

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY

Deadra L. Jefferson, Circuit Court Judge

Case No. 2012-CP-08-1235

Jermaine T. McKelvey, 280590

Appellant,

v.

State of South Carolina,

Respondent,

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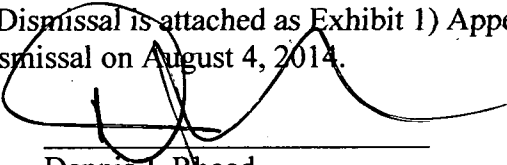
AUG 14 2014

S.C. SUPREME COURT

NOTICE OF APPEAL

Jermaine T. McKelvey appeals the Order of Dismissal of the Honorable Deadra L. Jefferson dated July 17, 2014. (Order of Dismissal is attached as Exhibit 1) Appellant received written notice of entry of this Order of Dismissal on August 4, 2014.

August 11, 2014


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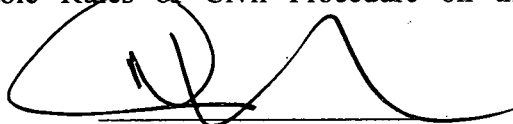
v.

State of South Carolina,

Respondent,

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Intent to Appeal in the captioned matter has been served on each party and/or each counsel of record, and on the Clerk of Court for Berkeley County, South Carolina by U.S. mail, properly addressed, using address information provided on pleadings or otherwise, with the sufficient postage affixed thereto in the manner prescribed by the applicable Rules of Civil Procedure on this 11th day of August, 2014.



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STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 Jermaine T. McKelvey, #280590,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2012-CP-08-1235

ORDER OF DISMISSAL

MARY P. SIMON
 CLERK OF COURT
 BERKELEY COUNTY, SC

2014 JUL 22 PM 4:48

FILED
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Presiding Judge:
 Applicant's Attorney:

Hon. Deadra L. Jefferson
 Dennis J. Rhoad, Esquire
 Sally Rhoad, Esquire

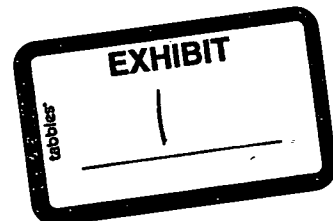
Respondent's Attorney:
 Trial Counsel:
 Date of Hearing:
 Court Reporter:

Ashleigh R. Wilson, Esquire
 Chad D. Shelton, Esquire
 May 19, 2014
 Joyce C. Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 23, 2012 and amended on May 28, 2013 and May 9, 2014. The Respondent made its Return on June 28, 2013. An evidentiary hearing on the matter was convened on May 19, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Dennis J. Rhoad and Sally Rhoad, Esquires. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Chad Shelton, Esquire, Suzanne Cromer, Cynthia Fuda, and Michelle Moritzky. The Court had before it the trial transcript, the Berkeley County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the

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Applicant's PCR application, the Respondent's Return, the Applicant's appellate records, and exhibits submitted to the Court by the Applicant¹.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the February 2009 term of the Berkeley County Grand Jury for Assault and Battery with Intent to Kill (ABWIK)² (2009-GS-08-0304) and Possession of a Firearm During the Commission of a Violent Crime³ (2009-GS-08-0305). The Applicant was subsequently indicted at the April 2009 term of the Berkeley County Grand Jury for Armed Robbery⁴ (2009-GS-08-0504).⁵ The Applicant was represented by Chad D. Shelton, Esquire and David Schwacke, Esquire.

On April 14, 2010, the Applicant proceeded to trial and was found guilty on all charges. The Applicant was sentenced by Judge Dennis to confinement for a period of twenty-seven (27) years for Armed Robbery, five (5) years for Possession of a Firearm During the Commission of a Violent Crime, and twenty (20) years for ABWIK. The sentences for Armed Robbery and

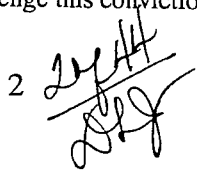
¹ Applicant's Exhibit 1 is an affidavit with attachments from Dr. Donna R. Roberts. Applicant's Exhibit 2 is an affidavit with attachments from Dr. Stephen Schabel.

² ABWIK is a violent, most serious felony punishable by twenty (20) years' imprisonment; the offender is not eligible for parole until he serves at least seven (7) years of his sentence. See S.C. CODE ANN. § 16-3-620 (2008); S.C. CODE ANN. § 16-1-60 (2008); S.C. CODE ANN. § 17-25-45 (2008).

³ Possession of a Firearm During the Commission of a Violent Crime is a felony punishable by a mandatory minimum five (5) years' imprisonment in addition to the sentence imposed for the principal crime. See S.C. CODE ANN. § 16-23-490 (2008).

⁴ Armed Robbery is a violent, most serious felony punishable by a mandatory minimum ten (10) years' imprisonment and a maximum thirty (30) years' imprisonment, none of which sentence may be suspended, nor probation granted. See S.C. CODE ANN. § 16-11-330(A) (2008); S.C. CODE ANN. § 16-1-60 (2008); S.C. CODE ANN. § 17-25-45 (2008).

⁵ The Applicant was also convicted of Possession of Cocaine Base/Meth (2009-GS-08-2447) and sentenced to one (1) year imprisonment. See S.C. CODE ANN. § 44-53-375(A) (2008) (penalty for misdemeanor Possession of Cocaine Base/Meth-First Offense is a maximum three (3) years' imprisonment and/or a five thousand dollar (\$5,000.00) fine). However, the Applicant does not challenge this conviction in his Application for post-conviction relief.

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Possession of a Firearm During the Commission of a Violent Crime are to be served consecutively to each other and concurrent with the remaining sentences.

A timely Notice of Appeal was filed on behalf of the Applicant. Katherine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders brief. See Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. The Remittitur was issued on February 26, 2013.

ALLEGATIONS

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

1. Violation of 6th Amendment Right to Effective Assistance of Counsel
 - a. Failure to timely and properly object to jury instruction on malice
 - b. Failure to call expert witness to testify on the Applicant's behalf
 - c. Failure to object to perjured testimony
 - d. Failure to fully investigate the case
 - e. Failure to impeach witnesses with prior convictions
 - f. Failure to attack the character of the victim and the witnesses
 - g. Failure to prepare for trial
 - h. Failure to secure the victim's medical records
 - i. Failure to move for the recusal of the judge
 - j. Failure to subpoena witnesses
 - k. Failure to subpoena the Applicant's investigator
 - l. Failure to challenge the court's guilty verdict
2. Violation of 5th Amendment Right to a Fair Trial
3. Violation of 14th Amendment Right to Due Process and Equal Protection

On May 28, 2013, the Applicant amended his application to allege the following:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to object to the inference of malice charge given by the trial judge.
 - b. Counsel failed to object to the testimony of the MUSC nurse (Cindy Fuda) that the alleged victim Mr. Phoenix sustained a gunshot wound.

- c. Counsel failed to object to the introduction of the bullet jacket found at the scene as evidence.
- d. Counsel failed to impeach witnesses based on their prior convictions.
- e. Counsel failed to inform Applicant that he was not calling any witnesses on his behalf.
- f. Counsel failed to adequately investigate the facts and circumstances surrounding the injury to the victim.
- g. Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence for sentencing.

On May 9, 2014, the Applicant amended his application a second time to allege the following:

1. Ineffective Assistance of Counsel.

- a. Counsel failed to timely and properly object to the trial judge's improper jury instruction that malice could be inferred from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).
 - i. The trial judge's use of an improper jury instruction in Applicant's trial violated Applicant's Fifth Amendment right to a fair and impartial trial.
 - ii. The trial judge's use of an improper jury instruction and the prosecution's announcement that the judge would charge the jury panel that malice could be inferred from the use of a deadly weapon violated Applicants' rights to due process and equal protection in his trial proceedings.
- b. Counsel failed to properly investigate the facts surrounding the Applicant's case including but not limited to the following:
 - i. Prior records of testifying witnesses
 - ii. Medical experts who treated and made diagnosis concerning victim Bernard Phoenix
- c. Counsel failed to call expert witnesses on Applicant's behalf including but not limited to treating and or non-treating physicians and nurses, emergency personnel, forensic experts and police personnel.
- d. Counsel failed to object or move to impeach testimony of testifying witnesses.
- e. Counsel failed to move for or accept the court's offer of a continuance based on the failure of Dr. Todd Mishall to attend the trial.
- f. Counsel failed to investigate or subpoena any medical expert who could testify on the issue of whether the alleged victim Bernard Phoenix did in fact sustain a gunshot wound to the head.

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- g. Counsel failed to question witnesses and or subpoena medical records showing facts in conflict with the allegation that Bernard Phoenix in fact sustained a gunshot wound to the head.
- h. Counsel failed to investigate and subpoena an expert witness who would testify as to the level of alcohol in alleged victim Bernard Phoenix's blood and its impact on his ability to perceive and observe his surroundings.
- i. Counsel failed to investigate, subpoena, and question an expert on the issue of the significance of the presence or lack of presence of gun powder burns or residue.
- j. Counsel failed to object to emergency personnel and treating nurse's testimony that the alleged victim Bernard Phoenix in fact sustained a gunshot wound when such witnesses lack the expertise to classify a wound as coming from a gunshot.
- k. Counsel failed to investigate and subpoena an expert witness to testify as to whether the CT scan and other medical records indicate the alleged victim Bernard Phoenix sustained a gunshot wound.
- l. Counsel failed to object to or question the alleged victim Bernard Phoenix as to possible perjury in his testimony and failed to impeach his testimony based on prior arrest records of Mr. Phoenix.
- m. Counsel failed to object to and/or question witness Korshanda Baskin as to blood spatter statements made by bar owner, and inconsistencies in her testimony and statement.
- n. Counsel failed to object to and question witness Sharon Vance as to inconsistencies in her testimony and statement. Also, trial counsel failed to impeach witness Vance with the use of her prior convictions.
- o. Counsel failed to further question or investigate Officer James Taylor regarding his testimony as to where the gun was found and as to who performed the booking of Mr. McKelvey.
- p. Counsel failed to object to testimony concerning gunshot residue as said evidence was improperly collected and collected without giving Mr. McKelvey his Miranda rights as required by the State and Federal Constitutions.
- q. Counsel failed to object to the testimony of Officer Tony Edwards concerning a bullet jacket and fragment found at the scene. Trial counsel also failed to object to the introduction of said bullet jacket and fragment into evidence.
- r. Counsel failed to properly investigate or object to Officer Michael Roach's testimony concerning whether Mr. Phoenix was in fact shot and the location of alleged wounds as Officer Roach is not qualified to make such conclusions.
- s. Counsel failed to object to the trial court's jury instruction of malice.
- t. Counsel failed to present any evidence or argue to the jury that there was in fact evidence that malice should not be inferred and there was evidence that the "deed" was not done with a deadly weapon.

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- u. Counsel failed to investigate or question witness Laurie Villalobos as to her criminal record. Further, counsel failed to attempt to impeach Ms. Villalobos concerning her criminal record.
- v. Counsel failed to investigate and attack the victim and witnesses' character.
- w. Counsel failed to have properly qualified medical experts present concerning Mr. Phoenix's x-rays, CT scans, and other medical records. Further, trial counsel failed to obtain such pictures so the jury could view the alleged gunshot wound with the assistance of trained medical personnel.
- x. Counsel failed to move the Court for the trial judge to recuse himself from the case when the trial judge showed resentment and hostility toward the Applicant.
- y. Counsel failed to subpoena witnesses on Applicant's behalf and to be properly prepared to go forward with Applicant's trial.
- z. Counsel failed to further investigate and question witness David Black concerning his testimony that the gun he examined did not have any fingerprints, blood or anything to link the Applicant to the gun.
- aa. Counsel failed to inform the Applicant as to the possible length of sentence he could be given based on the charges Applicant faced in his trial.
- bb. Counsel failed to ask for a continuance when he discovered he had not been provided the most recent police report concerning Applicant's incident.
- cc. Counsel failed to properly object to alleged statement of Applicant. Trial counsel should have objected to the statement on the grounds it was not voluntarily given since Applicant was not mentally and physically capable of knowingly making a statement at the time. Further trial counsel should have objected to the statement on the ground he was not provided a complete copy of the police investigation report prior to trial such that trial counsel could have properly investigated the statement and its circumstances and could have informed his client of the consequence of the introduction of the statement.
- dd. Counsel failed to object to the testimony of the MUSC nurse (Cynthia Fuda) that the alleged victim Mr. Phoenix sustained a gunshot wound.
- ee. Counsel failed to object to the introduction of the bullet jacket found at the scene as evidence. Trial counsel should have objected when officer testified he picked up a jacket of a bullet fragment that he said passed through victim and landed in wall.
- ff. Counsel failed to inform the Applicant that he was not calling any witnesses on Applicant's behalf.
- gg. Counsel failed to adequately investigate the facts and circumstance surrounding the injury to the victim.
- hh. Counsel's performance during the sentencing phase was both unreasonable and prejudicial.
 - i. Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence.

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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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

Summary of the Testimony

Chad Shelton, Esquire, was present and testified he has been a public defender since 2007. He testified he was appointed to represent the Applicant and first met with him on February 3, 2009. Counsel testified he met with the Applicant frequently at the detention center. He testified that the majority of his interaction with the Applicant took place at the detention center. He testified he filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the materials received with the Applicant. Counsel testified he received and reviewed police reports, the victim's medical records, SLED analysis reports from the gunshot residue, drug, bullet, and firearm testing, the SLED chain of custody, witness statements from people inside and outside of the club, the Applicant's criminal record, and the evidence log from the police department, as well as close to two hundred (200) pages of medical records.

Counsel testified he hired an investigator to speak with witnesses given to him by the Applicant. He testified the witnesses he spoke to were not helpful. Counsel testified he discussed calling witnesses at trial with the Applicant, but they did not have any witnesses to present. He testified he also discussed with the Applicant the preservation of last argument and calling a firearms expert because he did not think the gunshot was a gunshot due to the caliber of the

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weapon. He testified he was unable to find a firearms expert that would have been helpful to the Applicant's case to present at trial. He testified, however, that he did thoroughly consider and investigate an expert on the gunshot issues.

Counsel testified the Applicant's defense to the Armed Robbery charge was that the Applicant had money on him at arrest and did not have any reason to take any money from Mr. Phoenix the victim. He testified on the ABWIK charge the Applicant's defense was that the medical reports all relied on the victim's testimony, that the victim was lying about being shot by the Applicant and that the victim owed the Applicant money, so the money the Applicant took from the victim was in fact owed him. Counsel testified he tried to get the court to charge the jury on Attempted Armed Robbery, but was unsuccessful. Counsel testified he is unsure if he discussed his trial strategy with the Applicant prior to trial because communication with the Applicant broke down after the Applicant's hearing denying his bond reduction. He testified this breakdown in communication did not affect his trial strategy or his ability to effectively attack the State's evidence at trial because at the outset of Counsel and the Applicant's relationship, communication was good and Counsel was able to obtain all the information he needed. Counsel testified the Applicant was upset at the State and did not want to hear what Counsel was working on because it was not what the Applicant wanted to hear. However, Counsel testified he felt his representation was effective, even though he and his client were not communicating well. Counsel's articulated strategy was to argue the Applicant beat up the victim without a gun to get money he was owed in order to obtain a jury charge on the lesser included offense of ABWIK—Assault and Battery of a High and Aggravated Nature (ABHAN)⁶—which would eliminate the

⁶ ABHAN is a common law misdemeanor punishable by up to ten years in prison. State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000); State v. Hill, 254 S.C. 321, 331, 175 S.E.2d 227, 232 (1970); State v. Prince, 240 S.C. 96, 100, 124 S.E.2d 778, 780 (1962). ABHAN is the unlawful act of violent injury to another accompanied by circumstances of aggravation. State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990); State v. Foxworth, 269 S.C.

possibility of a Possession of a Firearm During the Commission of a Violent Crime conviction altogether.

Counsel testified that prior to trial the State offered the Applicant a guilty plea to a sentence ranging from twelve (12) to eighteen (18) years, which the Applicant rejected. Counsel testified he discussed with the Applicant the sentences he was facing and his constitutional rights. He testified he was prepared to proceed to trial when the Applicant's case was called. Counsel also testified he did not move to recuse Judge Dennis prior to trial. He testified he did, however, have his recusal request of Judge Harrington granted because she prosecuted the Applicant on previous unrelated charges during her time as an assistant solicitor.

Counsel testified the State's evidence against the Applicant included the victim's testimony, which formed the basis of the State's case, the fact that the Applicant was seen trying to leave the club shortly after police heard shots fired at the corner in the area of the incident, and a positive gunshot residue test of the Applicant's hands. The State's evidence also included: the police report that states the gun was found in the glove box closest to the Applicant and the victim's statement to police that the Applicant shot him. The Applicant's version of the facts differed on the number of shots fired and the Applicant and the victim getting into an argument over the victim taking money from the Applicant.

Counsel testified that prior to trial he was given the time to review an additional police report he received during the Applicant's Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964) hearing on statements alleged to have been made by the Applicant prior to the gunshot residue

496, 238 S.E.2d 172 (1977). Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. Foxworth, 269 S.C. at 498, 238 S.E.2d at 173; State v. Hollman, 245 S.C. 362, 140 S.E.2d 597 (1965); State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999).

test. Counsel testified the additional police report included a statement from the Applicant. He testified after review of the report he was able to adequately cross-examine the State's witnesses at trial.

Counsel testified he did not speak with the SLED agents prior to trial. He testified he generally does not speak with the SLED agents unless he has a question about their reports. He testified some of the SLED reports in the Applicant's case were helpful to the defense. Counsel testified he also did not speak with a SLED agent about whether or not blood was found on the bullet jacket. He testified he brought out at trial the fact that the bullet jacket was not tested for blood. He testified if blood was found on the bullet jacket it would have been hurtful to the Applicant, but if blood was not found on the bullet jacket it could have been helpful to the Applicant.

Counsel testified he reviewed all the victim's medical records prior to trial and did not feel the need to speak with medical professionals about the records. Counsel testified it was his experience that when testifying at trial medical professionals rarely stray away from the conclusions reached in their reports. He testified further he felt a medical professional at trial would testify the victim's injuries were a gunshot wound based on the victim's testimony and it was unlikely the treating physician would have changed his opinion. He testified he was able to effectively cross-examine the medical professionals presented by the State without consulting or calling an expert witness. Counsel's strategy was to introduce criminal records, such as witness Sharon Vance's pending bench warrant, even though Counsel did not discover that until later, to impeach witnesses and to ultimately show that the victim was not credible; however, Counsel found nothing to impeach the witnesses. He further testified that he would not have been able to

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establish the witness, Sharon Vance's knowledge of the pending bench warrant at the time of her testimony.

Counsel testified he did not consider moving for a continuance based on the absence of the victim's treating physician at trial. He testified the treating doctor's testimony would not have been helpful. He testified the treating doctor's absence was in fact beneficial to the defense. Counsel testified he did not want the victim's treating doctor present to say for certain the Applicant suffered a gunshot wound. He testified because the physician was absent he was also able to more effectively cross-examine Nurse Fuda. Counsel testified he did not interview Nurse Fuda but knew the substance of her testimony based on the victim's medical reports. He testified Nurse Fuda was not qualified to diagnose the victim's injuries as a gunshot wound. Counsel testified that on cross-examination he got Nurse Fuda to say the victim was intoxicated and that medical professionals relied on the victim's history of the incident to diagnose the victim.

Counsel also testified he did not have an expert witness to testify about the victim's injuries at trial because he did not want a doctor to opine definitively that the victim's wound was from a gunshot and that the absence of a doctor's testimony was beneficial to the Applicant's case. He testified he did not call any witnesses and thought strategically preserving last argument was important. He also testified calling an expert to testify about whether or not the victim suffered from a gunshot wound would have only been a challenge to the victim's credibility on the gunshot wound but not his remaining testimony that he was hit in the head by the Applicant and would not have affected the elements of proof on the Applicant's armed robbery charge. Counsel testified whether the victim sustained a gunshot wound was important, but a gunshot wound is not an absolute requirement for the Applicant to be convicted of assault and battery with intent to kill. Counsel testified he spoke with his client about possibly calling a

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gun expert, but that ultimately he was not able to get in touch with any expert who could offer favorable testimony. He testified he was able to prepare for cross-examination and effectively examine the officer with the information he had and was aware of the substance of the victim's testimony prior to trial.

Counsel testified he did not consider objecting to the testimony of Michelle Moritzky, the EMS personnel who responded to the scene of the shooting. He testified he had no basis to challenge her qualifications. He testified on cross-examination of Ms. Moritzky at trial, he elicited testimony from her that she was dispatched to a call of a gunshot wound and the victim's injury seemed to indicate a gunshot wound. He testified he also got Ms. Moritzky to agree that her testimony about the victim's injury was based on the information she received from the police before arriving at the scene.

Counsel testified he did not object to the admissibility of the bullet fragment found by Officer Edwards at the scene. He testified he did not have a basis to object because the fragment was found at the scene and he intended to point out to the jury that the bullet fragment did not match the gun found at the scene to help exculpate his client. Counsel testified he also did not have a basis to object to Officer Edwards' testimony about blood being on the gun. He testified there was no evidence of whose blood was on the gun and he saw Edwards' testimony as a police observation.

Counsel testified he reviewed the victim's prior record before trial. He testified the Applicant had a pending warrant and did not recall the Applicant having a conviction for breach of trust. Counsel testified he reviewed the prior record of Sharon Vance as she took the stand to testify at trial. He testified Vance had an active bench warrant and a pending forgery charge, but her prior convictions were not within the admissible time period. Counsel testified he did not see

any convictions that could be used to impeach the victim or Vance at trial, but that he was effectively able to cross-examine Vance by questioning her on her different, conflicting statements made at the scene of the incident and at trial.

Counsel testified he was aware of State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803–804 (2009) (jury may not infer malice in order to prove the element of Murder or ABWIK by use of a deadly weapon where evidence present that would reduce, mitigate, excuse, or justify the homicide or ABWIK) at the time of trial. He testified he did not object to the malice instruction given to the jury using Belcher. He testified the malice charged in the Applicant's case was critical. Counsel testified there was no evidence that would reduce, mitigate, excuse, or justify the ABWIK or of self-defense presented in this case. Counsel testified that the Applicant always maintained his innocence. Likewise, Counsel did not challenge the admissibility of the blood spatter evidence and that he should have objected under Edwards. State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940) (non-expert may identify substance as blood at trial).

Suzanne Cromer also testified at the hearing. Cromer testified she is a SLED agent who testified at the Applicant's trial as a firearms and toolmarks expert. Cromer testified she concluded the bullet fragment found at the scene of the shooting was not suitable for identification. She testified the bullet fragment could have been fired by the firearm found in this case or any other firearm.

Cromer testified she did not observe blood or fiber on the bullet fragment. She testified she was not asked at trial about blood being found on the fragment but that the fragment was admitted at trial. Cromer testified there is a 50/50 chance blood will be found on a bullet fragment. She testified the blood could have been wiped off on clothing or the bullet could have

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been so hot when it was ejected that the blood dissipated. She testified many factors come into play when determining whether blood was on the fragment.

Cromer testified a semi-automatic gun will eject a cartridge case after expelling the bullet. She testified she was not given a cartridge to test. She testified in her experience the fired bullet and the casing are usually dispersed in the same general area, however, it is possible for casings to be removed or collected at the scene. Cromer testified further she does not always receive a casing when given a bullet or fragment to test and did not receive a cartridge case in the Applicant's case. She testified that where a cartridge is found on the scene of a crime "depends"; however, this line of questioning was explored at trial.

Cynthia Fuda also testified at the hearing. She testified she is a registered nurse at MUSC. At the time of trial Nurse Fuda was qualified as an expert in intensive care nursing. Nurse Fuda testified she treated the victim during his time in the surgical trauma unit. She further testified that she has training in treating gunshot wounds. She testified that the victim's medical records reflected "gunshot wound" as his admitting diagnosis. She testified she does not have training or experience in identifying or diagnosing a gunshot wound. She testified further her testimony during the Applicant's trial that the victim suffered a gunshot wound was based on the victim's medical records—the EMS, police, and doctor's reports that the victim was admitted with a gunshot wound—and her experience as an intensive care nurse. She testified prior to testifying at trial, she reviewed the victim's records. She testified her testimony at trial was not based on a conclusion that she reached about the victim's injuries and that her testimony was not her assessment that the victim suffered from a gunshot wound.

Also present to testify was Michelle Moritzky. Ms. Moritzky testified she has been a paramedic in Berkeley County from the time of the Applicant's trial until now. She testified she

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treated the victim after being called to the scene by dispatch. Ms. Moritzky testified she treated the victim for a "penetrating type injury to the head." She testified she never diagnosed the victim's injuries as a gunshot wound, but the victim's injuries appeared to indicate a gunshot type wound to the head. She testified her conclusion was based on the amount of blood and the type of injury, as well as the casing found by the police. She testified that although she has been trained to treat gunshot wounds, she treats symptoms and does not evaluate the injury. She further testified that she had been to this type of scene before and the Applicant's case was not the first time she was seeing what was alleged to be a gunshot type wound.

Lastly, the Applicant took the stand. The Applicant testified he thought his poor communication with counsel shortly before trial affected counsel's performance at trial. He testified he thought counsel abandoned him at trial, never communicated to him in writing, and never communicated his trial strategy to him. He testified counsel never told him he could not find any witnesses and never discussed calling any expert witnesses. The Applicant testified counsel did not present evidence to support his theory that he did not shoot the victim.

The Applicant testified counsel never discussed with him the evidence or the fact that the victim's treating doctor would not testify at trial. He testified counsel also never discussed with him cross-examination of the State's witnesses. The Applicant testified counsel kept telling him he was ready and prepared for trial but that he believes Counsel was highly ineffective. The Applicant testified he thought counsel should have objected to the malice charge given at trial. He testified counsel also never discussed the bullet fragment with him but the Applicant did not clarify whether the victim's injury was or was not a gunshot wound. The Applicant testified if all these things were done, the outcome of his trial would have been different.

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Ineffective Assistance of Counsel

I. Standard

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence.” Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant alleges ineffective assistance of counsel 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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. See id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its “‘reasonableness under prevailing professional norms.’” Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel’s deficient performance must have prejudiced the applicant such that “‘there is a reasonable probability that, but for counsel’s unprofessional

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errors, the result of the proceeding would have been different.” Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds Counsel is a trial practitioner who has extensive experience in the trial of serious offenses. This Court finds Counsel’s testimony credible and finds the Applicant’s testimony to be not credible. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, Counsel discussed the pending charges, the range of penalty, the elements of the charges and what the State was required to prove, the Applicant’s constitutional rights, the Applicant’s version of the facts and possible defenses or lack thereof.

Regarding the Applicant’s claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant’s attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev’d on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court finds further Counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that Counsel’s representation did not fall below an objective standard of reasonableness.

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II. Expert Witness Testimony and Trial Strategy

The Applicant alleges Counsel was ineffective for failing to investigate or subpoena an expert witness to testify at trial about whether the victim suffered a gunshot wound to the head. This Court finds Counsel was not deficient for failing to procure an expert to testify at trial about the victim's injuries. At the evidentiary hearing, Counsel testified he looked into procuring a firearms expert to testify at trial about whether the caliber of gun found in the cases could have caused the type of injury sustained by the victim. Counsel testified he was unable to find an expert witness with favorable testimony and ultimately decided not to call any witnesses at trial because he felt it was important strategically to preserve last argument.

This Court finds Counsel articulated a valid strategic basis for his decision not to call any witnesses at trial. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992) (finding counsel's decision not to call witnesses reasonable where their testimony would have been of no value to the case and witnesses were not credible). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)). Counsel stated he decided not to call any witnesses at trial to preserve last argument which he thought was very important. This Court finds Counsel's desire to preserve last argument was a valid strategic basis for not calling any witnesses at trial.

This Court finds the Applicant's assertions that Counsel never discussed with him strategic decisions, such as whether the defense should present a case or obtain last argument is without merit. The trial court specifically questioned the Applicant on whether Counsel explained his strategic decisions, as well as the Applicant's right to testify and present a case, to which the Applicant affirmed Counsel discussed and he understood. (Tr. 337: 14–25, 338:1–25, 339:1–25, 340:1–25, 341:5–10). See Abney v. State, 408 S.C. 41, 51, 757 S.E.2d 544, 549 (Ct. App. 2014) (“While trial counsel should consult with his client, the final decision on strategy belongs to counsel.”); More v. State, 399 S.C. 641, 723 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551 (2004) (“Attorneys have a duty to consult with their clients regarding ‘important decisions,’ including questions of overarching ‘defense strategy.’ . . . This does not require counsel to obtain the defendant’s consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights [to plead guilty, waive a jury, testify on his own behalf, or take an appeal] cannot be made for the defendant by surrogate”). Further, the Applicant presented no evidence at the hearing that Counsel made decisions on fundamental trial strategies without his consent. Therefore, this assertion of error is overruled.

This Court also finds the Applicant was not prejudiced by Counsel's failure to call an expert witness to testify about the victim's injuries at trial. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812 (2005) (citing McLaughlin v. State, 352 S.C. 476, 483–84, 575 S.E.2d 844–45 (2003)) (finding defense counsel's decision not to call an expert witness to rebut the State's expert witness was legitimate strategic decision and any resulting prejudice to the Applicant would be merely speculative). This Court finds the testimony of the expert witnesses presented by the Applicant at the evidentiary hearing was not exculpatory and it is unlikely the expert's testimony would have affected the outcome of the Applicant's trial.

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The Applicant presented by affidavit the testimony of Dr. Donna R. Roberts, a radiologist. See Robert's Aff. 1, Apr. 25, 2014. Dr. Roberts, after review of the victim's two CT scans, stated she observed a depressed skull fracture and, based on her medical training and experience, found no metallic ballistic fragments. See Robert's Aff. 2, Apr. 25, 2014. The Applicant also presented by affidavit the testimony of Dr. Stephen Schabel, a radiologist. See Schabel Aff. 1, May 14, 2014. Dr. Schabel also observed a depressed skull fracture after review of the victim's two CT scans. See Schabel Aff. 2, May 14, 2014. Dr. Schabel also opined that based on the shape of the depression and based on his medical training and experience, to a reasonable degree of medical certainty, the victim's skull depression as shown on the victim's CT scan may have been caused by a strike from a barrel of a gun or some other linear object and not by the firing of a bullet from a gun. See Schabel Aff. 2-3, May 14, 2014. Dr. Schabel based his opinion on review of the MUSC CT scan, SLED ballistics report concerning the gun, and the bullets in evidence. See Schabel Aff. 2, May 14, 2014. Dr. Schabel also opined that "almost all non-jacketed bullet gunshot wounds striking bone leave metallic fragments after striking the bone." See Schabel Aff. 3, May 14, 2014.

This Court finds neither expert presented by the Applicant could conclusively say the victim did not suffer from a gunshot wound to the head. This Court finds their testimony, if presented by Counsel at trial, also would not have helped the Applicant defend against the Armed Robbery charge for which he was also on trial. This Court also finds the testimony of both Dr. Schabel and Dr. Roberts that the victim suffered from a skull fracture was consistent with the testimony of the State's witness Nurse Cynthia Fuda. (Tr. 322:3-9).

This Court finds Dr. Schabel's testimony that the victim's skull fracture may have been caused by a strike from a barrel of a gun or some other linear object was not particularly helpful

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to the Applicant. This testimony, if presented by the Applicant at trial, would have corroborated the victim's testimony at trial that before being shot by the Applicant, the Applicant hit him on the head with an object. (Tr. 103:6-9, 15-17).

This Court also finds that whether the victim sustained a gunshot wound is not dispositive or required for the Applicant to be convicted of Assault and Battery with Intent to Kill. ABWIK is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation. Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002) (citing State v. Fennell, 340 S.C. 266, 531 S.C.2d 512 (2000)). ABWIK is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied. Id. Malice is a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it. Fennell, 340 S.C. at 278, 531 S.E.2d at 518. Intent to kill required to convict of ABWIK need only be a general intent demonstrated by acts and conduct from which a jury may naturally and reasonably infer intent and may be proved with evidence of the character of the means of instrument used. State v. Coleman, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000) (citing State v. Forest, 325 S.C. 12, 14, 479 S.E.2d 50, 51 (1996)). This Court finds that had Counsel presented Dr. Schabel's testimony at trial, his statement that the victim may have been struck in the head by some object would have aided the State in proving an element of Assault and Battery with Intent to Kill: an unlawful act of a violent nature.

This Court finds Counsel was not deficient for failing to present an expert witness to testify about the victim's injuries. This Court further finds that Counsel was able to challenge the testimony of the State's witness on the gunshot and the victim's injuries through the effective cross-examination of Nurse Fuda and Ms. Moritzky and Counsel was able to argue the lack of conclusive testing on the issues of weapon used at the crime scene and exact nature of the

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victim's injuries. As to the prejudice prong of the Strickland analysis, Counsel's strategy not to call a doctor as an expert witness bolstered the Applicant's case at trial. Moreover, this Court finds that it was advantageous for Counsel to argue that the State's failure to call a doctor as an expert to testify as to the gunshot issues was a failure of the State to prove an element of the offense and meet their burden of proof. Further, upon review of the affidavits presented by the Applicant, neither expert could conclusively state that the CT scans and other reports presented to them indicate whether the victim suffered a gunshot wound. This Court finds that Counsel's strategy to maintain last argument and attach the credibility of the victim was valid and inured to the Applicant's benefit. Consequently, this Court fails to ascertain any prejudice caused to the Applicant from Counsel's strategic decisions. Counsel articulated a valid strategic reason for not calling witnesses at trial. This Court finds the Applicant was not prejudiced in any way by Counsel's performance since the testimony of the experts presented by the Applicant at the evidentiary hearing would not have been beneficial to the Applicant at trial. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective in this regard.

III. Inferred Malice Jury Charge

The Applicant alleges Counsel was ineffective for failing to object to the trial court's instruction to the jury that malice could be inferred from the use of a deadly weapon. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to object to the malice instruction given at trial. The Applicant alleges the malice instruction given was improper pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). In Belcher, the Court held that instructing the jury that malice may be inferred from the use of a deadly weapon in Murder or Assault and Battery with Intent to Kill prosecution is no longer proper where evidence is presented that would reduce, mitigate, excuse, or justify the homicide.

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Id. at 600, 685 S.E.2d at 803–4. The Court also held that the permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed the Murder or Assault and Battery with Intent to Kill. Id. at 612, 685 S.E.2d at 810.

This Court finds the malice instruction by the Court in the Applicant’s trial was proper and Counsel had no basis to object to the jury instruction. This Court finds and the record reflects that, unlike the defendant in Belcher, the Applicant did not claim self-defense and no evidence was presented at trial that would reduce, mitigate, excuse or justify the Applicant shooting the victim. See State v. Price, 400 S.C. 110, 114–15, 732 S.E.2d 652, 654 (Ct. App. 2012) (malice inference instruction proper in ABWIK case where only uncontradicted evidence presented was that an assailant shot a victim at close range as the victim stood with his hands up, causing the victim serious injury and the only issue to determine was whether the defendant committed the crime). This Court also finds the malice instruction given was a correct statement of law since the Applicant maintained his innocence, presented no other defenses, and the only issue presented to the jury was whether the Applicant was in fact the assailant and committed the Assault and Battery with Intent to Kill.

This Court also notes that even if this jury instruction were improper, pursuant to Belcher the Applicant still would not be entitled to post-conviction relief. In Belcher, the Court explicitly held “[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief.” Id. at 612–13, 685 S.E.2d at 810. Therefore, this Court finds Counsel’s failure to object to the malice jury instruction given at trial did not result in deficient performance and Counsel’s performance did not affect the outcome of the Applicant’s proceeding.

IV. Impeachment of Witnesses

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A. Bernard Phoenix and Sharon Vance

The Applicant alleges Counsel was ineffective for failing to investigate and use for impeachment the prior records of Bernard Phoenix, the victim, and Sharon Vance, the State's witness. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to investigate and use for impeachment the prior records of the victim and State's witness. Defense counsel ordinarily has a duty to investigate possible methods for impeaching prosecution witnesses. Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986).

This Court finds Counsel provided credible testimony that he reviewed the criminal history of both the victim and Vance prior to their testimony at trial. This Court also finds credible Counsel's testimony that he did not find convictions usable for impeachment on the records of either the victim or Vance. This Court finds the Applicant has also failed to present to the Court the criminal history of either the victim or Vance in support of his claim that the records contained convictions that the Applicant could have used for impeachment. Further, had the Applicant established that Counsel knew about Vance's pending bench warrants, the Applicant has not shown that Vance's bench warrant would have been admissible to impeach her at trial. This Court finds the Applicant has failed to show that Counsel's performance was deficient. This Court also finds the Applicant has failed to show that Counsel's failure to impeach the victim and Vance with any prior convictions affected the outcome of his proceeding.

The Applicant alleges Counsel was ineffective for failing to cross-examine Sharon Vance on inconsistencies in her statements. This Court finds and the record reflects Counsel adequately cross-examined Vance at trial and challenged her credibility. On cross-examination, Counsel elicited testimony from Vance about her inability to recall when she arrived at the club the night

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of the shooting (Tr. 192:24–25, 193:1–13), how often she had seen the victim as a customer at the bar (Tr. 193:14–23), how she was one of the last witnesses to give her statement (Tr. 194:9–25), and how she was not outside to know what took place between the victim and the Applicant once they left the club (Tr. 195:5–9). This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to effectively cross-examine Vance at trial. This Court also finds the Applicant has failed to show how additional cross-examination of Vance by Counsel would have affected the outcome of his trial.

B. Laurie Villalobos

The Applicant alleges Counsel was ineffective for failing to investigate and question witness Laurie Villalobos as to her criminal record. This Court finds the record is void of any witness called by either the State or the defense named Laurie Villalobos. This Court finds the Applicant failed to present Villalobos or her criminal record to the court for review. “[A] PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)). This Court finds this allegation is wholly without merit and it is unclear to the Court how Villalobos or her criminal record had any relevance to the Applicant’s case. This Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that his failure to investigate and question Villalobos affected the outcome of his proceeding.

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V. Failure to Request a Continuance

The Applicant alleges Counsel was ineffective for failing to request a continuance on two bases: 1) the absence of the victim's treating physician, Dr. Mishall, at trial and 2) Counsel's receipt of an extended version of an officer's report during the Applicant's Jackson v. Denno hearing. This Court finds Counsel articulated a valid strategic reason for not requesting a continuance on the basis that the victim's treating physician was not present. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992) Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

Counsel provided credible testimony that he did not request a continuance based on Dr. Mishall's absence at trial because he expected Dr. Mishall to confirm the findings in his medical reports, which was that the victim suffered from a gunshot wound to the head. State v. Madry, 93 S.C. 412, 76 S.E.977, 977 (1913) (trial court's refusal to grant continuance based on absence of witness not abuser of discretion where testimony would have merely corroborated evidence already presented). This Court finds Counsel's reason for not objecting to the absence of Dr. Mishall at trial was valid and Dr. Mishall's absence was helpful to the defense and allowed a more beneficial cross-examination of Nurse Fuda. This Court also finds Dr. Mishall's absence did not affect the outcome of the Applicant's proceeding.

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This Court finds Counsel was not ineffective for failing to request a continuance based on counsel's receipt of an extended version of a police report during the Applicant's Jackson v. Denno hearing. The record reflects at the conclusion of the Applicant's Jackson v. Denno hearing, Counsel noticed the incident report from the Applicant's case that he had was a page and a half and the copy of the incident report the officer referred to during his testimony was three pages. (Tr. 26:4–25, 27:1–22). The Court provided Counsel with a copy of the extended report and gave him the opportunity to review the report during a break. This Court finds Counsel had ample time to review the extended version of the report and never indicated he needed additional time to review the report. See State v. Lytchfield, 230 S.C. 405, 411, 95 S.E.2d 857, 860–61 (1957) (no abuse of discretion in denial of the motion to continue on the ground of witness absence). Cf. State v. Lunsford, 318 S.C. 241, 243, 456 S.E.2d 918, 920 (1995); State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (no dismissal or mistrial when, after receiving discovery material, defense counsel allowed time to review material during break in trial and before examination of witnesses continued). This Court also finds the Applicant has also failed to show what benefit the additional time to review the extended portion of the police report would have yielded. This Court finds Counsel was adequately prepared for trial and the cross-examination of the State's witnesses. This Court finds trial counsel was not ineffective for failing to request a continuance at trial.

VI. Failure to Investigate and Subpoena Witnesses.

Our Courts have repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503

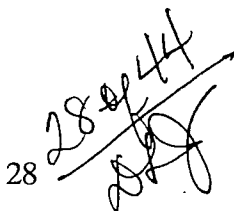
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S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant's mere speculation as to what a witness' testimony would have been by itself, cannot satisfy the Applicant's burden of showing prejudice. Id. (citing Glover, 318 S.C. at 498–99, 458 S.E.2d at 540). See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (“So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.”); Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066) (“Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

A. The Victim’s Blood Alcohol Content

The Applicant alleges Counsel was ineffective for failing to subpoena witnesses to testify about the victim’s blood alcohol level. This Court finds the Applicant has failed to produce the testimony of any witness to establish the victim’s blood alcohol level.

This Court also finds Counsel elicited testimony about the victim’s alcohol use prior to the shooting at trial. The record reflects Counsel elicited testimony from the victim that he drank before going to the club and had one beer while at the club before the shooting. (Tr. 108:15–24). Counsel also elicited testimony from Nurse Fuda that the victim’s EMS records said the victim vomited alcohol prior to being intubated. (Tr. 328:25–329:4). This Court finds Counsel presented testimony about the victim’s alcohol use to the jury and the Applicant has failed to prove that Counsel’s failure to call a witness to testify about the victim’s blood alcohol level affected the outcome of his trial.

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B. Gunpowder Burns/Residue

The Applicant alleges Counsel was ineffective for failing to investigate, subpoena, or question an expert on the issue of the significance of the presence or lack of presence of gun powder burns and/or residue. This Court finds the Applicant has failed to produce the testimony of any expert witness to establish what their testimony would have been about gunpowder burns and residue during the Applicant's trial. This Court finds the Applicant has failed to show how Counsel's failure to present expert witness testimony on this issue affected the outcome of the Applicant's trial. This Court will not speculate on the substance of a witnesses testimony and finds the Applicant has failed to carry his burden of proving Counsel was both deficient and that the outcome of his proceeding would have been difference had an expert on this issue been procured by Counsel.

C. Officer James Taylor

The Applicant alleges Counsel was ineffective for failing to question or investigate Officer James Taylor regarding his testimony as to where the gun was found and who performed the booking of Mr. McKelvey. The record reflects Officer Taylor testified at trial he found a gun in the floorboard on the passenger's side of the car halfway under the front seat where the Applicant had been sitting. (Tr. 166:12-22, 167:3-20). The record also reflects Officer Taylor testified he did not recall booking the Applicant and never went to the jailhouse to book the Applicant, and, after he turned the evidence over to his Corporal, he had no other interactions with the gun. (Tr. 176:3-5).

This Court finds the Applicant has failed to show what additional information would have been obtained by Counsel had he further investigated or questioned Officer Taylor about where in the car police located the gun or who booked the Applicant at the jail. This Court finds

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it is unlikely additional investigation into these facts would have yielded any benefit to the Applicant or affected the outcome of the Applicant's proceeding.

D. Officer Michael Roach

The Applicant alleges Counsel was ineffective for failing to investigate and object to Officer Michael Roach's testimony concerning whether the victim in fact was shot and the location of the victim's wounds on the grounds that the officer was not qualified to make such conclusions. This Court finds Counsel's performance was not deficient in this regard. This Court finds Officer Roach's testimony was not objectionable. Officer Roach testified at trial he responded to the scene after receiving a call that there had been a shooting at the Pleasure Lounge behind the middle school and the victim had been shot in the head. (Tr. 226:21-25). Officer Roach testified he took an oral statement from the victim once he regained consciousness. (Tr. 228:2-14). Officer Roach testified the victim told him Jermaine McKelvey (the Applicant) had shot him in the head. (Tr. 228: 15-20).

This Court finds it is clear Officer Roach's testimony about the victim being shot in the head was based on what he learned over the course of his investigation. This Court finds Officer Roach's testimony about the victim's injuries was not based on any medical conclusions and did not require any medical expertise or training. This Court also finds the Applicant has failed to show what benefit further investigation or questioning of Officer Roach by Counsel would have yielded the Applicant. This Court finds it is unlikely any objection to Officer Roach's testimony on the grounds raised by the Applicant would have been successful. This Court finds Counsel was not deficient for failing to object to Officer Roach's testimony and that his performance did not affect the outcome of the Applicant's proceeding.

E. Agent David Black

The Applicant alleges Counsel was ineffective for failing to investigate and question witness David Black concerning his testimony that the gun he examined did not have any fingerprints, blood, or anything to link the Applicant to the gun. This Court finds Counsel's performance was not deficient. David Black, a latent print examiner at SLED, testified at the Applicant's trial. (Tr. 260:11–20). Agent Black was qualified without objection as an expert in latent fingerprint examination (Tr. 261–264, 264:15–20). He testified on cross-examination that he really did not have any information, such as fingerprint evidence or blood DNA, to help the jury sort out the identity of the suspect. (Tr. 274:13–18, 275:20–24, 276:1–6, 277:12–14, 278:9–13).

This Court finds the Applicant has failed to show what additional testimony Counsel would have been able to elicit had he investigated or further questioned Agent Black. See Bannister, 333 S.C. at 303, 509 S.E.2d at 809. This Court finds Agent Black's testimony at trial was beneficial to the Applicant and it is unlikely further questioning of Agent Black by Counsel on the lack of physical evidence on the gun linking the Applicant to the weapon would have affected the outcome of the Applicant's proceeding.

VII. Failure to Object.

A. Gunshot Residue Collection.

The Applicant alleges Counsel was ineffective for failing to object to testimony regarding gunshot residue evidence that was improperly collected and collected without giving the Applicant his Miranda rights. See Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966) (“the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural

safeguards effective to secure the privilege against self-incrimination”). This Court finds Counsel was not deficient and he objected to the admissibility of the Applicant’s statement to police before the gunshot residue test was administered on this very basis at trial. The record reflects Counsel argued to the Court during the Applicant’s Jackson v. Denno hearing that the Applicant’s statement to police before the gunshot residue test was performed should be excluded because the Applicant was not given Miranda warning. (Tr. 25:3–9). In response to Counsel’s argument, the trial court found the Applicant’s statement was not in response to any interrogation by police and Miranda was not required. (Tr. 25:23–26:1). This Court finds Counsel made the argument presented by the Applicant and the lower court ruled on this very issue at trial. At the evidentiary hearing, the Applicant raised the issue that Counsel was ineffective for failing to move to suppress the results of the gunshot residue tests based on the lack of a search warrant. While no South Carolina or United States Supreme Court cases are directly on point, this Court follows the prevailing black-letter precedent and adheres to the view that in this case, a search warrant was not required to swab the Applicant’s hands for gunshot residue and, thus, the results of that test were admissible at trial. Therefore, this Court finds Counsel was not ineffective for failing to challenge the admission of the gunshot residue test results. Like many other pre-trial, investigative proceedings, performing a gunshot residue test on a suspect potentially has an exculpatory effect. This Court agrees with other jurisdictions that have applied the prevailing law and concluded that a gunshot residue test and the swabs taken from the suspect are non-testimonial in nature, minimally invasive, are not immediately self-incriminating, occur prior to initiation of the adversarial process and before any “critical stage” in a suspect’s case, and are not subject to Miranda, 5th Amendment, or 6th Amendment protections. See Jones v. State, 74 A.3d 483, 494–95 (Md. 2013); Kyger v. Carlton, 146 F.3d

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374, 381 n.2 (6th Cir. 1998); Williams v. Schario, 93 F.3d 527, 528 (8th Cir. 1996). Accordingly, this Court finds Counsel was not ineffective for failing to challenge the admission of the results of the Applicant's gunshot residue test. Therefore, this Court finds the Applicant has failed to prove prejudice resulting from this purported failure and his corresponding burden of proof on this assignment of error. This Court finds the Applicant has failed to carry his burden of proving Counsel was both deficient and that his performance affected the outcome of his proceeding.

B. Bullet Fragment Evidence

The Applicant alleges Counsel was ineffective for failing to object to Officer Tony Edwards' testimony about a bullet fragment found at the scene and the introduction of the fragment into evidence. "Defense counsel may decide as a strategic matter not to object because his objection would highlight the erroneous evidence, argument, or charge." State v. Torrence, 305 S.C. 45, 65, 406 S.E.2d 315, 326 (1991). See Fernandez v. State, 306 S.C. 264, 267, 411 S.E.2d 426, 428 (1991) (counsel's failure to object to admission of syringe into evidence not ineffective assistance of counsel where counsel impeached State witness and bolstered the applicant's case by showing that the syringe was not consistent with the State's case against the applicant.). This Court finds Counsel was not deficient for failing to object to testimony about the bullet fragment and the introduction of the fragment into evidence. The record reflects Officer Edwards testified he noticed the bullet jacket lying near the doorway close to the victim and he collected the bullet jacket to put into evidence. (Tr. 120:14-23).

Counsel testified he did not see a basis to object to the admissibility of the bullet fragment since it was found at the crime scene and nothing about the bullet evidence introduced at trial was inculpatory. This Court finds Counsel's conclusion that he did not have a basis to object to the admissibility of the bullet fragment was valid. This Court finds there was no basis to

exclude the bullet fragment since it was found at the crime scene in close proximity to the victim. This Court finds Counsel was not deficient for failing to object to Officer Edwards' testimony about the fragment. This Court finds the Applicant has presented no evidence to show that Officer Edwards was not qualified to make statements about the bullet fragment at trial. Moreover, the Applicant has presented no argument in favor of excluding the bullet fragment's admission into evidence, as it was part of the crime scene and all questions surrounding the bullet fragment go to weight of the evidence and extent of the investigation—factual issues for the jury to decide—and not admissibility. Further, admission of the bullet fragment allowed Counsel to cross-examine witnesses regarding ancillary issues about the reliability of the evidence inured to the Applicant's benefit. This Court finds the Applicant failed to carry his burden of proving Counsel was deficient and his failure to object to the admissibility of Officer Edwards' testimony and the admissibility of the bullet fragment affected the outcome of his proceeding.

C. The Applicant's Statement

The Applicant alleges Counsel was ineffective for failing to object to the admission of the Applicant's statement. The Applicant claims Counsel should have objected to his statement to police on the grounds that it was not voluntarily given based on the Applicant's mental and physical impairment. The Applicant also claims Counsel should have objected to the statement on the grounds he was not provided a complete copy of the police investigation report prior to trial.

The rules for mandatory disclosure in criminal cases provide:

Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence

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may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

Rule 5(a)(1)(A), SCRCrimP. To maintain compliance with the rules, a trial judge has broad discretion in connection with previously undisclosed materials:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Rule 5(d)(2), SCRCrimP. See State v. Newell, 303 S.C. 471, 476, 401 S.E.2d 420, 423–24 (Ct. App. 1991) (trial judge has broad discretion in handling material that should have been produced pursuant to an earlier request that is revealed during or just before trial). Upon finding a Rule 5, SCRCrimP violation, a court will only reverse where the defendant suffered prejudice as a result of the violation. State v. Kennerly, 331 S.C. 442, 453–54, 503 S.E.2d 241, 220 (Ct. App. 1998). Accordingly, this Court finds the Applicant suffered no prejudice as a result of the late introduction of the full report; the delay in production certainly had no bearing on the admissibility of the Applicant's statement.

“When considering the voluntariness of a statement, the court and jury should consider ‘not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant’s maturity; education; physical condition; and mental health.’” Withrow v. Williams, 507 U.S. 680, 693, 113 S. Ct. 1745 (1993) (citations omitted). “A defendant’s mental condition in and of itself does not render a statement involuntary in violation of due process.” Colorado v. Connelly, 479 U.S. 157, 164, 107 S. Ct. 515 (1986); State v. Hughes, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999).

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This Court finds the Applicant was not deficient for failing to object to the Applicant's statement on the grounds that the Applicant was mentally and physically impaired. This Court finds the Applicant has presented no evidence to support his claim that he was mentally or physically impaired when he made his statement to police. Counsel testified he spoke with the Applicant about being under the influence, but did not have anything to corroborate the Applicant's claim since the officers' testimony and reports did not indicate the Applicant was under the influence.

This Court finds Counsel was not deficient for failing to object to the Applicant's statement on the grounds that he was not provided a complete copy of the police investigation report prior to trial. This Court finds the Applicant has failed to carry his burden of proving Counsel's performance was deficient in this regard. This Court finds Counsel had ample time to review the extended police report received during the Jackson v. Denno hearing. This Court also finds the differences between the two versions of the report as highlighted by Counsel would not have affected the admissibility of the Applicant's statements at trial and it is unlikely the late receipt of the report would have warranted the absolute exclusion of the Applicant's statement. Moreover, this Court reiterates its findings and conclusions propounded in Section V. of this order that, based on the trial transcript, the State, Counsel, and the trial judge all had ample time to review the record prior to the determination of the admissibility of the Applicant's statement and further examination of witnesses. This Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that his performance affected the outcome of the Applicant's proceeding.

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D. Nurse Fuda's Expert Testimony

The Applicant alleges Counsel was ineffective for failing to object to Cynthia Fuda's testimony at trial about the victim's injuries on the grounds that Nurse Fuda lacked the expertise to make conclusions about the cause of the victim's injuries. This Court finds Counsel's performance was not deficient in this regard. This Court finds Nurse Fuda's testimony was not objectionable. The record reflects Nurse Fuda was qualified at trial without objection as an expert in the area of intensive care nursing. (Tr. 319:11-18). Nurse Fuda testified when the victim arrived at the emergency room he had a gunshot wound to the left side of his head which caused a skull fracture. (Tr. 322:3-15). On cross-examination by Counsel, Nurse Fuda testified the basis of her testimony was the victim's medical records, which she had reviewed and relied on in directly treating the victim upon his arrival in the surgical trauma unit at the hospital. (Tr. 326: 2-13). At the evidentiary hearing, Nurse Fuda testified her testimony at trial was based on her review of the victim's medical records and her experience as an intensive care nurse. She testified further she did not diagnose the victim's injuries but explored the exact nature of the injury and whether the puncture wound was in fact a gunshot wound, on which topics Counsel cross examined her. (Tr. 330: 2-14, 331: 3-5). The record reflects that she did not provide any expert opinions regarding the "diagnosis" of the victim but instead was simply relying on his "admitting diagnosis" in her care and treatment of the victim in the surgical trauma unit.

This Court finds Nurse Fuda was qualified as an expert in intensive care nursing and qualified to testify as to her rational perception of the victim's medical condition while under her care. This Court also finds it is clear from the record that Nurse Fuda did not evaluate or diagnose the victim's injuries and merely reported the victim's admitting diagnosis from his medical records. This Court finds it is unlikely any objection to Nurse Fuda's testimony would

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DJF

have been successful. Therefore, this Court finds Counsel was not deficient for failing to object to Nurse Fuda's testimony and his performance did not affect the outcome of the Applicant's proceeding.

E. Michelle Moritzky's EMS Testimony

The Applicant alleges Counsel was ineffective for failing to object to Michelle Moritzky's testimony at trial about the victim's injuries on the grounds that Moritzky lacked the expertise to make conclusions about the cause of the victim's injuries. This Court finds Counsel's performance was not deficient in this regard. See Rule 701, SCRE (lay witness testimony); Rule 703, SCRE (opinion on ultimate issue); State v. Mitchell, 399 S.C. 410, 416–17, 731 S.E.2d 889, 893 (2012); State v. Douglas, 380 S.C. 499, 502–503, 671 S.E.2d 606, 608–609 (2009) (witness testified as to her personal observations and experiences, as well as personal interview with victim; thus, witness may offer lay opinion testimony and need not be qualified as an expert). This Court finds Ms. Moritzky need not have been qualified as an expert in order to render her lay opinion based on her rational perceptions while rendering aid to the victim; therefore, her testimony was not objectionable. (Tr. 253: 2–11). Ms. Moritzky, a paramedic for Berkeley County EMS, testified at the Applicant's trial that she was called to the scene of a gunshot wound at the Pleasure Lounge. (Tr. 253:21–25). She testified the victim's wounds "seemed to indicate a gunshot wound" because she saw an "entrance type wound and an exit type wound." (Tr. 258:16–23; 259:1–11). Further, Moritzky testified that at the scene of the incident, in treating the victim, she relied on "what we see his injuries are and what the injuries indicate happened." At the evidentiary hearing Ms. Moritzky testified she did not diagnose the victim and her testimony at trial was based on her observation of the victim's symptoms and the amount of blood at the scene.

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This Court finds Ms. Moritzky's testimony as to the cause of the victim's injuries based on her observations and treatment of the victim was appropriate. The record reflects Ms. Moritzky's conclusions were based on her rational perception of the victim's injury for purposes of rendering treatment. This Court finds Ms. Moritzky could testify as to what she saw when treating the victim and it is unlikely an objection to her would have been successful. This Court finds Counsel was not deficient for failing to object to Ms. Moritzky's testimony about the victim's injury and his performance did not affect the outcome of the Applicant's proceeding.

VIII. Failure to Develop Mitigation Evidence

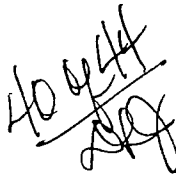
The Applicant alleges Counsel was ineffective for failing to develop admissible mitigation evidence to present to the Court during sentencing. See Simpson, 367 S.C. at 607, 627 S.E.2d at 712 (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) ("Even if the PCR judge correctly found counsel deficient, Simpson failed to show that he was prejudiced during the mitigation case. The jury was aware of Simpson's troubled childhood, traumatic life experiences, and mental condition. Any additional investigation would have merely resulted in a "fancier" mitigation case, having no effect on the outcome of the trial."); see also Butler, 286 S.C. at 442-43, 334 S.E.2d at 814-15 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2066) (Applicant alleged counsel was ineffective for failing to research, develop, and present evidence in mitigation during the sentencing phase of trial; however, based on testimony adduced during the PCR hearing, the court was unable to find the applicant had been prejudiced under Strickland). This Court finds the Applicant has failed to show that Counsel's performance was deficient. This Court finds the Applicant has also failed to show what, if any, further mitigation evidence existed. This Court further finds the Applicant has also failed to show what benefit further development of mitigation evidence by Counsel would have yielded. This Court finds the

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Applicant failed to carry his burden of proving Counsel performance affected the outcome of the Applicant's proceeding.

IX. Recusal of Judge Dennis

The Applicant alleges Counsel was ineffective for failing to move to recuse Judge Dennis when he showed resentment and hostility toward the Applicant. Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (S.C. Ct. App. 2003). It is not enough for a party seeking disqualification to simply allege bias or prejudice. Brailsford v. Brailsford, 380 S.C. 443, 451, 669 S.E. 2d 342, 346 (Ct. App. 2008); State v. Jackson, 353 S.C. 625, 627, 578 S.E. 2d 744, 745 (Ct. App. 2003); Rule 501, SCACR; Rule 501, Canon 3(E)(1)(a), SCACR. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge. Canon 3(E)(1)(a), SCACR. Jackson, 353 S.C. at 627, 578 S.E. at 745. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. Murphy v. Murphy, 319 S.C. 324, 331, 461 S.E. 2d 39, 42 (1995). Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case. Reading v. Ball, 291 S.C. 492, 494, 354 S.E.2d 397, 398 (Ct. App. 1987). It is not enough for the party seeking disqualification to simply allege bias. Id. The party seeking disqualification must show some evidence of bias or prejudice. If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Mallett v. Mallett, 323 S.C. 141,

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145–46, 473 S.E. 2d 804, 807–08 (Ct. App. 1996); Roper v. Dynamique Concepts, Inc., 316 S.C. 131, 139, 447 S.E. 2d 218, 222–23 (Ct. App. 1994), Koon v. Fares, 379 S.C. 150, 156, 666 S.E. 2d 230, 234 (2008). A motion to recuse may not be predicated on the judge’s rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench. Mallett, 323 S.C. at 145–46, 473 S.E. 2d at 807–08 (citing U.S. v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698 (1966); Berger v. U.S., 255 U.S. 22, 31, 41, S. Ct. 230, 232 (1921)). The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held that the judge committed errors in his rulings. Mallett, 323 S.C. at 147, 473 S.E. 2d at 808 (citing Reading, 291 S.C. at 494, 354 S.E.2d at 398).

This Court finds the record is void of any showing of resentment or hostility toward the Applicant by the trial judge. This Court also finds there was no basis for Counsel to move to recuse the trial judge. This Court finds further the Applicant has failed to present any evidence of a bias or prejudice stemming from an extra-judicial source by the trial judge. This Court finds this allegation is wholly without merit and the Applicant has failed to carry his burden of proving Counsel should have moved to recuse the trial judge and that Counsel’s failure to do so effected the outcome of his proceeding.

X. Failure to Inform of Potential Sentences

The Applicant alleges Counsel was ineffective for failing to inform the Applicant of the potential sentences he was facing if convicted at trial. This Court finds this allegation is wholly without merit. This Court finds credible Counsel’s testimony that he informed the Applicant of the potential sentences he was facing along with his constitutional rights. This Court finds Counsel was not deficient in this regard and his performance did not affect the outcome of the

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Applicant's proceeding. See Randall v. State, 356 S.C. 639, 641–42, 591 S.E.2d 608, 609–610 (2004) (citing Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002)) (failure to advise of collateral consequences of parole eligibility before the applicant proceeds to trial not ineffective assistance of counsel).

XI. Overwhelming Evidence of Guilt

Lastly, this Court finds the presence of overwhelming evidence of the Applicant's guilt presented by the State at trial negates any claim that Counsel's performance could have reasonably affected the outcome of the Applicant's trial.⁷ See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding no reasonable probability the result of trial would have been different had counsel's performance not been deficient where there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

At trial, the State presented the following evidence of the Applicant's guilt: the victim testified the Applicant took money from him and then shot him (Tr. 103:13–25, 104:15–18, 105:18–21, 228:15–25); the Applicant was seen trying to leave the scene shortly after police heard gunshots in the area of the shooting (Tr. 117:7–24); a gun was found on the side of the car where the Applicant was seated (Tr. 123:1–9, 166:12–22); an eyewitness testified she saw the Applicant inside the club with a gun in his hand after hitting the victim (Tr. 188:23–25, 189:1–14); the victim and defendant were seen having a dispute at the club shortly before the shooting

⁷ At the conclusion of the Applicant's trial, the trial judge commented the jury "returned a verdict of guilty, and I think the evidence overwhelmingly supports their decision, both direct and circumstantial evidence as to all charges." (Tr. 434:4–8).

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(Tr. 244:5–25, 245:1–5); a second eyewitness saw the Applicant with a gun in his hand as he was kicked out of the lounge with the victim and heard gunshots shortly after they exited (Tr. 246:4–20); and the Applicant’s hands tested positive for gunshot residue shortly after arrest (Tr. 311:2–5). This Court finds the Applicant has failed to carry his burden of proving prejudice resulted from Counsel’s performance since there is overwhelming evidence of guilt.

All Other Allegations

As to any and all allegations—specifically whether the Applicant desired to challenge his Armed Robbery conviction and the Applicant’s bald assertion that Counsel’s cumulative errors constitute ineffective assistance of counsel—that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence at the evidentiary hearing regarding such allegations. Accordingly, this Court deems those allegations abandoned by the Applicant. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel’s representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

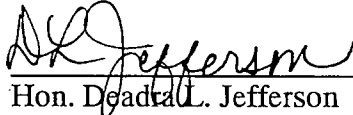
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and

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2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 17th day of July, 20 14



Hon. Donald L. Jefferson
Presiding Judge, 9th Judicial Circuit

Charleston, South Carolina
At Chambers



RHOAD & RHOAD
ATTORNEYS AT LAW

DENNIS J. RHOAD

SALLY H. RHOAD

August 11, 2014

RECEIVED

AUG 14 2014

South Carolina Supreme Court
Clerk of Court
1231 Gervais Str.
Columbia, SC 29201

S.C. SUPREME COURT

**RE: My Client: Jermaine T. McKelvey, #280590 v. State of South Carolina
Case No.: 2012-CP-08-1235**

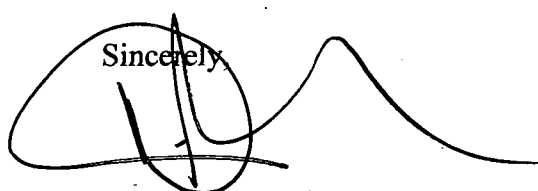
Dear Clerk:

I have enclosed an original and one copy of our Notice of Intent to Appeal in the case of State v. Jermaine McKelvey Case # 2009-GS-08-0504 . I have attached a copy of Judge Jefferson's Order dismissing Applicant Jermaine McKelvey's Application for Post Conviction Relief. I would request that you file the Notice and return a filed copy to me in the self-addressed stamped envelope provided for your convenience.

It is my understanding that the \$100.00 filing fee will be waived because Mr. McKelvey is an indigent. If this is not correct please notify me immediately.

Also I was appointed to represent Mr. McKelvey in his application for PCR and I would respectfully request that the Office of Appellate Defense assume all responsibilities for Mr. McKelvey's appeal. By copy of this letter and the Notice of Appeal, I am notifying the Office of Appellate Defense and Mr. McKelvey of my request.

Sincerely,



Dennis J. Rhoad

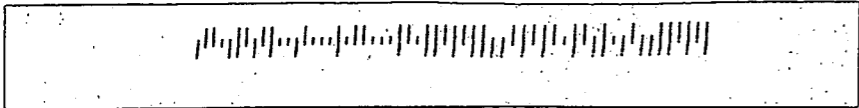
SHR/tpm

Enclosures: as stated

cc: Ms. Ashleigh Wilson, Esq. w/enclosures
Berkeley County Clerk of Court w/enclosures
Mr. Jermaine T. McKelvey w/enclosures
Ms. Kimberly McCall w/enclosures
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