiction that could have been obtained by counsel if requested earlier, or that the video or other depiction was favorable to Applicant's defense. The investigating law enforcement officers were never able to acquire a video or other depiction of the alleged stop and Deputy Solicitor Thompson testified that the view range of the surveillance cameras would likely have not included the area where the victims pulled over. The owner and manager of American Auto Sales testified that the security camera footage is automatically recycled or wiped clean every twenty-eight (28) to thirty (30) days and therefore any footage that might have existed would not have been available. It should be noted that counsel expressed doubt that the victims stopped at American Auto. Moreover, counsel developed a trial strategy in which he used the possibility that the victims disposed of a gun at American Auto to his advantage at trial. Had counsel obtained the video, it might have precluded that favorable use at trial.

The Applicant failed to establish there is a reasonable probability the result of the trial would have been different had counsel been able to obtain and present the surveillance footage from American Auto at trial. Instead, the Applicant engages in pure speculation. See Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006) (stating applicant failed to meet his burden of proof when he failed to show that further investigation would have led to a different result). Counsel

was able to use other evidence and inferences to suggest the victims disposed of a gun at that location. The allegation is without merit and is denied.

### **C. Failure to accept plea offer**

The Applicant also alleges in his application for post-conviction relief that counsel was “deficient in his efforts to get (Applicant) to accept a guilty plea offer of 15 years to manslaughter.” He also complains that Counsel “was deficient in failing to attempt to get the plea offer reinstated after the trial judge ruled the ‘Castle Doctrine’ statute did not apply to this case because the statute was prospective in its application only.”

Trial counsel testified that he engaged in plea negotiations with the State but did not receive an acceptable offer from the State before trial. At the conclusion of the first day of trial during which pre-trial matters were presented, the trial court denied Applicant’s motion respecting the Protection of Persons and Property Act at that point but indicated it would entertain the matter as it might relate or impact directed verdict and or other matters later during trial. The trial court indicated that the facts of the case did not appear to fall within the provisions of the Act but the court would review the issue further. The record reflects that Applicant was present in court when these statements were made by the trial court.

On the second day of trial, the State extended an offer to allow Applicant to enter guilty pleas to a series of charges, the most serious of which was voluntary manslaughter for a negotiated sentence of fifteen (15) years and concurrent sentences on the other charges. Prior to that time, the State’s offer had been for a sentence of twenty (20) years. Applicant’s co-defendant, Lee Owens, entered a nolo contendere plea pursuant to the State’s offer when the trial resumed the second morning. It was counsel’s recollection that this more favorable plea offer

was extended to Applicant by the State on the heels of Owens' plea and sentencing. Counsel discussed the State's plea offer, the trial judge's rulings up to that point and the trial judge's comments to co-defendant Owens when Owens was sentenced. Counsel recommended that Applicant accept the plea offer and provided specific reasons for his recommendation, including the trial judge's comments during co-defendant Owens' plea, the results of his investigation, the facts of the case, strengths and weaknesses of the State's case and the defense, the Protection of Persons and Property Act, counsel's experience in the trial of murder cases and counsel's specific experience with the trial judge. In addition to discussions with Applicant, counsel made arrangements for Applicant's family to meet with Applicant to discuss the plea offer. Counsel advised Applicant's family members that it was his recommendation that Applicant accept the plea offer. Despite counsel's discussion and recommendation, Applicant rejected the plea offer. It was counsel's recollection that once the plea offer was declined, the offer would not be revisited or reinstated by the State.

Deputy Solicitor Willy Thompson testified that he engaged in plea discussions with Applicant's attorney. Thompson initially extended an offer which allowed Applicant to plead "straight up" to voluntary manslaughter and some of the companion charges. Later, he offered a cap of twenty (20) years, which was rejected. During trial, he offered voluntary manslaughter for a negotiated sentence of fifteen (15) years and concurrent sentences on the other charges. Thompson testified that the trial judge provided Applicant the opportunity to speak with his family and attorney after which Applicant rejected the plea offer. Thompson stated that he did not and would not have agreed to the guilty plea after that point in the trial.

This Court finds that Applicant failed to establish that counsel provided ineffective assistance in connection with Applicant's rejection of the guilty plea offer or in failing to revisit the matter with the prosecutor later during trial. Counsel conferred with Applicant extensively about his options and the possible consequences of accepting or rejecting the offer extended by the State on the second morning of trial. Counsel also extensively conferred with Applicant's family member about the offer and counsel's recommendation and made arrangements for them to meet with Applicant prior to Applicant's decision to reject the plea offer. Deputy Solicitor Willy Thompson confirmed that counsel looked "dejected" when he returned to the courtroom after failing to convince Applicant to use the offer to his advantage. The Court is satisfied that counsel did everything he could to convince Applicant to accept the plea offer and finds that Applicant freely, knowingly and voluntarily rejected the plea offer. This Court also finds that, once the plea offer was rejected, it was no longer available to Applicant and any efforts by counsel to revisit the offer later during trial would have been rejected by the prosecutor.

Applicant's complaints respecting counsel and the guilty plea offer are without merit and are denied.

#### **D. Victim's Gang Tattoo**

To the extent Applicant suggested at the evidentiary hearing that counsel provided ineffective assistance for failing to present autopsy photographs of the deceased victim's gang tattoos, this Court finds the claim to be lacking in merit and must be denied. When questioned about the matter, trial counsel testified that the jury was already aware of the victim's background and propensity for violence through presentation of other evidence and that presenting autopsy photographs of the deceased victim to make a point about a gang tattoo

would have been detrimental to Applicant's case. It was counsel's opinion that the evidence would have caused greater harm to Applicant than any benefit to be gained in view of the other evidence presented to the jury of the deceased victim's propensity for fighting and violence. This Court finds counsel did not offer the photographs as a matter of trial strategy and in an effort to present the most favorable defense possible to the jury. This Court finds counsel's strategy to be reasonable and that counsel's failure to present the photographs did not constitute deficient performance. This Court also finds that Applicant failed to establish the requisite prejudice in view of the other evidence presented at trial. The allegation is without merit and is denied.

## II.

### **Ineffective Assistance of Appellate Counsel**

The Applicant alleges in his Application for Post-Conviction Relief and First Amended Application that he received ineffective assistance of appellate counsel for counsel's failure to pursue a Petition for Writ of Certiorari to the South Carolina Supreme Court after he was unsuccessful in the South Carolina Court of Appeals. This Court finds the allegation to be without merit.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to

appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, Id. at 537. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

To prove prejudice when an Applicant claims ineffective assistance of counsel, he must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, he must prove prejudice by showing he would have prevailed on appeal had counsel made the argument he claims he did not make. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); see Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

This Court finds that counsel was successful in representing Applicant in the State's appeal from the trial court's decision to quash the indictment on the charge of possession of a weapon by a person under the age of twenty-one. Counsel also represented Applicant in the appeal pursued on Applicant's behalf challenging the convictions and sentences. Counsel testified that, at the time of Applicant's trial, the Protection of Persons and Property Act, S.C. Code Ann. Section 16-11-410 et seq, was a recent enactment and the issues of interpretation, proper procedure and retrospective application of the provisions of the Act had not been addressed. Counsel stated he hoped the Act would be applied retroactively at trial but

acknowledged that the Act contained a saving clause that could be interpreted as unfavorable to retroactive application. Counsel pursued the issues at trial because the question had not been resolved and counsel hoped the interpretation might be favorable to Applicant but conceded it likely would not be applied to Applicant's case. Counsel discussed all of these factors with Applicant before trial and made a pre-trial motion to quash the indictments and end prosecution pursuant to the Act in an attempt to invoke immunity. He also moved for a directed verdict at trial on the indictments based upon S.C. Code Ann. Section 16-11-450. He further asked the trial court to charge the jury on the presumptions contained in the Act. The motions and requests were denied by the trial court.

In preparing for the appeal, counsel reviewed his trial notes and the transcript to refresh his recollection on all matters presented to the trial court and preserved for appeal. Counsel devised an appellate strategy as is reflected in the briefs submitted on Applicant's behalf, based upon the facts of the case, the research conducted and counsel's experience in the trial and appeal of criminal matters. Counsel also consulted with and received input from other defense attorneys about the Protection of Persons and Property Act. On appeal, counsel argued that the trial court erred in refusing to instruct the jury on the legal presumptions contained in S.C. Code Ann. Section 16-11-440 and in refusing his motion for a directed verdict based upon the Act. The South Carolina Court of Appeals opined that the Act went into effect four months after the events leading to the charges in this case, that the Act did not apply retroactively to Applicant's case, and that the trial court did not err in refusing Applicant's requests. State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (2009).

Counsel considered filing a petition for rehearing in the South Carolina Court of Appeals

and petition for writ of certiorari in the South Carolina Supreme Court and discussed those options with Applicant and his family. Based upon his reasonable professional judgment, the facts of the case and his experience as a criminal trial and appellate practitioner, counsel ultimately concluded that the petitions would not be successful given the rulings of the court and would only further delay Applicant's ability to seek post-conviction relief as a potential remedy. Applicant alleges that counsel provided ineffective assistance on appeal for failing to pursue a Petition for Writ of Certiorari from the Court of Appeals to the South Carolina Supreme Court. This Court finds the claim to be without merit.

First, the allegation presented by Applicant in his Application for Post-Conviction Relief and First Amended Application is not whether appellate counsel was ineffective for failing to raise a meritorious issue; rather, the issue is whether appellate counsel was constitutionally ineffective for failing to pursue a discretionary appeal. This Court finds that appellate counsel was under no duty to do so, and that Applicant had no constitutional right to effective assistance of counsel when seeking discretionary appellate review. Our Supreme Court has held appellate counsel is under no duty to pursue rehearing and/or a petition for writ certiorari following the decision of the Court of Appeals in a direct appeal of a criminal case. Douglas v. State, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006). In addition, the Sixth Amendment right to assistance of counsel extends only to the first right of appeal. State v. Clinkscales, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995); *see also* Wainwright v. Toma, 455 U.S. 586, 587, 102 S.Ct. 1300, 1301 (1982) (a criminal defendant has no constitutional right to counsel to pursue discretionary state appeals). Thus, appellate counsel's failure to pursue review in the South Carolina Supreme

Court did not deprive Applicant of the effective assistance of counsel because Applicant had no constitutional right to counsel for a discretionary writ.

Even assuming appellate counsel had a duty to pursue certiorari, this issue is without merit. Applicant failed to show that our Supreme Court would likely have granted review, and thereafter issued a decision favorable to Applicant. In view of the unanimous determination by our Supreme Court that the Protection of Persons and Property Act does not apply retroactively to crimes committed before the effective date of the Act and that Court's specific approval of the Court of Appeals decision in this case that the Act cannot be applied retroactively, no deficiency or prejudice can be established by Applicant. See State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013) (stating that right to immunity from criminal liability under Protection of Persons and Property Act did not apply retroactively to defendant charged with murder prior to the Act's effective date).

On the contrary, this Court finds that counsel exceeded what was required for reasonable effective assistance of appellate counsel in his treatment of the then-newly enacted Protection of Persons and Property Act and in calling upon our Court of Appeals to interpret the language in the Act and rule on whether it would benefit Applicant. This Court finds that counsel properly preserved the issues and thereafter pursued the most meritorious of the claims in our Court of Appeals. Counsel understood that our appellate court might ultimately determine the Act would not be applied retroactively but felt it best to preserve and pursue the issues for Applicant with the hope he might be successful. This Court finds the Applicant's allegation respecting appellate counsel is without merit and is denied.

III.

**Admission of the Prosecutor's File**

The record before this Court reflects that Applicant moved for leave to conduct discovery in this post-conviction relief action pursuant to S.C. Code Ann. Section 17-27-150 which requires a showing of good cause before discovery is permitted in a noncapital post-conviction relief case such as is involved here. Applicant requested access to all files and documents in the possession of the solicitor relating to Applicant and Travis Falls. He also moved for a privilege log of materials not made available. The Respondent made Return to the motion and a hearing was held. The deputy solicitor who prosecuted Applicant's case appeared on behalf of his agency and opposed Applicant's request for unfettered access to the prosecutor's files, asserting work product privilege and Applicant's failure to show "good cause." The Honorable Lee S. Alford presided and ruled that absent a showing of good cause for some specific document or set of documents, Applicant would not be granted unfettered access to all of the State's documents and files respecting Applicant's prosecution. Judge Alford ruled that Applicant would not be allowed access to everything in the State's files "unless [Applicant] can show me something specific that you think you will find there [and] have good reason to believe [Applicant is entitled to it]." (July 2012 Tr. 42). Judge Alford further held, "But I simply am not going to set the precedent of requiring the solicitor to open their file in every single case when there is absolutely no good cause shown and simply just [let Applicant] explore their files." *Id.* Judge Alford directed the prosecutor to provide all notes and information relating to a possible video from American Auto Sales as well as anything else relating to the grounds raised in the Application for Post-

Conviction Relief and First Amended Application for Post-Conviction Relief. Judge Alford ruled that Applicant would be permitted access to other portions of the prosecution files if and when Applicant was able to identify the specific documents and support the request with specific reasons why Applicant should be provided with the documents, material or information. The reasons advanced by Applicant to support good cause was that access to the file in discovery will avoid delay at the hearing and speculation that Brady or Rule 5 material might be found.

In addition to information about American Auto, Applicant also specifically requested all of the notes taken by the prosecutor and his investigator while interviewing possible witnesses in preparation for trial on the ground the notes might contain exculpatory or impeaching information that was not disclosed to Applicant for trial. The prosecutor opposed the request asserting work product privilege. The prosecutor also asserted that he provided Applicant's trial attorney with any exculpatory and impeaching information as well as any information that might be unfavorable to the defense that was revealed during interviews as the information became known to the prosecutor for trial. Applicant did not revisit discovery before the evidentiary hearing by identifying the specific documents sought other than a possible video from American Auto which was never in the prosecutor's possession.

Thereafter, Applicant subpoenaed the prosecutor entire file for the post-conviction relief evidentiary hearing. The prosecutor produced four large boxes of materials. The contents of one box had been fully disclosed to Applicant and counsel for the Respondent prior to Applicant's discovery motion. Counsel for Respondent has also not been provided access to any documents or files in the prosecutor's possession except for the one box of documents provided to both

parties. Applicant offered the contents of all of the boxes as evidence at the hearing. Respondent opposed wholesale admission of the entire contents of the four boxes on the ground Applicant failed to show that the entire content of each of the boxes was material and relevant to the issues presented for litigation at the hearing as alleged in the Application for Post-Conviction Relief and First Amended Application for Post-Conviction Relief. Respondent also opposed admission of the contents of the boxes into evidence on the ground Applicant was attempting to revisit and circumvent Judge Alford's earlier ruling on the discovery without following the directions and procedures outlined by Judge Alford at the motion hearing for obtaining access.

After the hearing and pursuant to Applicant's letter dated October 24, 2012 in response to a privilege log submitted by the prosecutor, Applicant moved to have the post-conviction relief court conduct an *in camera* review of the polygraph report of Eric Brown and the content of two folders in the prosecutor's file containing handwritten notes of the prosecutor and the prosecutor's investigator on the ground the notes might contain Rule 5 or Brady material. The prosecutor listed the two folders of notes as privileged work product. Applicant also asked that all of the remaining material in the prosecutor's boxes of files be filed with the court for examination, if necessary. By letter dated November 21, 2012, Respondent did not oppose admission of the polygraph report into evidence but opposed the wholesale admission of the solicitor's entire file respecting the underlying prosecution as well as Applicant's request that this Court conduct an *in camera* review of the contents of the two folders based purely upon Applicant's speculation the items may contain Rule 5, SCRCrimP, and Brady material. Respondent objected on the grounds Applicant failed to show the entire prosecution file was

relevant to any of issues identified by Applicant in the pleadings requesting post-conviction relief, access to the material in the file was previously denied to Applicant, and Applicant made an insufficient showing allowing for an *in camera* review. The prosecutor also responded to Applicant's request by letter dated December 11, 2012, agreeing to release the contents of the folder relating to Eric Brown's polygraph and indicating the contents were made known to counsel for Applicant at the time the original trial. As to the handwritten notes, the prosecutor indicated the notes were taken in preparation for trial, were work product not subject to discovery, did not relate to any issues alleged by Applicant in his pleadings, access had been ruled upon by Judge Alford, and that all impeachable or exculpatory information was disclosed to Applicant at the time of the original trial. Applicant responded by letter dated December 18, 2012 contending the prosecutor failed to establish that the notes are work product.

This Court finds that the discovery of the folders sought by Applicant containing notes taken by the prosecutor and the prosecutor's investigator during interviews with potential witnesses in preparation for trial constitutes attorney work product. See Rule 26(b)(1), SCRCF ("Parties may obtain discovery regarding any matter, *not privileged...*") (emphasis added). Pursuant to the Rules of Civil Procedure, a party seeking protected work product must show a substantial need for the materials and that he cannot obtain the material sought, or a substantial equivalent thereof, without undue hardship. Rule 26(b)(3), SCRCF. The only item to which Applicant cited specifically as potentially discoverable within the State's files was possible surveillance footage from American Auto Sales. Deputy Solicitor Thompson testified, and this Court is satisfied, that the State was never in possession of any such surveillance footage. As this

was the only potentially discoverable material contained within the State's files to which Applicant could specifically and with good cause point, the Court is sustaining the objection to admission of the four boxes of documents and other material in bulk as evidence in this case for Applicant's failure to establish the contents are material and relevant to the issues raised by Applicant in his Application for Post-Conviction Relief and First Amended Application for Post-Conviction Relief and otherwise admissible pursuant to our evidentiary rules. The relevance of all of the documents in the prosecution file and admission of the documents must be reviewed on an individual basis rather than by way of wholesale admission of the entire file which precludes this Court from being able to adequately consider and rule upon the propriety of admitting each document or category of documents in the file into evidence.

This Court also denies Applicant further access to the State's files. To allow Applicant the access he requests would amount to a proverbial fishing expedition. The Court hereby finds that the documents contained in the State's files that have not yet been produced to Applicant are privileged work product, not subject to discovery, and not shown to be relevant to the issues as alleged at the time of the evidentiary hearing. Applicant does not identify any specific material that he alleges should have been provided before trial. He simply wants this Court to survey trial preparation notes made by the prosecutor and the prosecutor's investigator for a determination whether anything contained in the notes might be subject to Brady or Rule 5. The showing is not sufficient and a similar argument has already been rejected in this case by Judge Alford. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (stating that Rule 5 exempts internal prosecution documents made in connection with an investigation and Brady only requires

disclosure of impeachment or exculpatory evidence); State v. Myers, 359 S.C. 40, 596 S.E. 2d 488 (2004) (stating Rule 5 exempts work product and internal prosecution documents made by an attorney for prosecution.). Applicant merely speculates that notes taken during interviews with witnesses in preparation for trial might contain exculpatory or impeaching information which was not previously disclosed. Contrary to Applicant's contention, Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006) and Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), do not require the prosecution to provide any and all notes of witness interviews taken for or during trial preparation. Disclosure is only required as to facts and information learned that are exculpatory or impeaching. Deputy Solicitor Thompson testified at the evidentiary hearing that anything of that nature was provided to trial counsel and that the notes in question pertain to internal prosecution documents made in preparation for trial, including personal recollections, mental impressions, and matters respecting case theory and strategy. See Hickman v. Taylor, 329 U.S. 495 (1947). Applicant did not allege or establish that any evidence was suppressed by the State, favorable to him or otherwise.

#### IV.

#### **Request to Amend**

Subsequent to the evidentiary hearing in this case and this Court's communication to the parties that it intended to deny the application for post-conviction relief, Applicant moved for this Court to permit him to amend his pleadings to add new allegations as set forth in a Second Amended Application for Post-Conviction Relief filed by Applicant after a January 8, 2013, letter expressing his desire to amend. Respondent opposed the request in a response dated

January 18, 2013, asserting that it had no notice of the new or altered claims at the time of the evidentiary hearing, that lack of notice precluded investigation and presentation of evidence respecting the new or altered claims, and that the new claims were untimely, were matters that could have included in the application or amended application through the exercise of due diligence, leave Respondent without the opportunity to defend and would greatly prejudice Respondent. Respondent asserted it did not agree to litigate these new or altered claims at the evidentiary hearing, tacitly or otherwise and that Applicant was taking an unfair advantage. Applicant thereafter filed and served the Second Amended Application for Post-Conviction Relief and supported the request for permission to amend with argument presented in a letter dated January 25, 2013. Respondent submitted a reply by letter dated February 1, 2013, reiterating its objections.

This Court denies Applicant's request to amend as provided in the Second Amended Application for Post-Conviction Relief. Rule 71.1(a), SCRCP, provides that post-conviction relief actions are governed by the South Carolina Rules of Civil Procedure to the extent they are not inconsistent with the Uniform Post-Conviction Relief Procedure Act. Inasmuch as the request to amend is formally before the Court, this Court is treating the Applicant's request to amend with the Second Amended Application for Post-Conviction Relief as a Motion under Rule 15(b), SCRCP.

In South Carolina, pleadings may be amended to conform to evidence presented at trial as long as the amendment does not prejudice the opposing party's effort to maintain his case. See Rule 15(b), SCRCP. Generally, courts seek to ensure the opposing counsel has notice that the new issue is going to be tried and an opportunity to refute it. Pool v. Pool, 329 S.C. 324, 328-

329, 494 S.E.2d 820, 823 (1998). Our Supreme Court has specifically determined that prejudice “occurs when the amendment states a [claim or defense] which would require the opposing party to introduce additional or different evidence to prevail in the amended action.” Lee v. Bunch, 373 S.C. 654, 661, 647 S.E.2d 197, 201 (2007). When courts observe that both sides have thoroughly contested an issue that is not in the original pleadings, they will generally allow the pleading to be amended to include that issue. Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006); see also, Sossamon v. Peeler, 291 S.C. 256, 258, 353 S.E.2d 152, 154(Ct. App. 1987); Lee, 373 S.C. 661-62, 64 S.E.2d 197, 201.

This Court convened the evidentiary hearing on October 11, 2012 in York County and devoted an entire day to testimony and presentation of other evidence in this case. The Court is of the opinion that the matters presented at the hearing respecting the issues alleged in the Application for Post-Conviction Relief and First Amended Application were thoroughly litigated. Any and all evidence offered at the hearing was considered by this Court in its deliberation and in its decision to deny the application for post-conviction relief. Applicant’s Motion to File a Second Amended Application after the evidentiary hearing appears to pertain, in part, to a purported surveillance video alluded to, and allegedly presented for the first time by Applicant’s trial counsel in his testimony. Certainly if Applicant’s sole source for the purported existence of this video is his trial counsel’s testimony, Applicant cannot contend its existence was unknown or is the source of any prosecutorial misconduct.

Moreover, this Court acknowledges Respondent’s assertion that it was not on notice of the new or altered allegations at the time of the evidentiary hearing and would be greatly prejudiced because the hearing has been concluded, all evidence has been presented it was

unable to conduct an appropriate investigation into the issues and develop a record to refute allegations about which it had no notice. This Court notes that at the call of this case, Respondent announced on the record its understanding of the claims or allegations the Applicant intended to pursue and received verification of those claims from Applicant. This Court finds that this not a situation where both parties fully litigated some new issue.

The case law fully supports Respondent's objections and the Applicant's request to amend must be denied. See Harvey v. Strickland , 350 S.C. 303, 314, 566 S.E2d 529, 535 (2002) (stating that when the court determines one party requires additional or different evidence to accurately refute a claim that is not in the original pleading, the amendment is not permitted); Continental Radio and Television Corp. v. Furman, 193 S.C. 357, 8 S.E.2d 902, 904 (1940) (court would not permit amendment when plaintiff originally asserted defendant breached contract by advertising, offering for sale and selling radios, and plaintiff sought to amend to assert advertising, offering for sale, and sell of radios by third party without defendant's knowledge and permission); see also White v. Benedict Coll., Inc., 288 S.C. 572, 344 S.E2d 147 (1986) (plaintiff's request to amend complaint at the close of evidence to include a claim of assault and battery when the original complaint alleged sexual harassment was not permitted because it would require additional and different evidence); Lane v. Berry, 288 S.C. 54, 57, 339 S.E2d 521, 523 (Ct. App. 1986) (stating amendment requested at the at the close of plaintiff's case was not permitted because defendant not afforded adequate opportunity to gather additional evidence and prepare additional testimony to counter the new claim.); Ball v. Canadian Amendment Am. Exp., Inc., 314 S.C. 272, 276, 442 S.E.2d 620, 623(Ct. App. 1994) (stating plaintiff may not amend after the trial was concluded to convert a claim of fraud in the

inducement to a claim of fraud in the breach after the trial because the new claim would require presentation of different evidence).

“Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.” Ball v. Canadian American Express, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (internal citations omitted). As Respondent contends, leave to file a Second Amended PCR Application would require it to undertake not only a thorough, unanticipated investigation of evidence it had no prior notice would be at issue, but would also likely require this Court to reopen the record and reconvene to elicit further testimony from, not only Applicant’s witnesses on the matter, but any additional witnesses Respondent deems necessary to defend the Applicant’s additional allegations. Applicant’s Second Amended PCR Application raises claims of prosecutorial misconduct and the potential existence of a video alluded to in Applicant’s trial his testimony. Undoubtedly, these additional claims would require the Respondent to “introduce additional or different evidence.” Accordingly, this Court finds prejudice herein. The Court is therefore denies Applicant’s Motion to Amend the Pleadings.

### CONCLUSION

Based on the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that a notice of appeal must be served within thirty (30) days from the receipt of notice of entry of this Order to secure the appropriate appellate review.

The Applicant's attention is also directed to South Carolina Appellate Rule 227 for appropriate procedures after notice has been timely served and filed.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 27<sup>th</sup> day of Dec., 2013.



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Edgar W. Dickson  
Presiding Judge  
Sixteenth Judicial Circuit

Orangeburg, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS

2010-CP-46-0436

BERRY S. BOLIN, #317414 )

Applicant, )

vs )

AFFIDAVIT OF SERVICE BY MAIL

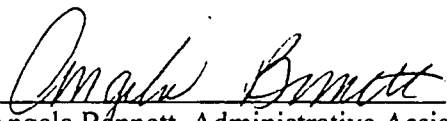
STATE OF SOUTH CAROLINA, )

Respondent. )

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Order of Dismissal** in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

**T. Micah Leddy, Esquire**  
**2008 Lincoln Street**  
**Columbia, South Carolina 29201**

DATED this 2<sup>nd</sup> day of January, 2014

  
Angela Bennett, Administrative Assistant  
For Respondent