THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable James R. Barber, III Circuit Court Judge

Case No.: 2006-CP-40-6124

Phillip H. Crocker, III,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Phillip H. Crocker, III, Petitioner, appeals the Order of Dismissal issued by the Honorable James R. Barber, III, on July 1, 2014 and filed on July 2, 2013. Petitioner also appeals the Order signed and filed by the Honorable James R. Barber, III on August 6, 2014. Petitioner, through counsel, received written notice of the entry of the Order on August 15, 2014.

Tricia A. Blanchette
S.C. Bar No. 74904
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Other Counsel of Record:

Megan Harrigan
Assistant Attorney General
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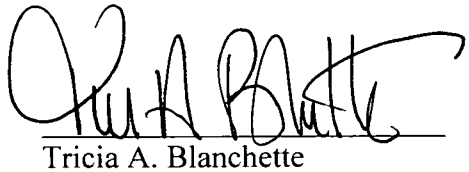
CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I placed in the United States Mail on this 18th day of August 2014, a copy of a Notice of Intent to Appeal, with postage prepaid and the return address clearly shown on said envelope to Megan E. Harrigan with the Office of the Attorney General at:

Office of the Attorney General
ATT: Megan E. Harrigan, Ast. AG
P.O. Box 11549
Columbia, SC 29211



Tricia A. Blanchette
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August 18, 2014

LAW OFFICE OF TRICIA A. BLANCHETTE

RECEIVED
AUG 18 2014
S.C. Supreme Court

August 18, 2014
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Phillip H. Crocker, III, v. State; Docket No.: 2006-CP-40-6124

Dear Sir:

Enclosed for filing is a Notice of Appeal for the above PCR case. Also enclosed are the following:

(1) Proof of service on the Respondent.

(2) A copy of the Order of Dismissal and Order denying Applicant's Motion.

I was appointed to represent Mr. Crocker, so I am sending a copy of these documents to the Office of Appellate Defense.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Megan Harrigan, Assistant Attorney General
Richland County Clerk of Court
Office of Appellate Defense
Phillip Crocker

PO Box 12725 | Columbia SC 29211

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mHS

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2006CP4006124

Phillip H #298423 Crocker III
PLAINTIFF(S)

John Ozmint
SC Dept of Corrections
DEFENDANT(S)

Submitted by: _____ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☑ Other 26

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: **Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 2 July 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Robert Cleland FitzSimons Tricia A. Blanchette Brian T. Petrano Megan E. Harrigan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Phillip H. Crocker, III, #298423, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2006-CP-40-6124 **ORDER OF DISMISSAL**

This matter is before the Court based on an application for post-conviction relief filed by Applicant on October 17, 2006. Respondent filed its Return on May 4, 2007. Thereafter, Applicant filed an amended application on January 9, 2014.[1] An evidentiary hearing into the matter was convened on January 21-23, 2014, before the Honorable James R. Barber, III. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. Testifying at the hearing were Applicant, homicide reconstruction specialist Wayne N. Hill, Sr., trial counsels E. Fielding Pringle and Douglas S. Strickler, appellate counsel John D. Delgado, and Applicant's friend Jeff McInnis.

At the conclusion of the hearing, the Court requested memorandums from both parties. Following its review of these memorandums and the testimony and evidence presented at the hearing, this Court finds that there are no constitutional deprivations or other errors entitling Applicant to relief and therefore, is denying and dismissing the application with prejudice.

[1] Applicant has also filed various *pro se* "amendments" and other pleadings, which were not considered by this Court as he is represented by counsel. Counsel moved to adopt these various pleadings at the start of the evidentiary hearing, which was denied by this Court.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the January 2002 term of the Richland County Grand Jury for Murder (2002-GS-40-4561) and Trafficking in Marijuana – Greater than Ten Pounds but Less than One-Hundred Pounds (2002-GS-40-9503). Chief Public Defender of the Fifth Judicial Circuit, Douglas S. Strickler and Chief Public Defender of Richland County, E. Fielding Pringle represented Applicant. Assistant Solicitors Deitrich Lake and Kathryn Luck Campbell, of the Fifth Circuit Solicitor's Office, prosecuted the case. On December 1-5, 2003, Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where he was convicted as indicted. Judge Cooper sentenced Applicant to thirty years imprisonment for Murder and a concurrent sentence of five years imprisonment for Trafficking in Marijuana.

A notice of appeal was filed and an appeal was perfected on Applicant's behalf by retained counsel, John D. Delgado, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences by published opinion. State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005). The Remittitur was sent on November 16, 2005.

In his *pro se* application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully based on allegations of: actual innocence, ineffective assistance of trial and appellate counsel, due process violations, and judicial misconduct. In his amended application for post-conviction relief, Applicant, through counsel, alleged the following:

1. Trial counsel rendered ineffective assistance of counsel when he failed to move to suppress the information obtained from the

warrantless search of the victim's cell phone. S.C. Code 17-13-140; See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), United States v. Wurie, 728 F.Supp.3d 1 (1st Cir. 2013), United States v. Quintana, 594 F.Supp. 2d 1291 (M.D. Fla. 2008), United States v. Gibbs, 2013 U.S. App. Lexis 23412 (4th Cir. 2013).

2. Trial counsel rendered ineffective assistance when he failed to present a suppression motion or enter contemporaneous objections on the basis that the search warrants obtained for cell phone records (Sprint Number: 646-408-5502, Cingular Number 843-615-3711, Verizon Number: 718-299-6611) were the fruit of the poisonous tree of the warrantless search of the victim's cell phone and/or in violation of S.C. Code 17-13-140; therefore, the cell phone records, tower information and testimony should have been excluded. Transcript p. 615-618, 749-753, 833. S.C. Code 17-13-140; See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986).

3. Trial counsel rendered ineffective assistance of counsel when he failed obtain / investigation all surveillance footage from Lowe's and failed to argue that the video surveillance obtained from Lowe's (Trial Exhibit #8) should have been suppressed due to chain of custody and other defects.

4. Trial counsel rendered ineffective assistance of counsel in matters involving Consuelo Casey, specifically but not limited to:
    a. Counsel failed to argue that immunity was improperly granted to Consuelo Casey by a law enforcement officer in exchange for her testimony and ask for a specific jury instruction on immunity. Transcript p. 958, lns. 16-25. United States v. Brooks, 928 F.2d 1403 (4th Cir. 1991).

b. Counsel failed to properly cross-examine Counselo Casey on her "immunity" and the prescription medications she was on at the time of her interviews with law enforcement. Transcript pp. 311, ln. 20-312, ln. 10, 288; See State v. Thrift, 312 S.C. 282, 440 S.E.2d 341(1993).

c. Counsel failed to fully explore the issue of Consuelo's involvement and guilt in the crimes committed.

d. Counsel failed to utilize Counselo Casey's prior record.

5. Trial counsel rendered ineffective assistance when he failed to obtain multi-jurisdictional agreements prior to trial and argue that law enforcement conducted an extra-territorial investigation. S.C. Code § 23-1-215, See State v. Burgess, 393 S.C. 396, 712 S.E.2d 1 (S.C. Ct. App. 2011), State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011).

6. Trial counsel rendered ineffective assistance when he failed to obtain multi-jurisdictional agreements prior to trial and argue that the execution of the search warrant and arrest of Applicant at his residence in Charlotte, North Carolina violated requirements set forth for extra-territorial jurisdiction and investigations, along with Applicant's 4th Amendment rights. Trial counsel also failed to argue for suppression of the evidence obtained during the search of Applicant's residence in North Carolina. Transcript pp. 562-70, 580-3, 734-5, 849-70, 963, 972, 1019-24; S.C. Code § 23-1-215; N.C. Code § 15A-247, 15A-251, 15A-252, 15A-254; See State v. Burgess, 393 S.C. 396, 712 S.E.2d 1 (S.C. Ct. App. 2011), State v. Boswell, 391 S.C. 592, 707 S.E.2d265 (2011), State v. Jones, 97 N.C.App. 189, 388 S.E.2d 213 (1990).

7. Trial counsel rendered ineffective assistance when he failed to utilize a ballistics expert as was requested in writing by Applicant. Trial counsel rendered ineffective assistance of

counsel when he failed to object to her initial qualification as an expert, failed to object to improper direct-examination and properly cross-examine Dr. Vandersteenhoven since she was not qualified as a forensic pathologist. Transcript pp. 782-7.

8. Trial counsel rendered ineffective assistance when he failed to fully investigate Applicant's case and utilize necessary witnesses at trial.

9. Trial counsel rendered ineffective assistance of counsel when he failed to file notice of and argue an alibi defense. Alternatively, trial counsel failed to request a jury charge on alibi. Trial counsel also failed to properly utilize Applicant's testimony to establish his defense.

10. Trial counsel rendered ineffective assistance of counsel when he failed to prepare and argue a viable third party guilt defense. Transcript pp. 235, 1240-42. See Holmes v.South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006). Alternatively, ineffective assistance of counsel for failure to request a third party guilty instruction.

11. Trial counsel rendered ineffective assistance of counsel when he failed to utilize the cross-examination of Willie Jennings to show Jennings' true level culpability and expose his role in the matter. Trial counsel rendered ineffective assistance of counsel when he failed to move for a new trial based upon the plea entered by Willie Jennings post trial. Transcript pp. 672-3.

12. Trial counsel rendered ineffective assistance when he failed to request a curative instruction when the solicitor improperly cross-examined Applicant and/or committed improper pitting. See Issue #18(a) below.

13. Trial counsel rendered ineffective assistance of counsel when he failed to object to vouching during the solicitor's closing argument; alternatively, Applicant alleges prosecutorial

misconduct. Transcript pp. 1391, ln. 24 – 1392, ln. 12. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

14. Trial counsel rendered ineffective assistance of counsel when he failed to object [to] the solicitor's closing argument regarding the charge of murder. Transcript pp. 1383-1385. In her closing, the solicitor informed the jury that malice can [be] express, implied and inferred. Applicant submits that this argument is not only confusing but an improper statement of the law that results in burden shifting and a presumption of malice. State v. Van Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996), State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003), Sandstrom v.Montana, 442 U.S. 510, 524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (holding that "burden-shifting presumption[s]" or "conclusive presumption[s]" deprive a defendant of the "due process of law" and are therefore unconstitutional),. The solicitor also improperly argued the concept of "felony murder" and submitted to the jury that finding Applicant guilty of a felony / trafficking should amount to an automatic finding of guilty for murder. Transcript pp. 1385, 1439, 1441-2. See Gore v. Leek, 261 S.C. 308, 199 S.E.2d 755 (1973), State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Alternatively, Applicant alleges prosecutorial misconduct on these grounds.

15. Trial counsel rendered ineffective assistance of counsel when he failed to request a proper instruction on murder during the charging conference and failed to object to the Court's instruction on murder since it was burden shifting and created an impermissible presumption of malice. Transcript p. 1344, 1346-38, 1452-1454; Sandstrom v.Montana, 442 U.S. 510, 524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (holding that "burden-shifting presumption[s]" or "conclusive presumption[s]" deprive a defendant of the "due process of law" and are therefore unconstitutional), State v. Van Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996), State v. Wilds, 355 S.C.

269, 584 S.E.2d 138 (Ct. App. 2003), Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Applicant submits that the trial court's charge was more than a slight deviation from the charge approved in State v.Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

16. Trial counsel rendered ineffective assistance of counsel when he failed to request a limiting or specific instruction on the trafficking charge consistent with the pre-trial and directed verdict argument.

17. Trial counsel rendered ineffective assistance of counsel when he failed to object to the trial court's instruction providing examples of express malice, which amounted to an unconstitutional comment on the facts. Transcript p. 1453, lns. 14-20; S.C. Const. Art. V, § 21, State v. Hartley, 307 S.C. 239, 414 S.E.2d 182 (Ct. App. 1992). The State's theory and argument immediately preceding the court's charge was that Applicant had set up / planned a drug deal days prior that culminated in the Lowe's parking lot and the victim's death. See Transcript pp. 1434, 1439, 1441. Additionally, the charge given by the court falls outside the standard / recommended charge for murder. See Ralph King Anderson, Jr., South Carolina Request to Charge – Criminal, 2012, § 2-1.

18. Appellate counsel rendered ineffective assistance of counsel by limiting the appellate review to only the drug conviction and sentence and by failing to raise all meritorious issues on appeal, as detailed below:

    a. Improper pitting / improper cross-examination of Applicant: During Applicant's testimony, trial counsel continuously objected to pitting, and his objection was sustained and bench conference was held. Transcript pp. 1260-161. Thereafter, the State continued with the same line of questioning, counsel continued with his

objections, and his objection was overruled. Transcript pp. 1261-3. At a later point, counsel also moved for a mistrial. Transcript p. 1336. Counsel's timely and proper objection to pitting and motion for mistrial were not raised on appeal. Applicant submits pursuant to State v. Brown, 297 S.C. 27, 374 S.E.2d 699 (1988), and State v. Sapps, 295 S.C. 484, 389 S.E.2d 145 (1988), he was prejudiced as a result of appellate counsel's failure to raise this preserved issue.

b. Appellate counsel failed to raise the trial court's denial of trial counsel's request to suppress the testimony of Paula Jones. Transcript pp. 36-41.

c. Appellate counsel failed to address the court's ruling regarding the admission of the cell site information and the qualification of the witness (Sgt. McDonald). Transcript pp. 875-892, 898-920.

19. Alternatively to the above stated issues, Applicant alleges ineffective assistance due to trial counsel's overall performance pursuant to United States v. Chronic, 466 U.S. 648, 104 S.Ct. 2039 (1984).

Applicant proceeded forward on these grounds as set forth in his amended application at the evidentiary hearing.

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 presented at the evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. This Court finds that the testimony of trial counsels, Douglas S. Strickler and E. Fielding Pringle, and appellate counsel, John D. Delgado, credible and should be afforded

great weight; in contrast, this Court finds that the testimony of Applicant lacks credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel:

Allegation No. 1: Trial counsel rendered ineffective assistance of counsel when he failed to move to suppress the information obtained from the warrantless search of the victim's cell phone.

Applicant alleges that trial counsel was ineffective for failing to object to and/ or failure to move to suppress information obtained from the victim's cell phone without a warrant. Applicant alleges that when law enforcement scrolled through the decedent's phone, with permission of his wife but without a search warrant, law enforcement was able to obtain information regarding a phone number listed as "Croc" which ultimately lead authorities to the discovery of subsequent information, such as statements from Willie Jennings and Consuelo Casey, and allowed law enforcement to obtain a search warrant for Applicant's home.

Applicant concedes that he does not have any standing to challenge the warrantless search of the victim's cell phone under the Fourth Amendment to the United States Constitution. See United States v. Castellanos, 716 F.3d 828, 833 (4th Cir. 2013) cert. denied, 134 S. Ct. 832, 187 L. Ed. 2d 692 (U.S. 2013) ("Accordingly, Fourth Amendment rights "may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. Conversely, suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights

were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. The capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection . . . has a legitimate expectation of privacy in the invaded place.") (internal citations omitted).

However, Applicant asserts that he had standing to challenge the introduction of evidence obtained from the warrantless search based on S.C. Code Ann. § 17-13-140 (1976), the South Carolina Search warrant statute that sets forth stricter requirements than those provided by the Fourth Amendment of the United States Constitution. See State v. McKnight, 291 S.C. 110, 115, 352 S.E.2d 471, 474 (1987) ("On the other hand, the rights afforded by Section 17–13–140 are not dependent upon a showing of an expectation of privacy in the searched premises. The primary purpose of the statute is to insure the timely recording of the testimony upon which the judicial officer relied in issuing the warrant. However, the primary *benefit* of the statute "is to the person arrested or searched." Therefore, one contesting the legality of a search because of a defect under Section 17–13–140 need only show that the State is attempting to introduce the evidence against him.") (internal citations omitted). In McKnight, the South Carolina Supreme Court held that any defendant against whom evidence is offered has standing to object to the validity of the search if a search warrant was procured pursuant to S.C. Code Ann. § 17-13-140. Applicant alleges that because he would have had standing to challenge the information garnered from the victim's phone under S.C. Code Ann. § 17-13-140 and McKnight, trial counsel was ineffective for failing to object to the introduction of the evidence or failing to move to suppress this information from being introduced against him at trial.

In response, Respondent asserts that this argument is in error because as no search warrant was obtained in the present case, S.C. Code Ann. § 17-13-140 does not provide any protection or relief to Applicant. See McKnight, 291 S.C. at 115, 352 S.E.2d at 474 (holding that when a motion to suppress is decided on constitutional grounds rather than S.C. Code Ann. § 17-13-140, whether the defendant has standing is the appropriate inquiry). Therefore, as the decedent's cell phone was searched without a warrant, S.C. Code Ann. § 17-13-140 was not utilized in the present case and trial counsel cannot be deficient for failing to challenge evidence based on its grounds. Additionally, Respondent argued that trial counsel cannot be deficient for failing to challenge the information based on Fourth Amendment grounds, as Applicant lacked standing to make such a challenge because he had no reasonable expectation of privacy in the decedent's cell phone.

This Court agrees with Respondent and finds that Applicant is not entitled to the protections of S.C. Code Ann. § 17-13-140 because no search warrant was obtained by law enforcement to view and extract information from the decedent's phone. As S.C. Code Ann. § 17-13-140 is inapplicable, Applicant is only afforded the protections provided by the Fourth Amendment of the United States Constitution to challenge the warrantless search of the decedent's cell phone. As discussed above, Applicant would need standing to challenge the search of the decedent's cell phone, which he is clearly lacking. Because Applicant had no standing to challenge the evidence obtained from the decedent's cell phone based on either Forth Amendment grounds or S.C. Code Ann. § 17-13-140 grounds, trial counsels were not ineffective for failing to either move to suppress and/or object to the information obtained by the warrantless

search of the decedent's phone. Based on the foregoing reasons, this Court finds that the performance of trial counsel was within the range of competency required and was not deficient in regards to this allegation. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 2: Trial counsel rendered ineffective assistance when he failed to present a suppression motion or enter contemporaneous objections on the basis that the search warrants obtained for cell phone records were the fruit of the poisonous tree of the warrantless search of the victim's cell phone and/or in violation of S.C. Code 17-13-140; therefore, the cell phone records, tower information and testimony should have been excluded.

During the course of the investigation into the murder of Nathaniel Casey, law enforcement sought and obtained search warrants for three numbers: Sprint Number (646) 408-5502, Cingular Number (843) 615-3711, and Verizon Number (718) 299-6611. Applicant introduced a copy of each warrant as Applicant's Exhibits Nos. 11, 12, and 13. All three warrants were obtained in Richland County pursuant to S.C. Code Ann. § 17-13-140 and were sent to the custodian of record for the various cell phone entities, all located outside of South Carolina. Applicant alleges that trial counsel rendered ineffective assistance of counsel by failing to object or move to suppress the introduction of cell phone records and testimony relating to these cell phone records, which he alleges were obtained in violation of S.C. Code Ann. § 17-13-140 because they were sent to entities outside of South Carolina. Applicant again alleges that although he did not have standing to challenge under the Fourth Amendment of the United States Constitution, he did have standing under S.C. Code Ann. § 17-13-140 and McKnight, supra. Applicant alleges that since the warrants were invalid because they exceeded the scope of S.C. Code Ann. § 17-13-140 by being sent to entities outside of the South Carolina, trial counsel was

deficient for failing to challenge these warrants. Applicant further alleges that because the cell phone records obtained from these warrants were such a critical part of the State's case, he was prejudiced by trial counsel's failure to object to or move to suppress these records and the accompanying testimony. In his memorandum of law, Applicant argues that these cell phone records were one of the primary reasons he became a suspect in the decedent's murder and were heavily relied on by the State throughout its case.

At the evidentiary hearing, trial counsel testified that he has frequently handled cases involving search warrants during his thirty-three year career and has previously had cases where search warrants were obtained for cell phone records. Trial counsel testified that he reviewed the search warrants in question in preparation for trial and did not see any problems with statutory compliance or have any reason to object that would have resulted in suppression. He testified that although the warrants were issued in Richland County and sent to entities outside of South Carolina, he does not believe a challenge would have successfully resulted in suppression, although he acknowledged that he could have made such a motion. He testified that had he made such a motion, suppression would have been unlikely based on either a "good faith exception" or by the State obtaining a "D Order" pursuant 18 U.S.C.A. § 2703.

This Court finds that although trial counsel could have objected to the introduction of the cell phone records and accompanying testimony, such an objection would not likely have resulted in suppression or exclusion of the records and testimony in question. To establish that counsel was ineffective for failing to move for suppression, an applicant must show that had such a motion to suppress been made, there is a reasonable probability that the trial court would have

granted the motion. Bannister v. State, 333 S.C. 298, 304, 509 S.E.2d 807, 810 (1998). In the present case, this Court finds that Applicant has failed to establish that such a motion would have been granted if made by trial counsel. As trial counsel, the Chief Public Defender for the Fifth Judicial Circuit, correctly noted during his testimony, such a motion would not likely have been granted based on the "good faith exception" to S.C. Code Ann. § 17-13-140. In State v. Sachs, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975), the Supreme Court of South Carolina found a good faith exception permits the introduction of evidence seized pursuant to a warrant that is defective under S.C. Code Ann. § 17-13-140 if the officers have made a good faith attempt to comply with the affidavit requirement. In the present case, officers fully complied with S.C. Code Ann. § 17-13-140 and the only complaint made by Applicant is that the warrants were improperly sent to entities outside of the state beyond the magistrate's authority. This Court finds that there is no reasonable likelihood that a motion to suppress would have been granted based on the ground that the warrants were sent to entities outside of South Carolina, as a good faith exception akin to Sachs would not have required exclusion. At the time the warrants were obtained in 2001, cell phones and other handheld devices were much more of a novelty and not nearly as widespread as today. This is evidenced by a review of the transcript. See e.g., Tr. p. 732-732. The testimony of Sergeant McDonald, who obtained the search warrants, demonstrates a good faith attempt to fully comply with all statutory requirements to obtain records for this burgeoning type of evidence, a process that was not nearly as commonplace as it is today, thirteen years later. See Tr. p. 832-33.

Furthermore, this Court finds that had such a motion to suppress been made, it likely would have been denied as the State could have obtained the records without a search warrant pursuant to 18 U.S.C.A. § 2703 (d). 18 U.S.C.A. § 2703 (d) states:

> "A court order for disclosure under subsection (b) or (c) may be issued ***by any court that is a court of competent jurisdiction*** and shall issue only if the governmental entity offers specific and articulable facts showing that there are ***reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.*** In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider."

In State v. Odom, the South Carolina Supreme Court held that any circuit court within South Carolina is a "court of competent jurisdiction" that can issue orders pursuant to 18 U.S.C.A. § 2703 (d) and determined that such orders are not a violation of South Carolina law. 382 S.C. 144, 676 S.E.2d 124 (2009). Therefore, had trial counsel moved to suppress the cell phone records based on a violation of the South Carolina search warrant statute, the State easily could have obtained the information without a warrant pursuant to 18 U.S.C.A. § 2703 (d), as it had reasonable belief that the electronic communications records were material to an on-going criminal investigation. There is no reasonable likelihood that the records would not have been able to be reproduced by the custodians of record for the various entities, and, therefore, Applicant cannot show that there is a reasonable likelihood that the result would have been

different if a motion to suppress had been made. Therefore, this Court finds that Applicant is unable to establish any prejudice stemming from the alleged deficiency of counsel.

Based on the foregoing, this Court finds that Applicant has failed to meet his requisite burden of proof in regards to this allegation, as there is no reasonable likelihood that the information would have been suppressed or excluded had such a motion been made and therefore, prejudice cannot be shown. Therefore, this Court finds that Applicant has failed to establish that trial counsel was ineffective and these allegations must be denied and dismissed with prejudice.

Allegation No. 3: Trial counsel rendered ineffective assistance of counsel when he failed obtain/ investigat[e] all surveillance footage from Lowe's and failed to argue that the video surveillance obtained from Lowe's (Trial Exhibit #8) should have been suppressed due to chain of custody and other defects.

Applicant alleges that trial counsel was ineffective for failing to argue that the video surveillance obtained from Lowe's should have been suppressed due to chain of custody and other defects. Specifically, Applicant alleges that trial counsel should have objected to the introduction of the Lowe's video based on: chain of custody defects because the State did not present all persons who handled the video cassette; authenticity because the raw data footage showed fifteen or sixteen different angles but only one was produced at trial; and possible tampering or altering of the video cassette because it was taken to Tennessee in an attempt to have the video enhanced. Applicant again alleges that this surveillance video was crucial to the State's case and trial counsel's deficiency regarding the tape caused him great prejudice. Applicant failed to produce any of these other "fifteen or sixteen" different angles from the raw surveillance footage he alleged was originally obtained by law enforcement, nor did he present

any evidence of tampering or alteration of the videotape.[2] As Applicant has failed to present evidence of any additional footage or any tampering, this Court finds that Applicant has failed to meet his burden in regards to these allegations and will instead focus on the alleged defects in the chain of custody.

A party offering into evidence of fungible items, such as drugs or blood, must establish a complete chain of custody as far as practicable. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 752 (2011). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007) (internal citations omitted). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id.

In contrast, "[w]hile the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: if the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition." State v. Freiburger, 366 S.C. 125,

[2] Applicant moved for discovery to obtain a copy of the tape, which was granted. Thereafter, Applicant sent subpoenas to various entities seeking the tape but none of the entities were able to locate a tape with the different angles as alleged by Applicant. Although Applicant attempted to get these materials and was unsuccessful, this Court finds that he has failed to meet his burden, as more than mere speculation is needed to satisfy his burden of proof.

134, 620 S.E.2d 737, 741-42 (2005) (citing State v. Glenn, 328 S.C. 300, 305–306, 492 S.E.2d 393, 395 (Ct.App.1997)).

In the present case, the evidence in question, a videotape of surveillance footage, is non-fungible, as it is "fairly unique and readily identifiable." Freiburger, supra. Respondent argues and Applicant concedes that the videotape is a non-fungible item and thereby does not require the establishment of a strict chain of custody. As a non-fungible item, admission of the videotape into evidence did not require a strict chain of custody, but rather, only testimony that the videotape is the video in question and in a substantially unchanged condition. Here, these requirements were satisfied through the testimony of Sergeant McDonald. Tr. pp. 823-827. As the State fulfilled its chain of custody requirements in regards to this non-fungible evidence, this Court finds that trial counsel was not deficient for not objecting to its admission based on purported chain of custody defects.

Additionally, even though this Court finds that the videotape in question is non-fungible, there are still no defects in the chain of custody even if this Court were to determine that the videotape is fungible evidence. The testimony of Sergeant McDonald and other officers from the Richland County Sherriff's Department establishes the identity of those who have handled the videotape and reasonably demonstrates the manner of handling the evidence. Therefore, there is no defect in the chain of custody and trial counsel was not deficient in regards to this allegation.

Furthermore, this Court finds that Applicant has failed to meet his burden of establishing the requisite prejudice in regards to this allegation. To establish prejudice in a post-conviction

relief action on a claim that counsel was ineffective for failing to move to suppress certain evidence, an applicant must also show that had his trial attorney challenged the evidence in question, there is a reasonable probability that he would have prevailed and the evidence would be excluded. Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001). As set forth above, this Court finds that there were no defects in the chain of custody. Had trial counsel made a motion to suppress the evidence based on defects in the chain of custody, the motion would have been denied and the tape would have been admitted. Furthermore, any potential defects in the chain of custody could have been readily and easily cured by the State calling additional law enforcement officers, including the law enforcement officer from Tennessee, and thus suppression based on any defect in the chain is extremely unlikely. Therefore, Applicant is unable to show any resulting prejudice. In conclusion, under the particular facts of this case, this Court finds that the Applicant has failed to meet his burden of establishing both deficiency and prejudice in regards to this allegation, which must be denied and dismissed with prejudice.

Allegation No. 4: Trial counsel rendered ineffective assistance of counsel in matters involving Consuelo Casey, specifically but not limited to: (a) Counsel failed to argue that immunity was improperly granted to Consuelo Casey by a law enforcement officer in exchange for her testimony and ask for a specific jury instruction on immunity; (b) Counsel failed to properly cross-examine Consuelo Casey on her "immunity" and the prescription medications she was on at the time of her interviews with law enforcement; (c) Counsel failed to fully explore the issue of Consuelo's involvement and guilt in the crimes committed; and (d) Counsel failed to utilize Consuelo Casey's prior record.

Applicant alleges that trial counsel was ineffective in regards to the decedent's wife, Consuelo Casey, including failure to argue immunity was properly granted in exchange for her testimony, failure to cross-examine her on her immunity and medications at the time of her

interviews with law enforcement, failure to fully explore her involvement, and failure to utilize her prior record. This Court finds that nothing in trial counsel's performance was deficient in regards to Consuelo Casey and will address each specific allegation below.

Applicant's first allegation in regards to Consuelo Casey is that she was improperly offered immunity from prosecution for her involvement in the drug conspiracy in exchange for her testimony and that trial counsel was deficient for failing to argue this to the court to exclude her testimony and/or obtain a specific jury instruction on immunity. Applicant argued that law enforcement, particularly Sergeant McDonald, improperly offered Casey immunity in exchange for her testimony against Applicant. Applicant argues that this offer of immunity was made in violation of S.C. Code Ann. § 8-13-705, which prohibits giving or promising anything of value with the intent to influence testimony. Additionally, Applicant argues that he was entitled to a cautionary instruction to the jury regarding Casey's immunity based on United States v. Brooks, 928 F.2d 1403 (4th Cir. 1991).

This Court finds that Consuelo Casey was not improperly given immunity from prosecution for her role in the drug conspiracy that ultimately led to her husband's death. Our courts have consistently held that law enforcement may offer a witness who could be prosecuted as a co-defendant immunity from his or her involvement in a criminal transaction in order to secure favorable, albeit self-incriminating, testimony from this witness. See State v. Thrift, 312 S.C. 282, 297, 440 S.E.2d 341, 349 (1994) ("If the government desires to obtain a statement from a citizen which might incriminate him, the government has two options. First, it may obtain from the citizen a voluntary waiver of his right of silence. The second option the government has

if it desires to require a citizen to testify against himself is to grant the citizen immunity from prosecution.") This Court finds that Sergeant McDonald's offer of immunity from prosecution regarding the drug transaction to encourage Casey to be forthcoming and assist into the murder of her husband was not improper. Furthermore, Applicant's reliance on S.C. Code Ann. § 8-13-705 is in error, as this statutory provision is intended to prohibit anything of material value from being given to influence witness testimony in the form of a bribe and does not pertain to immunity offered for assistance during an on-going criminal investigation. Additionally, this Court finds that Brooks, which Applicant cites in his argument that he was entitled to a jury instruction on Casey's immunity, is not persuasive or well-aligned to Applicant's argument. In Brooks, the court noted that the informant-witness had his charges dismissed months prior to testifying before the grand jury and could not have influenced his testimony in any way and therefore, the defendant was not entitled to a specific charge on the immunity offered. United States v. Brooks, 928 F.2d at 1409. Similarly, in the present case, Casey was never charged with any crimes for her role in setting up the drug transaction that ultimately led to her husband's death and any "immunity" offered to her was in the earliest stages of the investigation to encourage her to be open and honest with law enforcement so her husband's murderer could be found. As there was nothing improper about the immunity offered to Casey and Applicant was not entitled to a specific jury charge, this Court finds that trial counsel was not deficient in regards to these allegations. Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required under Strickland.

Applicant's second allegation is that trial counsel failed to properly cross examine Casey

on her immunity and any prescriptions she was on when she was interviewed by law enforcement. In regards to the allegations pertaining to Casey's medications, Applicant relies on the direct examination of Casey where she testified that she was placed on medication to help with sleep and anxiety shortly after her husband's death. Tr. p. 288-89. Applicant introduced a document comprised of a cover letter from Department of Health and Human Services and fifteen page double-spaced printout from a website, introduced as Applicant's Exhibit No. 15, which discusses the side effects of two medications that Casey was taking shortly after her husband's death to show that trial counsel should have cross-examined her regarding potential side effects.

This Court finds that this allegation must be denied and dismissed, as the record clearly demonstrates a vigorous cross-examination of Casey by trial counsel. Trial counsel's cross-examination of Casey encompasses forty-four pages of the trial transcript and is incredibly well executed. Trial counsel was able to elicit from Casey eleven times that she lied to law enforcement and highlighted that these lies were memorialized in signed, sworn statements. See Tr. p. 304; 305; 315; 317; 318. Trial counsel was also able to elicit testimony from Casey that she only began being forthright with law enforcement once immunity was promised in regards to her role in the drug transaction, showing that she was motivated by self-interest and self-preservation, not out of a desire to solve her husband's murder. See p. 311 ln. 13-312 ln. 10; 313 lns. 11-22. Trial counsel then was able to elicit similar testimony from Sergeant McDonald during his cross-examination. See 958-959. Additionally, trial counsel highlighted to the jury that Casey was granted immunity and this was her sole motivation for assisting law enforcement.

See Tr. p. 1401 ln. 22 – 1403 ln. 1. In regards to the allegation that trial counsel was deficient for not cross-examining Casey on the various medications she was prescribed or investigating these investigations further, this Court finds that Applicant has failed to meet his requisite burden of proof. Applicant presented no evidence beyond the website printout introduced as Applicant's Exhibit No. 15 in support of this allegation. Applicant presented no testimony or evidence that Casey experienced any of the possible side effects from these medications. Furthermore, Applicant presented no evidence that any additional investigation into these medications would have yielded any beneficial information to aid in trial counsel's thorough cross-examination of Casey. Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required under Strickland. This Court finds that Applicant has failed to meet this burden of proof in regards to this allegation, which must be denied and dismissed with prejudice.

Applicant's third allegation is that the trial counsel was ineffective for failing to fully explore the issue of Casey's involvement in and guilt of the crimes committed. Specifically, Applicant argues that Casey was "not an innocent party" and wanted trial counsel to investigate her involvement with Willie Jennings and other persons that could have implicated her in her husband's death. Applicant testified that he wanted trial counsel to speak with several witnesses, including LaToya Hunter and Monica McClain, on their knowledge of Casey's involvement and possible motives for involvement in her husband's murder. Applicant cites to Casey's various statements to law enforcement that are not consistent and attempt to reduce her involvement, introduced as Applicant's Exhibits No. 18, 19, and 20. This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation. As an initial matter, this Court notes

that Applicant failed to present any additional witnesses that he wanted trial counsel to speak with and failed to present any evidence as to what further investigation into Casey would have beneficially yielded. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (internal citations omitted) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. There is nothing in the record to indicate that interviewing the victims would have led to any different result."). Furthermore, as discussed above, this Court finds that trial counsel's cross-examination of Casey was thorough and fully explored her immunity and motivations for testifying. This Court finds that trial counsel's performance was reasonable and fell within professional norms. Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required under Strickland. Therefore, this allegation must be denied and dismissed with prejudice.

Finally, Applicant alleged that trial counsel was ineffective for failing to utilize Casey's prior record for impeachment purposes during her trial testimony. In support of this allegation, Applicant introduced Casey's criminal record report as Applicant's Exhibit No. 21, which shows two convictions for misdemeanor possession of marijuana. All other offenses listed in Applicant's Exhibit No. 21 were either dismissed or resulted in non-conviction. This Court finds that trial counsel was not ineffective for failing to impeach Casey on her prior record, as she was not convicted of any impeachable offenses. At the evidentiary hearing, Applicant argued that Casey was a felon and trial counsel should have impeached her with these prior felonies. However, Applicant could identify no prior felonies and Applicant's Exhibit No. 21 clearly

shows that Casey is not a convicted felon. Casey's only two convictions were for misdemeanor marijuana possession, neither of which is an impeachable offense. See Rule 608, SCRE; State v. Lilly, 278 S.C. 499, 500, 299 S.E.2d 329, 330 (1983) ("Simple possession of marijuana is not a crime of moral turpitude.") Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required under Strickland. Therefore, trial counsel was not ineffective in regards to this allegation, which must be denied and dismissed with prejudice.

Allegation No. 5: Trial counsel rendered ineffective assistance of counsel when he failed to obtain multi-jurisdictional agreements prior to trial and argue that law enforcement conducted an extra-territorial investigation

Applicant alleges that trial counsel was ineffective for failing to challenge the Richland County Sheriff's Department's investigation, which included meeting with witnesses outside Richland County without a multi-jurisdictional agreement. Applicant alleges the Richland County Sheriff's Department exceeded their jurisdictional authority when officers traveled to interview witnesses in Lee and Dillon Counties, specifically Willie Jennings and Shannon Miles. Applicant contends that to conduct any investigation outside of Richland County, the Richland County Sheriff's Department needed to obtain a multi-jurisdictional agreement pursuant to S.C. Code Ann. § 23-1-215 and that the failure to get such agreements made the investigation illegal. In support of this claim, Applicant cites to State v. Burgess, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2011) and State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011).

This Court finds that Applicant's claims are without merit and must be denied and dismissed with prejudice. First, Applicant's reliance on S.C. Code Ann. § 23-1-215 is incorrect. S.C. Code Ann. § 23-1-215(a) states: "In the event of a crime or crimes that have occurred where

multiple jurisdictions, either county or municipal, are involved, law enforcement officers are authorized to exercise jurisdiction within other counties or municipalities for the purpose of criminal investigations only if a written agreement between or among the law enforcement agencies involved has been executed." Such agreements are necessary when multiple law enforcement agencies are working in tandem on a case that spans different jurisdictions. See e.g., State v. Burgess, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2011) (where eleven law enforcement agencies in Lexington County entered into a Lexington County Multi–Agency Narcotics Enforcement Team to investigate and combat the illegal use of controlled substances and related crimes across Lexington County). In the present case, the crimes occurred squarely within Richland County and were being investigated exclusively by Richland County without the assistance of any outside law enforcement agency. A multi-jurisdictional agreement was unnecessary. Law enforcement officers are allowed to investigate and interview witnesses beyond their jurisdictional confines without the use of a multi-jurisdictional agreement. As no multi-jurisdictional agreement was necessary, trial counsel cannot be ineffective for failing to object on this ground.

Additionally, both Burgess and Boswell are readily distinguishable from the present case for several reasons. First, in Boswell, law enforcement officers from Lexington County conducted a warrantless search and arrest of Boswell in Calhoun County without any involvement, assistance, or presence of Calhoun County law enforcement officers. In contrast, in the present case, Richland County law enforcement officers interviewed witnesses voluntarily in Lee and Dillon Counties, but made no arrests outside Richland County. Furthermore, the

present case is distinguishable from Burgess as well. In Burgess, eleven law enforcement agencies from across Lexington County came together to create a task force to combat controlled substances across the county and created a valid multi-jurisdictional agreement. Here, such an agreement was not necessary, as the Richland County Sheriff's Department was the only agency investigating a crime which occurred within Richland County limits. No assistance was needed from any other agency and officers only traveled to Lee and Dillon Counties to interview witnesses. For such activity, a multi-jurisdictional agreement was not necessary and there was no error for not securing such needless agreements in the present case. As stated above, trial counsel was not deficient for failing to object to the lack of a multi-jurisdictional agreement when such an agreement was not necessary. Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required under Strickland. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 6: Trial counsel rendered ineffective assistance when he failed to obtain multi-jurisdictional agreements prior to trial and argue that the execution of the search warrant and arrest of Applicant at his residence in Charlotte, North Carolina violated requirements set forth for extra-territorial jurisdiction and investigations, along with Applicant's 4th Amendment rights. Trial counsel also failed to argue for suppression of the evidence obtained during the search of Applicant's residence in North Carolina.

Applicant alleges that trial counsel rendered ineffective assistance of counsel when he failed to obtain multi-jurisdictional agreements prior to trial and argue that the execution of the search warrant and arrest of Applicant at his residence in Charlotte, North Carolina violated requirements as set forth for extra-territorial jurisdiction and investigation, along with Applicant's Fourth Amendment rights. In support of this allegation, Applicant cites State v.

Burgess, 393 S.C. 396, 712 S.E.2d 1 (S.C. Ct. App. 2011), State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011), and the North Carolina case of State v. Jones, 97 N.C.App. 189, 388 S.E.2d 213 (1990). Additionally, in his memorandum of law, Applicant cited various North Carolina statutes pertaining to search warrants that he contends were violated in his case, including but not limited to the lack of testimony of the officer who signed the return. This Court finds that this allegation must be denied and dismissed with prejudice, as Applicant has failed to meet his requisite burden of proof in regards to this allegation.

As a preliminary matter, this Court finds that Applicant has failed to establish that the search and arrest warrants in question were defective. Applicant did not introduce any documents regarding the arrest warrant, and therefore, as a threshold matter, this Court finds that he has failed to meet his burden of establishing any defects in the arrest warrants. In regards to the search warrant, Applicant asserts that the search warrants were defective due to a lack of signature of the affiant on one copy of the search warrant and accompanying application for search warrant, as well as other violations as set forth in his memorandum of law. In support of this allegation, Applicant introduced documents he received in response to his subpoenas sent to the Fifth Circuit Solicitor's Office and the Fifth Circuit Public Defender's Office requesting all documentation on the search warrant of his home in Charlotte, North Carolina; the documents were introduced as Applicant's Exhibits Nos. 23-26. Applicant argued that because the documents contained differing amounts of materials, there was an obvious defect. This Court is not persuaded by this argument and notes that the documents regarding the search warrant from both the Solicitor's and Public Defender's file are essentially the same, with a full and complete

copy of the search warrant and accompanying application in each.

There is a presumption that search warrants are valid. Contra State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005), *cert. denied,* 547 U.S. 1147 (2006) ("Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures.") Reviewing courts should give great deference to a magistrate's determination of probable cause. State v. Bowie, 360 S.C. 210, 217, 600 S.E.2d 112, 115 (Ct. App. 2004) aff'd in part and vacated in part, 366 S.C. 335, 621 S.E.2d 890 (2005); State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct.App.1996); see also State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976) (magistrate's determination of probable cause should be paid great deference by reviewing court). Additionally, affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion. Bowie, 360 S.C.at 219-20, 600 S.E.2d at 117; Sullivan, 267 S.C. 610, 230 S.E.2d at 622; Dupree, 354 S.C. at 683, 583 S.E.2d at 441

In a post-conviction relief action, burden is on the party challenging such validity to establish defects. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) ("in a post-conviction relief action, the applicant bears the burden of proving the allegations in his application."). Here, this Court finds that Applicant has failed to satisfy his burden of establishing any defects to the warrants. Applicant failed to present any testimony or other evidence from any member of the Charlotte-Mecklenburg Police Department, who obtained both warrants, to establish any structural or other defects with the warrants. Additionally, North

Carolina Code § 15A-246 is clear that the signature of the specific officer to whom the warrant is addressed is not required, only the name of such officer; here, the search warrant includes this name. Furthermore, North Carolina Code § 15A-245 allows for oral testimony or affirmation under oath before the issuing official and does not indicate that such a signature is needed. Applicant's mere speculation that the lack of an affiant's signature on one copy of the search warrant and accompanying documents makes them presumptively defective is incorrect and not sufficient. Furthermore, this Court has reviewed the additional, more minor grounds that Applicant has asserted in his memorandum of law and also finds that no defects are present in the search warrant, including Applicant's argument that no testimony was presented from the officer listed on the return, CR Williams. This Court finds that Applicant has failed to establish any defects to the arrest or search warrants. Therefore, Counsel was not deficient for not challenging these warrants validity and Applicant has failed to establish the requisite prejudice as required under Strickland.

Applicant also asserts that trial counsel was ineffective for failing to challenge the warrants based on violations that occurred during the effectuation of the search and arrest warrants. Specifically, Applicant asserts that trial counsel "failed to obtain multi-jurisdictional agreements prior to trial" for this "extra-territorial jurisdictional and investigation." In support of this claim, Applicant cites to State v. Burgess, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2011) and State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011). However, both Burgess and Boswell are readily distinguishable from the present case for several reasons.

First, in Boswell, law enforcement officers from Lexington County conducted a

warrantless search and arrest of Boswell in Calhoun County without any involvement, assistance, or presence of Calhoun County law enforcement officers. In contrast, in the present case, Richland County law enforcement officers approached the Charlotte-Mecklenburg Police Department and asked them to obtain search and arrest warrants. Once valid warrants were issued to the proper jurisdictional authority – the Charlotte-Mecklenburg Police Department, Richland County ***accompanied*** Charlotte Mecklenburg officers to Applicant's residence for the search and arrest of Applicant. Applicant testified that he did not see any Charlotte-Mecklenburg Police officers during the search and arrest but does acknowledge that he saw a Charlotte-Mecklenburg Police cruiser in his driveway. Additionally, Applicant asserts that because no Charlotte-Mecklenburg officers present during the search testified at his trial, there is there is no evidence to support that they were present. However, this logic is clearly flawed, as Applicant's own testimony clearly establishes the presence of Charlotte-Mecklenburg law enforcement at his residence during the search and arrest. Furthermore, there was testimony from numerous Richland County law enforcement officers who were present at the search during both pre-trial hearings and at the trial, and all testified consistently to the involvement of Charlotte-Mecklenburg officers in the search and arrest.

Furthermore, the present case is distinguishable from Burgess as well. In Burgess, eleven law enforcement agencies from across Lexington County came together to create a task force to combat controlled substances across the county and created a valid multi-jurisdictional agreement. Here, such an agreement was not necessary, as Richland County was the only agency investigating a crime which occurred within Richland County limits. Only short-term

assistance was needed from the Charlotte-Mecklenburg Police Department for the obtainment and effectuation of search and arrest warrants. For such activity, a multi-jurisdictional agreement was not necessary.

Instead, the present case is more closely aligned to the factual scenario presented in State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978). In Hammond, Greenville City law enforcement officers executed a search warrant in Greenville County, outside the city limits. However, the South Carolina Supreme Court found no jurisdictional violations or defects, as the warrant was properly obtained from a Greenville County magistrate and Greenville County Sheriff's Deputies were present for the search. Additionally, Hammond cites Kirby v. Bento, 426 F.2d 258 (5th Cir. 1970), which fits even closer to the factual scenario here. In Kirby, law enforcement officers from Dallas executed a warrant in Irving, but because the warrant was validly obtained from a magistrate in Irving and Irving law enforcement was present during the search, there were no jurisdictional violations. Based on Hammond and Kirby, which are closely aligned to the present case, this Court finds that there were no violations regarding the effectuation of the search or arrest warrants.

This Court finds that as there were no defects in the search warrant or violations in its effectuation, trial counsel cannot be deficient for failing to challenge the warrant. Applicant asserts that trial counsel was deficient for failing to challenge the search and arrest warrants on Fourth Amendment grounds. In support of this allegation, Applicant references trial counsel's testimony from the evidentiary hearing stating that if he should have moved to suppress the warrants and failed to do so, his performance would have been deficient. However, as discussed

above, there are no defects to the search or arrest warrants, as well as no violations regarding the effectuation of said warrants. Because there were no defects or violations to challenge, this Court finds that trial counsels cannot be deemed deficient for failing to challenge the warrants.

Furthermore, this Court finds that Applicant has failed to establish any resulting prejudice from trial counsel's alleged deficiency. To establish prejudice in a post-conviction relief action on a claim that counsel was ineffective for failing to move to suppress certain evidence, an applicant must show that had his trial attorney challenged the search and seizure, there is a reasonable probability that he would have prevailed in a suppression hearing. Rollison v. State, 346 S.C. 506, 509-10, 552 S.E.2d 290, 292 (2001). As established above, there were no defects in the warrants and no violations in the effectuation of the warrants. Had trial counsels moved to suppress the evidence, it would not have been successful. Therefore, this Court finds that Applicant cannot establish any resulting prejudice pursuant to Strickland. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 7: Trial counsel rendered ineffective assistance when he failed to utilize a ballistics expert as was requested in writing by Applicant. Trial counsel rendered ineffective assistance of counsel when he failed to object to Dr. Vandersteenhoven's initial qualification as an expert, failed to object to improper direct-examination, and failed to properly cross-examine her since she was not qualified as a forensic pathologist.

Applicant alleges that trial counsel was ineffective for failing to utilize a ballistics expert despite his request that counsel do so. Applicant also alleges that trial counsel was ineffective in his handling of Dr. Vandersteenhoven, the State's pathologist who conducted the decedent's autopsy and testified at trial. In support of these allegations, Applicant presented testimony from homicide reconstruction specialist Wayne N. Hill, Sr., who was admitted as an expert in

homicide reconstruction over Respondent's objection.[3]

In regards to his first allegation, that trial counsel was ineffective for not utilizing a ballistics expert, Applicant testified that he told trial counsel numerous times that he wanted him to find and consult with a ballistics expert. Applicant testified that, to the best of his knowledge, trial counsel failed to do so despite his repeated demands. Applicant testified that he wanted trial counsel to utilize a ballistics expert to show how unlikely it was that he was able to shoot decedent, who was 5'7", at the angle necessary to produce the entry and exit wounds he suffered based on his tall stature of 6'8". Applicant presented testimony and several diagrams from Hill exemplifying this. During cross-examination, Hill acknowledged that no witnesses saw the exact position of either the shooter or decedent and that his diagrams and testimony were based on the unverified and speculative assumption that both parties were standing when decedent was shot. Hill also conceded that the position decedent was originally in was unknown, which also affected his results. Hill testified that while he believed it would have been "unlikely" for a shooter who was 6"8" to shoot decedent, he testified that this was based on his assumption that the shooter was standing upright. Ultimately, Hill testified that he could not say to any reasonable degree of certainty that Applicant could not have shot decedent based on the discrepancies in their height. Hill also testified that if he had been retained by trial counsel, he would have highlighted

[3] Following a lengthy voir dire, Respondent objected to Mr. Hill's classification as an expert in homicide reconstruction, noting that: he had no formal education (including continuing education classes) since 1980; no training since 1988; had contributed to no publications since 1997; could not name any recent publications or materials he used to stay current in his field; had never investigated a homicide; his only investigative experience was taking photos of a non-homicide crime scene in the 1980s; his only medical training was as an emergency medical technician from 1975-77; had no pathology training; and he testified that his primary training is "informal training" including shooting a variety of ammunition into different masses and analyzing the results. This Court qualified Hill as an expert in "homicide reconstruction" but noted that Respondent's objections all go towards the weight of any testimony he provides and that this is a "limited field."

problems in the crime scene to trial counsel, such as a lack of blood spatter, bullet trajectory, and additional photos of the crime scene. Hill acknowledged on cross-examination that decedent was shot in a parking lot and that it is "not uncommon to not find any blood spatter on blacktop" or to not find bullet fragments or trajectory at this type of a crime scene.

In response to this allegation, trial counsel testified that he considered using a ballistics expert in this case, but ultimately determined that one was not necessary based on the facts of the case. Trial counsel elaborated that he felt like he was able to successfully convey to the jury that it was unlikely that Applicant was the shooter based on the height discrepancy compared with the entry and exit wounds, which he highlighted demonstratively during his closing argument. See Tr. p. 1410 lns. 7-19. Trial counsel testified that no blood spatter was found in the present case, which was to be expected. He elaborated that "it would have been surprising to find blood spatter" based on this crime scene, as most cases where blood spatter is found occur inside. He testified similarly in regards to bullet trajectory, noting that this crime scene was a large and well-traveled shopping center parking lot. Trial counsel testified that he does not think that the lack of blood spatter or bullet trajectory is indicative of faulty investigation, but rather, is typical based on real world crime scenes.

This Court finds that trial counsel's performance was not deficient for failing to utilize a ballistics expert. Trial counsel was able to convey to the jury the same information that a ballistics expert would have, highlighting the difficult angle required for Applicant to have shot decedent. Additionally, Applicant's own expert was unable to say to any reasonable degree of certainty that Applicant could not have been the shooter. Furthermore, this Court is not

persuaded by Applicant's argument that a consultant such as Hill was necessary to point out errors in the State's case. Trial counsel, the Chief Public Defender for the Fifth Judicial Circuit, has been practicing law for nearly thirty-three years and was able to identify all of the "flaws" in the investigation absent assistance from Hill, who himself has never investigated a homicide. This Court is firmly convinced that the result of Applicant's trial would have been the same if Hill or a similar expert had testified at trial. This Court finds that Applicant has failed to meet his required burden in regards to this allegation in regards to both deficient and prejudice and that this allegation must be denied and dismissed with prejudice.

In regards to Applicant's second allegation that trial counsel was ineffective in regards to Dr. Vandersteenhoven, this Court similarly finds that Applicant has failed to establish that trial counsel was ineffective. Applicant argues that trial counsel should have objected to Dr. Vandersteenhoven's qualification as an expert in clinical pathology. This Court disagrees and finds that counsel performed reasonably in not objecting to her qualifications, as her education, experiences, and board certification clearly demonstrate her expertise in the field of clinical pathology. Next, Applicant argues that trial counsel was ineffective for failing to object to her testimony regarding forensic pathology as she was not qualified as an expert in forensic pathology. Again, this Court is not persuaded by Applicant's argument, as the record clearly reflects that trial counsel objected to Dr. Vandersteenhoven's qualifications as an expert in forensic pathology, which was sustained by the trial court as well as additional objections made on the same basis. See Tr. p. 779-788. This Court finds that trial counsel's performance was not deficient. Furthermore, this Court finds that Applicant failed to establish any resulting prejudice

from this alleged deficiency as there is no likelihood that the result of the trial would have been different. Based on trial counsel's objections to Dr. Vandersteenhoven's testimony outside her area of expertise, the State called forensic pathologist Dr. Clay Nichols, who ultimately confirmed all of Dr. Vandersteenhoven's results and conclusions. This Court finds that Applicant has failed to meet his requisite burden of proof and this allegation must be denied and dismissed with prejudice.

Allegation No. 8: Trial counsel rendered ineffective assistance when he failed to fully investigate Applicant's case or utilize necessary witnesses at trial

Applicant alleges that trial counsel was ineffective for failing to fully investigate his case or utilize necessary witnesses at trial. Applicant testified that he wanted more witnesses called on his behalf at trial, particularly more character witnesses. Applicant testified that prior to his arrest he was very involved with youth mentoring programs and youth athletics, particularly basketball, and that several persons who were not called to testified would have been ideal character witnesses. Applicant testified that many of these witnesses are now deceased and therefore could not be present to testify at the evidentiary hearing. He testified that he wanted trial counsel to speak to Jeff McInnis and call him as a character witness. In support of this allegation, Applicant presented testimony from Jeff McInnis, who testified that he would have testified at Applicant's trial if called and that he was never personally contacted by trial counsel.

In response to this allegation, trial counsel testified that he employed a private investigator, Patti Rickborn, to assist on this case. He testified that he selected Rickborn for this case because of her exemplary record of assisting in capital and other high profile cases. He testified that Rickborn was particularly helpful at "shaking down people in Dillon and tracking

down people in Charlotte." Trial counsel testified that Applicant provided himself and other members of the defense team (including second chair, E. Fielding Pringle, Rickborn, and his paralegal) with numerous character witnesses, all of whom were contacted by a member of the trial team. Trial counsel testified that he could not recall if McInnis was personally contacted, but is certain that a member of the trial team talked to McInnis' mother, Cynthia, at least once regarding her and her son testifying as character witnesses at Applicant's trial. He testified that there were copious discussions with Applicant and the trial team as to whom to call as character witnesses. He testified that many witnesses provided by Applicant indicated that Applicant either used or sold drugs or that they had heard rumors to that effect, which was memorialized in an email between the trial team introduced as Respondent's Exhibit No. 9. Trial counsel testified that based on this information, he and Pringle had to be careful not to open the door to any of this information. He testified that five character witnesses were called on Applicant's behalf and that more were not called because they would have been cumulative.

Second chair, E. Fielding Pringle, also testified that she personally handled all character witnesses at trial and spoke to all witnesses at least once before they testified. She testified that the strategy in calling these witnesses was to show the jury Applicant's peaceful and non-violent nature and that he had an impeccable background. She testified that she was not certain if she personally spoke with McInnis, but is positive that she spoke with his mother Cynthia on more than one occasion and "begged" both of them to come to Applicant's trial to testify. She elaborated that as both lived in North Carolina, she did not have subpoena power to command their presence. She testified that she could not recall if McInnis or his mother came to the trial.

She confirmed that five character witnesses were called on Applicant's behalf and that all testified that they had known Applicant for an extended period of time and regarding his peaceful nature.

This Court finds that trial counsel was not ineffective in regards to this allegation. In regards to Applicant's allegation that trial counsel failed to fully investigate his case, this Court finds that trial counsel's performance was more than reasonable. Trial counsel employed a private investigator to assist with Applicant's case and testified that she was specifically selected for this case based on her distinguished professional reputation. Furthermore, Applicant has failed to establish what benefits could have been gleaned from any additional investigation. This Court finds that Applicant has failed to meet his burden with regards to counsel's investigation.

Additionally, this Court finds that Applicant has failed to meet his burden of proof of establishing that counsel failed to utilize necessary witnesses at trial. Trial counsel and Pringle both testified that Applicant provided them with numerous potential witnesses and that a member of the trial team spoke with every witness either directly, or in McInnis' case, indirectly. This Court also notes that most of Applicant's desired witnesses lived outside of South Carolina and therefore, could not be subpoenaed by trial counsel. Five witnesses were called to testify to Applicant's outstanding character and reputation in the community and this Court is convinced that any additional witnesses would be cumulative and would have had no impact on the proceedings. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 9: Trial counsel rendered ineffective assistance when he failed to file notice of and argue an alibi defense, request an alibi charge, and utilize Applicant's testimony to establish an alibi defense

Applicant alleges that trial counsel was ineffective for failing to utilize an alibi defense, including failure to notify the State of such a defense, failure to argue an alibi defense, failure to request a jury instruction on alibi, and failure to properly utilize Applicant's testimony to establish an alibi. Applicant testified that he was at home in Charlotte, North Carolina with his father all day on November 21, 2011 and that he was also in court paying traffic tickets on November 19 and 20, 2001. He testified that he relayed this information to trial counsel and wanted him to present an alibi defense, but that counsel failed to do so. He acknowledged that his father passed away on May 11, 2002 and a copy of his father's certificate of death was introduced as Applicant's Exhibit No. 48.[4]

In response to this allegation, trial counsel testified that Applicant told him that he was at home alone with his father in Charlotte on November 21, 2001. Trial counsel testified that by the time he was appointed to represent Applicant on December 10, 2002[5], Applicant's father had been deceased for more than six months. He testified that Applicant also told him that he was in court paying traffic tickets on November 19 and 20, 2001, but that this information was not useful as the crime occurred on November 21, 2001. Applicant testified that he was unable to pursue an alibi defense because there were no witnesses who could testify as to Applicant's whereabouts on November 21, 2001. He testified that the defense team attempted to confirm his

[4] Applicant attempted to determine if Applicant's father was interviewed by law enforcement prior to his death, but was unable to do so. See Affidavit L/Cpl. Juli Barnes, introduced as Applicant's Exhibit No. 75.

[5] Applicant was originally represented by retained counsel Deborah Chapman. Once Chapman's representation ceased, Applicant applied for a public defender and trial counsel, acting in his capacity as Chief Public Defender of the Fifth Judicial Circuit, assigned the case to himself with Pringle as his second chair.

alibi through other witnesses or evidence but were unable to find any helpful information. He testified that he relayed this information to Applicant in advance of trial.

This Court finds that trial counsel's performance was reasonable based on the facts of the case. See Walker v. State, --S.E.2d --, 2014 WL 1052609 (S.C. Mar. 19, 2014) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable.) (internal citations omitted). In the present case, Applicant's only possible alibi witness was his father, who passed away well before trial and before trial counsel was even appointed to the case. Therefore, Applicant did not have a viable alibi defense that could have been pursued at trial, and he was not deficient for failing to present one. See State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) (since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all). Trial counsel testified that he and the members of his trial team attempted to verify his alibi through other witnesses or means to no avail. Furthermore, this Court finds that Applicant cannot establish prejudice from this alleged deficiency as he was unable to produce any alibi witnesses to account for his whereabouts. See Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995). This Court finds trial counsel was not ineffective and that this allegation must be denied and dismissed with prejudice.

Allegation No. 10: Trial counsel rendered ineffective assistance when he failed to prepare and argue third party guilt

Applicant alleges that trial counsel was ineffective for failing to prepare and argue third party guilt. At the evidentiary hearing, Applicant asserted that trial counsel should have argued third party guilt against Willie Jennings, Marty Morgan, his father, Phillip Crocker, Jr., Jonathan Love, and Ezat Saied. Applicant testified that the physical descriptions of the suspect given by various witnesses all better fit these five individuals and establish that he should have been able to argue third party guilt. Additionally, he argued that only his father's fingerprints were found on the tub in decedent's car. Applicant argued that trial counsel addressed the issue of third party guilt in a pre-trial hearing, but asserts that trial counsel failed to further pursue the issue or prepare a memorandum in support as requested by the court.[6] In support of this allegation, Applicant cites to Holmes v. South Carolina, 547 U.S. 319 (2006), where the United States Supreme Court held that denying a defendant the right to present a defense of third party guilt because the evidence did not raise an inference as to defendant's own innocence denied defendant the right to a fair trial. Applicant acknowledged that Holmes was more than three years after his trial.

Trial counsel testified that although it has since been overturned by Holmes, the controlling law at the time of Applicant's trial was State v. Gay, which held that evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are

[6] Applicant also orally amended his application to include an allegation of ineffective assistance of appellate counsel for failing to address this issue on appeal in the event that the issue was preserved. This Court finds that the trial court never formally ruled on the issue of whether Applicant could present a third party guilt defense, as the request to formally present the request was not pursued by trial counsel after reasonable investigation and case law analysis, as discussed below.

inconsistent with the defendant's guilt. State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) abrogated by Holmes v. S. Carolina, 547 U.S. 319 (2006). Trial counsel testified that based on this standard, which was the controlling law at the time of Applicant's trial, he was not able to formally argue third party guilt. He testified that this is why he did not file any motions regarding third party guilt or formally request to argue third party guilt, despite having initially addressed the issue with the court and the State in a pre-trial hearing. He testified that third party guilt is incredibly difficult to formally argue and that he has never been able to do so in the countless cases he has tried throughout his more than thirty year career. He testified that although he was not able to formally argue third party guilt, he was able to present evidence of third party guilt informally throughout Applicant's trial in reference to the other suspects, which he believed raised reasonable doubt as to Applicant's guilt.

This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation. As trial counsel correctly noted, the controlling law at the time of Applicant's trial was Gay and under Gay, Applicant would not have been permitted to present a defense of third party guilt based on the speculative evidence he presented at the evidentiary hearing. This Court finds that trial counsel's strategy of raising third party guilt through the trial was reasonable based on the case law at the time of trial and his performance was not deficient. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice from this alleged deficiency, as trial counsel would not have been able to present a third party defense under the controlling case law at the time of Applicant's trial if he had so moved. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 11: Trial counsel rendered ineffective assistance of counsel when he failed to utilize the cross-examination of Willie Jennings to show Jennings' true level culpability and expose his role in the matter. Trial counsel rendered ineffective assistance of counsel when he failed to move for a new trial based upon the plea entered by Willie Jennings post trial.

Applicant alleges that trial counsel was ineffective for failing to properly cross-examine Willie Jennings to show the full nature of his involvement, including his continued social relationship with decedent's wife after the murder. In support of this allegation, Applicant introduced various statements of Jennings, a polygraph report of Jennings, and various investigative reports pertaining to Jennings. Applicant also alleges that trial counsel was ineffective for failing to move for a new trial based on the after-discovered evidence of the dismissal of Willie Jennings' charges based on Rule 29(b), SCRCrimP. In support of this allegation, Applicant introduced the case history of Willie Jennings' Trafficking in Marijuana – Ten to One Hundred Pounds charge as Applicant's Exhibit No. 53, which shows that the charge was dismissed on October 18, 2004.

Trial counsel testified that he cross-examined Jennings at length regarding the inconsistencies in his statements to law enforcement. Counsel testified that he was able to elicit from Jennings that he lied to law enforcement numerous times. See Tr. p. 673-675; 680. Trial counsel testified that he vigorously cross-examined Jennings regarding his own involvement in setting up the drug transaction, which Jennings repeatedly tried to minimize. See p. 690-92. Trial counsel also questioned Jennings about possible immunity from law enforcement and other benefits derived from his involvement with law enforcement. See 668-69; 671. Trial counsel testified that he was able to highlight all of this to the jury during his closing argument.

This Court finds that Applicant has failed to meet his burden of proof in regards to this

allegation. Trial counsel's testimony and the record both support a well-planned and well-executed cross-examination of Jennings. As discussed above, trial counsel was able to elicit testimony from Jennings that he lied to law enforcement numerous times, attempted to minimize his own involvement in the drug transaction out of self-interest, and was hoping for immunity in exchange for his testimony against Applicant. This Court finds nothing in trial counsels performance in regards to this allegation to be deficient. Additionally, this Court finds that Applicant has failed to meet his requisite showing of prejudice in regards to this allegation.

Furthermore, this Court finds that Applicant has failed to meet his burden of proof regarding trial counsel's failure to file a post-trial motion based on after-discovered evidence stemming from the dismissal of Jennings' charge. To prevail on a motion for a new trial based on after discovered evidence, a defendant must show (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (S.C. 1998). This Court finds that had trial counsel made a motion for a new trial pursuant to Rule 29(b), SCRCrimP, this motion would have been denied as the dismissal of Jennings' charge would not "probably change the result if a new trial is granted." Therefore, trial counsel was not ineffective for failing to move for a new trial based on Rule 29(b), SCRCrimP. Based on the foregoing, this Court finds that trial counsel's performance was reasonable and effective. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 12: Trial counsel rendered ineffective assistance when he failed to request a curative instruction when the solicitor improperly cross-examined Applicant and/or committed improper pitting

Applicant alleges that trial counsel was ineffective for failing to request a curative instruction to improper pitting by the solicitor during her cross-examination of Applicant. See Tr. p. 1260-63. The record reflects and trial counsel testified that he objected to this line of questioning, which was initially sustained and then overruled in regards to later questioning. Outside the presence of the jury, trial counsel moved for a mistrial, which was denied by the trial court. See Tr. p. 1335-36. Applicant alleges that once this mistrial motion was denied, trial counsel should have moved for a curative instruction. Applicant also moved to orally amend his application to include an allegation of prosecutorial misconduct related to this allegedly improper pitting.

Trial counsel testified that he did not want a jury instruction based on pitting as he made a strategic decision not to do so because he did not feel there was any benefit to be gained from such an instruction. He elaborated that he thinks any possible benefit would have been greatly offset by the prejudice of reminding the jury of the particular testimony again, which he described as ringing the bell again and asking the jury to then ignore the ringing. Furthermore, he testified that he is unaware of any jury instruction that could have been given in such a situation. He testified that although he objected to this testimony and found it to be improper, he did not think it amounted to prosecutorial misconduct.

This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation. Where counsel articulates a valid reason for employing certain strategy, such conduct

will not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). Trial counsel articulated valid reasoning for not requesting a curative instruction – that he thought any minimal benefit to be derived from such an instruction would be greatly outweighed by the prejudice of reminding the jury of the improper testimony once again. This Court finds that trial counsel performed effectively in regards to this allegation. Additionally, this Court finds that Applicant has failed to establish any resulting prejudice as required under Strickland. Therefore, this allegation must be denied and dismissed with prejudice. Furthermore, this Court finds that the solicitor did not engage in prosecutorial misconduct and that the Applicant has failed to meet his burden in regards to this allegation, which also must be denied and dismissed with prejudice.

Allegation No. 13: Trial counsel rendered ineffective assistance of counsel when he failed to object to vouching during the solicitor's closing argument; alternatively, Applicant alleges prosecutorial misconduct.

During the State's closing argument on the law, prosecuting Assistant Solicitor Campbell stated the following:

> "When considering a witness's believability or credibility, you can consider the following things, and the judge will tell you, you can consider their demeanor on the stand. Were they forthright? Were they hesitant? Was their testimony corroborated by other testimony? Was their testimony corroborated by the evidence? You can believe one witness against many, many against one. You can believe part of what a witness says, none, or all. It is totally up to you. You must determine the credibility of what has come before you. Do they have a bias? Do they have a prejudice? What do they have to gain or lose? I beg you, ladies and gentlemen, judge Consuelo Casey. She came up here, and I don't think it was pleasant for her. She told you what she was involved with. You heard from Willie Jennings. What makes him credible? He didn't want to be here. There's no dispute about that. What makes them

> absolutely credible is the evidence. Judge the credibility of each and every witness the state puts before you. Consuelo Casey got up here, and she told you flat out she didn't tell the truth at first. She didn't tell the truth for a while. I submit that's what makes her credible. Why would she choose to pick him if he didn't do it?"

Tr. p. 1391 ln. 12 – p. 1393 ln. 12. Applicant argues that this passage amounts to improper vouching of the State's witnesses and that trial counsel should have objected. Alternatively, Applicant alleges prosecutorial misconduct based on this passage.

In response to this allegation, trial counsel testified that he does not believe the passage in question is objectionable and that it does not amount to vouching or prosecutorial misconduct. He elaborated that this passage is not objectionable because it comments on testimony and evidence presented throughout the trial and permissible inferences based on the evidence and testimony.

This Court agrees with trial counsel that the passage in question is neither objectionable nor improper vouching. "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (internal citations omitted). As the passage in question is not objectionable, this Court finds that trial counsel was not deficient. Additionally, this Court finds that Applicant has failed to establish

any resulting prejudice as required under Strickland. Furthermore, this Court finds that State did not commit prosecutorial misconduct and Applicant has failed to meet his requisite burden of proof in regards to this allegation. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 14: Trial counsel rendered ineffective assistance of counsel when he failed to object [to] the solicitor's closing argument regarding the charge of murder when the solicitor informed the jury that malice can be express, implied, or inferred, which he alleges impermissibly shifted the burden of proof; Solicitor improperly argued the concept of felony murder amounting to prosecutorial misconduct

During the State's closing argument on the law, prosecuting Assistant Solicitor Campbell reviewed the definition of malice with the jury, stating that malice can be express, implied or inferred. See Tr. p. 1383-85. Applicant argues that this closing argument was confusing, an improper statement of the law, and that trial counsel should have objected. Additionally, Applicant argues that Campbell deliberately argued malice in this way over the trial court's ruling during the in-camera discussion on jury charges. Applicant also argues that Campbell improperly argued the concept of "felony murder" and submitted to the jury that finding Applicant guilty of a felony / trafficking should amount to an automatic finding of guilty for murder. See Tr. p. 1385-1386; 1439-1442.

In response to this allegation, trial counsel testified that nothing in either of these portions of the State's closing on the law are objectionable. He elaborated that the State electing to review malice with the jury as "express, implied, or inferred" may be redundant, as "implied" and "inferred" are essentially the same, but that this does not amount to burden-shifting and does not prejudice Applicant. He noted that at the time of Applicant's trial, malice could be inferred

based on the use of a deadly weapon, although that is no longer always the case now. He testified that he recalled the in-camera charge discussion with the court where Campbell asked for malice to be charged in all three ways in the court's jury charge, which was denied by the court. He testified that Campbell electing to review malice in this way during her closing on the law does not amount to prosecutorial misconduct. In regards to the felony murder portion of the State's closing on the law, trial counsel testified that he does not think this portion is objectionable or rises to prosecutorial misconduct.

This Court has reviewed the passages in question, in conjunction with the State's closing on the law in full and the trial court's jury charge, and finds that Applicant has failed to meet his burden of proof in regards to these allegations. First, this Court finds that trial counsel was not deficient because neither passage amounts to burden-shifting or is objectionable. The Court notes that at the time of Applicant's trial, malice could be express, implied, or permissibly inferred based on the use of a deadly weapon. See State v. Wilds, 355 S.C. 269, 276, 584 S.E.2d 138, 141 (Ct. App. 2003). Since Applicant's trial, the South Carolina Supreme Court has held that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, Belcher was decided more than five-and-a-half years after Applicant's trial and is inapplicable given the facts of Applicant's case, as no evidence was presented that would reduce, mitigate, excuse, or justify the homicide. Therefore, trial counsel was not ineffective for not objecting to this portion of the State's closing on the law. Additionally, as this portion of the State's closing

was a correct statement of law, this Court finds that the State did not commit prosecutorial conduct. This Court rejects Applicant's argument that because the Court declined to personally charge the jury in this manner and the State elected to do so amounts to prosecutorial misconduct. No portion of the in-camera discussion reflects that the court ruled the State could not cover all three types of malice in its closing on the law, the trial court simply ruled that it would not charge all of the State's requested instructions during its jury charge. See Tr. p. 1342-1350. Additionally, with respect to the State's closing on the felony murder rule, which the Applicant characterized as the State "improperly argued the concept of felony murder and submitted to the jury that finding Applicant guilty of a felony / trafficking should amount to an automatic finding of guilty for murder," this Court finds that this is a mischaracterization of the record. The State informed the jury that: "[t]he law says if one intentionally kills another during the commission of a felony, and the judge will instruct you that trafficking in marijuana is a felony, the implication of malice ***may arise***." Tr. p. 1365 ln. 23-1386 ln. 1 (emphasis added). The State did not inform the jury that a finding of guilt for trafficking in marijuana would automatically result in a finding of guilt for murder; rather, the State simply argued that malice may be implied. This Court finds that trial counsel performed effectively in regards to this allegation. Additionally, this Court finds that Applicant has failed to establish any resulting prejudice as required under Strickland. Therefore, this Court finds that Applicant has failed to meet his burden with respect to these allegations, which must be denied and dismissed with prejudice.

Allegation No. 15: Trial counsel rendered ineffective assistance of counsel when he failed to request a proper instruction on murder during the charging conference and failed to object to the Court's instruction on murder since it was burden shifting and created an impermissible presumption of malice.

Applicant alleges that trial counsel was ineffective for failing to request a proper jury instruction on murder and failing to object to the trial court's murder charge, which he characterizes as "burden-shifting" and "creating an impermissible presumption of malice." In its jury charge, the trial court instructed that malice could be express, implied, or inferred from the use of a deadly weapon. Tr. p. 1452-55. Applicant notes that the jury instruction is more than a slight deviation from State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), where the South Carolina Supreme Court suggests the following charge:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive."

The Elmore court "caution[ed] the bench, that hereafter only slight deviations from this charge will be tolerated." Id.

This Court finds that Applicant's allegations are without merit and must be denied and dismissed. First, as discussed supra in allegation no. 14, at the time of Applicant's trial, malice could be express, implied, or permissibly inferred based on the use of a deadly weapon. See State v. Wilds, 355 S.C. 269, 276, 584 S.E.2d 138, 141 (Ct. App. 2003). Since Applicant's trial, the South Carolina Supreme Court has held that a jury charge instructing that malice may be inferred

from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, Belcher was decided more than five-and-a-half years after Applicant's trial and is inapplicable given the facts of Applicant's case, as no evidence was presented that would reduce, mitigate, excuse, or justify the homicide. Therefore, trial counsel was not ineffective for not objecting to this portion of the trial court's instruction on malice. Furthermore, this Court notes that the trial court's instruction includes the following passage:

> "If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive."

Tr. p. 1455 lns. 2-8. Applicant's contention that the court's jury instruction is "more than a slight deviation" is wholly without merit, as the instruction contains the exact language requested by the Elmore court.[7] As the jury instruction on murder was appropriate, trial counsel was not deficient for failing to object or request a different charge. Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required for relief pursuant to Strickland. Based on the foregoing, this Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, which must be denied and dismissed with prejudice.

Allegation No. 16: Trial counsel rendered ineffective assistance of counsel when he failed to request a limiting or specific instruction on the trafficking charge consistent with the pre-trial and directed verdict argument.

Applicant alleges that trial counsel was ineffective for failing to request a limiting or

[7] The initial sentence of the suggested Elmore charge is paraphrased more than once on p. 1454.

specific instruction on the trafficking charge consistent with the pre-trial and directed verdict arguments set forth by Applicant. The trial court's jury charge on trafficking in marijuana is as follows:

> "The defendant is charged with trafficking in marijuana. The State must prove beyond a reasonable doubt that the defendant knowingly sold, manufactured, cultivated, delivered, purchased, or brought into this state or provided financial assistance to or otherwise aided, abetted, attempted, or conspired to sell, manufacture, cultivate, deliver, purchase, or bring into this state, was knowingly in actual or constructive possession, knowingly attempted to become in actual constructive possession of marijuana.
>
> The State must prove beyond a reasonable doubt that the amount of marijuana was 10 pounds or more but less than 100 pounds. The charge of trafficking in marijuana is a felony in the State of South Carolina."

Tr. p. 1452 lns. 6-19. Applicant argues that in pre-trial and directed verdict argument, trial counsel argued that the State could only possibly establish that he had conspired to sell marijuana and that, due to a lack of meeting of the minds the State could not establish a conspiracy to sell marijuana. See Tr. p. 1035-1040. Applicant argues that the above charge was improper because it stated all the ways one could be guilty of trafficking in marijuana by having: sold, manufactured, cultivated, delivered, purchased, or brought into this state or provided financial assistance to or otherwise aided, abetted, attempted, or conspired to sell, manufacture, cultivate, deliver, purchase, or bring into this state, was knowingly in actual or constructive possession, knowingly attempted to become in actual constructive possession of marijuana. Applicant contends that trial counsel should have requested that the trial court only charge the jury that Applicant could be found guilty if the State proved that he conspired to sell marijuana

and left out all the other ways reviewed. In response, trial counsel testified that the charge given by the court is directly from the statute on trafficking in marijuana and that he does not believe this charge was objectionable based on this case.

This Court finds that Applicant has failed to satisfy his burden of proof in regards to this allegation. As trial counsel noted, the trial court's jury charge is virtually identical to the language of S.C. Code Ann. § 44-53-370(e)(i), the statute on trafficking in marijuana. This Court rejects Applicant's argument that trial counsel was deficient for not objecting to a jury charge that nearly verbatim charges the exact law of the offense. Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required for relief pursuant to Strickland. Therefore, this Court finds that trial counsel was not ineffective and that this allegation must be denied and dismissed with prejudice.

Allegation No. 17: Trial counsel rendered ineffective assistance of counsel when he failed to object to the trial court's instruction providing examples of express malice, which amounted to an unconstitutional comment on the facts; additionally, Applicant argues that the charge falls outside the standard/recommended charge for murder

Applicant alleges that trial counsel was ineffective for failing to object to the trial court's instruction on malice. The portion of the jury instruction in which Applicant takes issue is as follows:

> "Expressed malice is shown when a person speaks words which express hatred or ill will for another, or when a person prepared beforehand to do the act which was later accomplished: for example, lying in wait for a person, or any other acts of preparation going to show the deed was done within the defendant's mind would be expressed malice."

Tr. p. 1453 lns. 14-20. Applicant argues that the term "preparation" is prejudicial to him because

it shows that evidence of a "plot or plan" can establish express malice. He argued that because the State presented evidence that the shooter planned the murder, the trial court's charge amounts to an impermissible comment on the facts.

Trial counsel testified that the express malice charge given by the trial court is the classic example often given by courts and is not objectionable. He testified that he does not think that it amounts to an impermissible comment on the facts, but rather, is a correct statement of the law.

This Court agrees with trial counsel and finds that Applicant has failed to establish any ineffective conduct of counsel in regards to this allegation. As trial counsel noted, the express malice charge given by the trial court is a common instruction often given across South Carolina and is not an impermissible comment on the facts of the case. This Court rejects Applicant's argument that he is prejudiced by the inclusion of the term "preparation" because the State presented evidence that the shooter planned his crime. The mere fact that a widely used and correct jury instruction squarely fits with the facts as presented by the State does not amount to prejudice for a defendant. Therefore, this Court finds that trial counsel was not ineffective in regards to this allegation, which must be denied and dismissed with prejudice.

Allegation No. 18: Appellate counsel rendered ineffective assistance of counsel by limiting the appellate review to only the drug conviction and sentence and by failing to raise all meritorious issues on appeal, including: (a) Improper pitting / improper cross-examination of Applicant; (b) the trial court's denial of trial counsel's request to suppress the testimony of Paula Jones; and (c) the court's ruling regarding the admission of the cell site information and the qualification of the witness.

Applicant alleges that appellate counsel was ineffective for failing to raise all meritorious issues on appeal, including improper pitting, the suppression of the testimony of Paula Jones, and

the admission of the cell site information. Applicant argues that all three issues were properly preserved following objections from trial counsel and that he was prejudiced by appellate counsel's failure to raise these issues in his appeal.

"A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. However, counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome. Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Thus, [the appropriate inquiry is] 1) whether appellate counsel's performance was deficient, and 2) whether [applicant] was prejudiced by appellate counsel's deficient performance." Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

Applicant's appellate counsel, John D. Delgado (hereinafter "Delgado), testified that he has been practicing law for thirty-eight years and has an extensive trial and appellate background. He elaborated that he has argued before the South Carolina Court of Appeals and South Carolina Supreme Court countless times and has submitted briefs to both of the South Carolina appellate courts, the United States District Court for South Carolina, and the Fourth Circuit Court of Appeals. He testified that he was retained by Applicant to represent him on his appeal and that he met with Applicant five or six times during the course of his representation. He described Applicant as having a "strong personality" and being a very demanding client. Delgado elaborated that many of these demands were unreasonable, including requesting that he write a letter to the Court of Appeals requesting an appeal bond and stating that Applicant would

be living with him while the appeal was pending. See Respondent's Exhibit No. 3. He testified that Applicant frequently made unrealistic demands, such as that every preserved issue be raised on appeal and that he file motions in North Carolina. See Respondent's Exhibits No. 4 and 5.

Delgado testified that his approach to appellate work is to thoroughly review the trial transcript, note all preserved issues, and then determine the most meritorious issues to raise in his brief. He testified that he carefully selects the most meritorious issues to raise because he does not believe that the "shotgun approach" of raising numerous issues is effective and distracts from the issues on which he might win. He testified that he explained this to Applicant numerous times, as well as explained the difference between reversible and harmless error. He testified that despite these numerous discussions, which he also memorialized in written correspondence to Applicant, Applicant was still adamant that every preserved issue be raised regardless of its merit.

Delgado testified that he decided to raise four issues on appeal and he selected these issues because he thought they were the most meritorious issues that constituted reversible error and had the greatest chance of success. He testified that he chose not to raise the issue of pitting on appeal because he did not think that the issue was as meritorious as other issues and that it did not arise to reversible error. He testified that he likewise did not raise the issue regarding the testimony of Applicant's former girlfriend Paula Jones because he did not think it was a meritorious issue or amounted to reversible error. Finally, in regards to the cell site information and testimony, Delgado again testified that he did not raise this issue because he did not think it was meritorious and would detract from more meritorious issues. He memorialized this in a

letter to Applicant. See Respondent's Exhibit No. 4.

This Court finds that appellate counsel's performance was reasonable based on professional norms. As discussed above, appellate counsel is "not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome." Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Using his vast experience as both a trial and appellate lawyer, Delgado selected the four issues which he believed had the highest likelihood of success on appeal. This Court finds that appellate counsel was not deficient for failing to raise the three issues Applicant set forth in this allegation. This Court finds that Applicant has failed to establish any resulting prejudice as well, as this Court finds that there is no reasonable likelihood that Applicant's convictions would have been reversed had Delgado raised the three issues listed in this allegation. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 19: Ineffective Assistance of Counsel due to trial counsel's overall performance pursuant to United States v. Chronic, 466 U.S. 648 (1984).

Applicant alleges that trial counsel's overall performance rises to a level of ineffectiveness based on cumulative errors that prejudiced him. In support of this position, Applicant cites to United States v. Chronic, where the United States Supreme Court held that if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, ineffective assistance of counsel is presumed without requiring specific inquiry into counsel's actual performance at trial. 466 U.S. 648 (1984).

This Court rejects Applicant's argument that this Court should employ a cumulative prejudice analysis to ineffectiveness claims. In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d

318, 324-25 (2002), the South Carolina Supreme Court expressly declined to address whether a post-conviction relief applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"). This Court finds that such an analysis is not constitutionally required and declines to employ that analysis.

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland v. Washington. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable"). Even in the absence of a cumulative prejudice analysis, a reviewing court, quite properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related, such as the failure to request a jury charge and the failure to introduce certain testimony. This is especially true where, as in this case, counsel's performance was determined not to be deficient on any of the

individual claims that Applicant wishes to aggregate, and there was no prejudice on any Ground. To hold otherwise is to conclude that even non-deficient performance under Strickland might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in Strickland. See Strickland, 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., both deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Furthermore, as discussed above in great detail in regards to each of Applicant's allegations, this Court finds nothing in trial counsel's performance to be deficient. Additionally, this Court finds that nothing presented by Applicant gives even the slightest indication that trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing. Chronic, supra. In contrast, this Court finds that Applicant was represented at trial by two highly skilled and capable trial attorneys who challenged the prosecution's case at every turn. This Court finds this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an

applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and

2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED this 13th day of January, 2014.

JAMES R. BARBER, III
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Phillip H. Crocker, III, SCDC #298423, Applicant, v. State of South Carolina, Respondent.	Case No. 2006-CP-40-6124 **ORDER DENYING APPLICANT'S "MOTION FOR REHEARING PURUSUANT TO RULE 59(a), AND MOTION TO ALTER OR AMEND PURSUANT TO RULE 59(e), SCRCP"**

This matter comes before this Court by way of Applicant's "Motion for Rehearing pursuant to Rule 59(a). SCRCP. and Motion to Alter or Amend pursuant to Rule 59(e) SCRCP," asking this Court to alter or amend its Order of Dismissal denying Applicant post-conviction relief.

I.

The records before this Court show that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the January 2002 term of the Richland County Grand Jury for Murder (2002-GS-40-4561) and Trafficking in Marijuana – Greater than Ten Pounds but Less than One-Hundred Pounds (2002-GS-40-9503). Chief Public Defender of the Fifth Judicial Circuit, Douglas S. Strickler and Chief Public Defender of Richland County, E. Fielding Pringle represented Applicant. Assistant Solicitors Deitrich Lake and Kathryn Luck Campbell, of the Fifth Circuit Solicitor's Office, prosecuted the case. On December 1-5, 2003, Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where he was convicted as indicted. Judge Cooper sentenced Applicant to thirty years imprisonment for Murder and a concurrent sentence of five years imprisonment for Trafficking in Marijuana.

A notice of appeal was filed and an appeal was perfected on Applicant's behalf by retained counsel, John D. Delgado, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences by published opinion. State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005). The Remittitur was sent on November 16, 2005.

II.

Applicant filed his *pro se* application for post-conviction relief on October 17, 2006, in which he alleged that he was being held in custody unlawfully based on allegations of: actual innocence, ineffective assistance of trial and appellate counsel, due process violations, and judicial misconduct. Respondent made its Return on May 4, 2007, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel, filed an amended application on January 9, 2014, alleging nineteen additional grounds for relief. An evidentiary hearing into the matter was convened on January 21-23, 2014, before this Court. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. Testifying at the hearing were Applicant, homicide reconstruction specialist Wayne N. Hill, Sr., trial counsels E. Fielding Pringle and Douglas S. Strickler, appellate counsel John D. Delgado, and Applicant's friend Jeff McInnis.

At the conclusion of the hearing, this Court requested memorandums from both parties. Following its review of these memorandums and the testimony and evidence presented at the hearing, this Court found that there were no constitutional deprivations or other errors entitling Applicant to relief and denied the application with prejudice by formal order signed and filed on July 1, 2014. Applicant received the filed Order on July 7, 2014.

On July 15, 2014, Applicant served a copy of his "Motion for Rehearing pursuant to Rule 59(a), SCRCP, and Motion to Alter or Amend pursuant to Rule 59(e) SCRCP" on Respondent and this Court. Respondent filed its Return to this motion on or about July 28, 2014.

III.

This Court's find that its ***sixty-three page*** Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds that there is no basis for altering or amending its prior ruling.[1] Therefore, this Court hereby denies the Applicant's Motion in its entirety, and affirms the previous Order of Dismissal.

This Court notes that if the Petitioner desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served within thirty days of the service of this Order. Petitioner is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 6 day of August, 2014

JAMES R. BARBER, III
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

[1] The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. See Rule 59(f), SCRCP.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2006CP4006124

Phillip H #298423 Crocker III
PLAINTIFF(S)

John Ozmint
SC Dept of Corrections
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow). ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 11 August 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Robert Cleland FitzSimons Tricia A. Blanchette Brian T. Petrano Megan E. Harrigan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

PHILLIP H. CROCKER, III.,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order Denying Applicant's Motion for Rehearing Pursuant to Rule 59 (e)** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
Post Office Box 12725
Columbia, South Carolina 29211

This 14th day of August, 2014.

Megan E. Harrigan
MEGAN E. HARRIGAN
ATTORNEY FOR RESPONDENT

SWORN to before me this 14th day of August, 2014.

Judy ann Carey
Notary Public for South Carolina.
My Commission Expires: 5/14/2024

2006-CP-40-6124