THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Deadra L. Jefferson, Circuit Court Judge

Case No.: 2011-CP-10-4113

Ferris Singley, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Ferris Singley appeals the denia of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Deadra L. Jefferson on June 16, 2014.

October 27, 2014

Rodney D. Davis
400 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Ashleigh Wilson, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Ashleigh Wilson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on October 28, 2014.

October 28, 2014

Rodney D. Davis
400 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Ashleigh Wilson, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

STATE OF SOUTH CAROLINA	)	IN THE SUPREME COURT OF SOUTH CAROLINA
	)	
COUNTY OF CHARLESTON	)	
	)	Case No.: 2011-CP-10-4113
	)	
FERRIS SINGLEY,	)	
Applicant.	)	
	)	
-versus-	)	REQUEST FOR REPRESENTATION ON APPEAL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;

2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;

3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;

4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;

5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,

Rodney D. Davis
South Carolina Bar #: 12396

October 28, 2014
Charleston, South Carolina.

STATE OF SOUTH CAROLINA)
) **VERIFICATION**
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.

Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me
this 28 day of October, 2014.

Notary Public for South Carolina
My Commission expires: By Commission Expires May 05, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2011–CP–10–4113
	)	
Ferris Geiger Singley, #211565,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Rodney Davis, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Kelly Solar, Esquire
Date of Hearing:	June 16, 2014
Court Reporter:	Karen V. Andersen

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 10, 2011. The Respondent made its Return on or about March 15, 2012. An evidentiary hearing on the matter was convened on June 16, 2014[1] at the Berkeley County Courthouse. The Applicant was present at the hearing and represented by Rodney Davis, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Kelly Solar, Esquire and Bruce Durant, Esquire. This Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return, and the Applicant's appellate records.

[1] This matter was originally scheduled to be heard on May 20, 2014; however, due to a death in Mr. Davis' family the matter was continued. The matter was rescheduled at a time convenient for the parties and heard in Berkeley County with their consent to avoid any further delay in the disposition of the PCR.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the January 2006 term of the Charleston County Grand Jury for Armed Robbery[2] (2006–GS–10–0094), Burglary-First Degree[3] (2006–GS–10–0095), and Kidnapping[4] (2006–GS–10–0093). He was represented by Kelly Solar, Esquire.

On May 1, 2006, the Applicant proceeded to trial and was found guilty by a jury of Armed Robbery and Burglary-First Degree. The Applicant was acquitted of Kidnapping. The Honorable R. Knox McMahon sentenced the Applicant to concurrent terms of life imprisonment without parole for Armed Robbery and Burglary.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert Dudek, Esquire, and Joseph L. Savitz, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. In a published opinion, the South Carolina Court of Appeals affirmed the Applicant's convictions and sentences on May 6, 2009. See State v. Singley, 383 S.C. 441, 679 S.E.2d 538 (Ct. App. 2009). The Applicant filed a Petition for Rehearing which was denied on June 29, 2009. The Applicant filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The Supreme Court affirmed the Applicant's convictions and sentences in a published opinion. State v. Singley, Op. No. 26954 (S.C. Sup. Ct.

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[2] Armed Robbery is a violent, most serious felony punishable by imprisonment "for a mandatory minimum term of not less than ten [(10)] years or more than thirty [(30)] years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven [(7)] years of the sentence." S.C. CODE ANN. § 16–11–330(A) (2005); S.C. CODE ANN. § 16–1–60 (2005); S.C. CODE ANN. § 17–25–45 (2005).

[3] "Burglary in the first degree is a [violent, most serious] felony punishable by life imprisonment. For purposes of this section, 'life' means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen [(15)] years." S.C. CODE ANN. § 16–11–311(B) (2005); S.C. CODE ANN. § 16–1–60 (2005); S.C. CODE ANN. § 17–25–45 (2005).

[4] Kidnapping is a violent, most serious felony punishable by imprisonment for a term of thirty (30) years. S.C. CODE ANN. § 16–3–910 (2005); S.C. CODE ANN. § 16–1–60 (2005); S.C. CODE ANN. § 17–25–45 (2005).

April 4, 2011). See State v. Singley, 392 S.C. 270, 709 S.E.2d 603 (2011). The Remittitur was issued on April 20, 2011.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
2. Ineffective assistance of appellate counsel.
    a. Date for petition for rehearing in reference to the writ of certiorari before the S.C. Supreme Court to look at the S.C. Court of Appeals affirming his conviction for Burglary 1st degree was not calendared; deadline passed before error caught.
3. Due process violation and conflict of interest.
    a. Failure to disclose that Judge Knox McMahon's daughter worked at the Solicitor's office.
    b. Solar used to be an advocate for female victims and the victim was female.

At the hearing, Applicant proceeded solely on the following allegations:

1. Ineffective assistance of counsel.
    a. Counsel failed to move to recuse Judge Knox McMahon because his daughter worked for the solicitor's office.
    b. Counsel failed to investigate the taxi records to determine whether the victim took a taxi home as she testified.
    c. Counsel failed to highlight inconsistencies in the police officers' statements during the Jackson v. Denno hearing.
    d. Counsel failed to call the Applicant as a witness during the Jackson v. Denno hearing.
    e. Counsel failed to move for a mistrial when the victim testified about the Applicant being incarcerated.
    f. Counsel failed to advise the Applicant of the risk of writing letters to his family.
    g. Counsel failed to provide adequate advice regarding the Applicant's right to testify at trial.
    h. Counsel was ineffective for calling the Applicant's cousin as a witness at trial.

This Court finds the Applicant failed to present any testimony or evidence regarding any other claims raised his application, therefore, this Court finds all allegations other than those presented at the hearing are deemed abandoned by the Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. CODE ANN. § 17–27–80 (2003).

Summary of the Testimony

The Applicant was present and testified he was represented at trial by Kelly Solar. The Applicant testified he met with counsel five (5) or six (6) times prior to trial. He testified he reviewed the evidence with counsel and discussed possible defenses. He testified counsel told him that he did not have a defense and that they had to "come up with something." The Applicant testified he provided one (1) witness to his attorney, John Preston, who was at the trailer with him, who Counsel said they could use if they could find him. The Applicant also testified that he provided Counsel leads for witness statements that Counsel did not investigate.

The Applicant testified he went to trial before Judge McMahon. He testified the day of trial, he was told by Counsel that Judge McMahon's daughter used to work at the Solicitor's Office. He testified Counsel told him that Judge McMahon would not recuse himself as trial judge and that Counsel would not move to recuse Judge McMahon because she thought he would do a good job. The Applicant also complained that this issue was not raised on the record.

The Applicant testified he made statements to police and had a Jackson v. Denno hearing prior to trial. He testified the State called two officers, specifically, the arresting officer and transporting officer, to testify. The Applicant testified Counsel cross-examined the officers, but

did not allow him to testify during the hearing and did not ask whether he wanted to testify about the inconsistencies in determining whether he was Mirandized. He testified the officers gave different statements about who was in the vicinity when Miranda warnings were given. He testified he told Counsel that he was not given Miranda warnings by police and that Counsel should have called the canine officer to testify about the discrepancies. He further testified that he was not aware he could testify and if given the opportunity he would have testified that he was not Mirandized. He testified the court allowed his statement to be admitted into evidence.

The Applicant testified his mother, the victim, was an eyewitness in his case and testified against him at trial. He testified there was an issue about the accuracy of his mother's whereabouts before the burglary and robbery. He testified he wanted a continuance to allow Counsel an opportunity to investigate taxi records because he thought his mother was lying about taking a taxi home in order to avoid drinking and driving. The Applicant testified he saw her in her car that night driving away and he wanted to use this inconsistency to impeach her. He testified that Counsel failed to use these inconsistencies to impeach his mother's testimony. The Applicant further testified he asked Counsel to request a continuance to look into the taxi records and she failed to do so.

The Applicant also testified trial counsel should have objected to his mother's reference to his being incarcerated during the *in camera* hearing regarding his letter to his aunt. He testified during the hearing about the admissibility of the letter he wrote to his aunt and his mother's comment about the Applicant being in jail in connection to the threat he made to scare his mother that he had killed someone the day before. To this comment, he testified the Solicitor asked a question and his mother said "that it didn't matter because he was going back to jail anyway." The Applicant testified Counsel did not address this issue and should have moved for a

mistrial or asked for a curative instruction. He testified this statement affected the jury and prejudiced him because they knew he had a record.

The Applicant testified the State introduced a letter he wrote to his mother's sister in North Carolina. The Applicant testified Counsel "encouraged" him to write his aunt and maybe as a result he would not get life in prison without parole because the victim was his mother. He further testified that it was his hope that his aunt would help him with his mom in a desire for leniency. He testified Counsel provided him with his aunt's zip code but the letter he wrote his aunt was ultimately given to the Solicitor's Office. He testified Counsel never explained that the letter he wrote could have gone to the Solicitor's Office or the implications of writing the letter. The Applicant testified Counsel unsuccessfully argued against the admissibility of the letter at the hearing.

The Applicant testified he spoke with Counsel about whether or not he should take the stand at trial and was advised of his right to testify. He testified Counsel did not want him to take the stand because she thought the Solicitor would use his prior convictions and the letter to "destroy" him at trial. The Applicant testified he did not have adequate advice on testifying at trial. He testified he understood that if he took the stand to testify the Court would have to evaluate the age and type of his prior convictions to see what the State could use against him at trial, which was not done prior to him informing the court that he did not wish to testify. He further testified that Counsel failed to request a ruling by the court on the admissibility of his prior convictions and as a result he did not know which, if any, prior convictions could be used to impeach him before he made the decision to testify or not.

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He testified he was advised by the court of his right to testify and he told the court it was his decision not to testify, but did not remember any other questions.

Lastly, the Applicant testified he did not know why Counsel called his cousin as a witness at trial because it backfired. He testified he thought it was to impeach his mother. He testified he told Counsel his aunt and cousin may be able to help impeach his mother. The Applicant testified his cousin's testimony was more harmful than helpful and he lost last argument as a result.

Kelly Solar, Esquire, was present and testified she was appointed to represent the Applicant about a month after he was arrested. She testified she has spent the last fifteen (15) years and her entire practice in criminal law. She testified she met with the Applicant frequently prior trial. Counsel testified she discussed with the Applicant the discovery material she received from the State, the elements of the charges he was facing, the range of penalty, possible defenses, what the State was required to prove to convict him, and the Applicant's version of the facts. Counsel testified the Applicant's version of the facts was exactly as the State had alleged. She testified the Applicant admitted his guilt to her and she tried to pursue a guilty plea, but the State would not offer anything other than a plea to life in prison without the possibility of parole. She further testified that as a result of this posture of the case they went to trial.

Counsel testified she discussed the lack of possible defenses like voluntary intoxication, which was no defense with the Applicant. She testified they ultimately decided to argue at trial that because the Applicant was not armed, the armed robbery was just a "theft" and that since the Applicant owned twelve percent (12%) of the victim's home there was no burglary, and, ultimately, there was no kidnapping. However, Counsel testified, consequently the Applicant owned the part of the home where the knife was found. Counsel testified the State's evidence

against the Applicant consisted mainly of the Applicant's mother's testimony and her credibility was key at trial.

Counsel testified the Applicant gave her potential witnesses and leads to investigate. She testified they were trying to get the Applicant's family to speak with the Applicant's mother but that this attempt was not successful and the Applicant's mother was not interested in helping the Applicant. Counsel testified the Applicant told her he wanted to call his cousin Teresa Singley at trial to show his mother was working while collecting disability and to impeach his mother's credibility. Counsel testified Teresa testified at trial that she worked for the Applicant's mother even though the mother collected disability. She testified she was able to elicit the testimony they wanted from Teresa at trial, just that she was part of the business the Applicant's mother owned. Counsel testified she did not recall how much time she spent with Teresa before she testified at trial but that her investigator had spoken with her prior to trial. She testified she put her on the stand to testify because the Applicant wanted to pursue a line of questioning to show his mother was dishonest but that they did not discuss any other avenues of impeaching her and that she would not have called her had the Applicant not "insisted" on it. Counsel recalled that the State impeached Teresa, but her testimony still showed that Brenda was dishonest. Counsel testified that based on the lapse of time, she could not recall whether she prepared Teresa for cross-examination but that she was sure she did. Counsel testified she did not recall if she discussed with the Applicant that they would get last argument if he did not call any witnesses at trial.

She testified she also spoke with the Applicant's two aunts, Kathy Willis and Ethel Singley. Counsel testified she has a note in her file that she asked her investigator to look for a guy named Preston the Applicant wanted to call as a witness, but she was unable to locate the result of that investigation in her file due to the passage of time or the possibility that the lead

was a dead end. Counsel testified she did not recall the Applicant asking her to move for a continuance at trial to investigate the taxi records and she just heard that allegation for the first time at this hearing. She testified if she had felt the taxi records would have been helpful to the Applicant at trial—no different than if she could show that Brenda drank and drove—she would have looked into it and that when the Applicant wrote her, she did what he asked. She further testified that the Applicant did not mention the taxi records to her until during the trial.

Counsel testified she did not recall speaking with the Applicant about moving to recuse Judge McMahon because of his daughter, but may have. She testified she did not see a basis to move to recuse Judge McMahon solely based on that and that she was not sure whether she had moved to recuse Judge McMahon on other trials upon request. She testified if the Applicant had been adamant about her moving to recuse Judge McMahon she would have done it. She further testified that her records do not reflect any such request from the Applicant and she has no recollection of it. Counsel testified she did not think Judge McMahon's daughter was employed with the Solicitor's Office at the time of the Applicant's trial.

Counsel testified she moved to suppress the Applicant's statements on the basis that the responding officers failed to Mirandize the Applicant and the Applicant would be prejudiced if the jury heard about the Applicant saying he killed someone. Additionally, Counsel testified that the statement was not true and was made only to scare the victim. Counsel clarified that she objected *in limine* once to the admission of the Applicant's statement that he had killed someone the day before and renewed her objection contemporaneously with the admission of the statement. She testified she saw no basis to move for a curative instruction or mistrial. She testified she did not recall if she talked to the Applicant about testifying during the Jackson v. Denno hearing, but if she thought it would have been helpful she would have called the

Applicant to testify. Counsel also testified it would not have been helpful to bring out during the Jackson v. Denno hearing inconsistencies in the officers' statements about who was in the vicinity when the Applicant was given his Miranda warnings.

Counsel testified the Applicant once sent her a letter that he wanted to send to the Solicitor's Office, but she advised him against it. She further testified that she advised him that that information should be held for mitigation. She testified she would have looked up the Applicant's aunt's zip code online and given it to him but she would never tell the Applicant to confess to the crime in a letter. Counsel testified she told the Applicant to talk to his aunt about speaking with his mother and she did not tell the Applicant to confess to anything in a letter to his aunt. Counsel testified she never saw the letter the Applicant sent to his aunt before it was sent and never had the opportunity to advise the Applicant against sending the letter.

Counsel testified she spoke with the Applicant about taking the stand and she was "sure" she advised him not to testify at trial. She testified that the judge reviewed the Applicant's right to testify and questioned him, told him that it was ultimately the Applicant's decision, and that the Applicant did not seem to question her advice at the time. She testified she did not recall a hearing regarding which of the Applicant's prior convictions would come out at trial if he took the stand. Counsel also testified that no hearing on the Applicant's specific "extensive" prior record was conducted and that the judge never made a ruling on the admissibility of the Applicant's record. Counsel testified she never knew the Applicant wanted to take the stand and it was not an issue at trial. She testified that it was "news" to her that the Applicant wanted to testify because his extensive record would certainly have come out during the trial which would be "damaging" and it was her advice for the Applicant not to testify.

Lastly, Bruce Durant, Esquire testified he was the Solicitor assigned to prosecute the Applicant's case. He testified Judge McMahon's daughter did not have any involvement in the prosecution of the Applicant's case and that he did not recall McMahon's daughter being in the Solicitor's Office at the time of the Applicant's trial. He further testified that she had already left employment in the Solicitor's Office when this case was tried.

Ineffective Assistance of Counsel

I. Standard

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

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

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel.

First, the applicant must prove that counsel's performance was deficient. See id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "'reasonableness under prevailing professional norms.'" Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel's deficient performance must have prejudiced the applicant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

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

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at

687–88, 104 S. Ct. at 2064–65; Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev'd on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds particularly telling the fact that Counsel obtained for the Applicant an acquittal on the Kidnapping charge he was facing. This Court finds that Counsel's representation did not fall below an objective standard of reasonableness.

A. Recusal of Judge McMahon

The Applicant asserts Counsel was ineffective for failing to move to recuse Judge Knox McMahon as trial judge because his daughter worked at the Solicitor's Office. This Court finds this allegation is without merit. Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. State v. Jackson, 353 S.C. 625, 627, 578 S.E. 2d 744, 745 (Ct. App. 2003). In South Carolina, it is not enough for a party to allege bias or prejudice; a party seeking disqualification of a judge must show some evidence of bias or prejudice. Brailsford v. Brailsford, 380 S.C. 443, 451, 669 S.E. 2d 342, 346 (Ct. App. 2008); Jackson, 353 S.C. at 627, 578 S.E. 2d at 745; Rule 501, SCACR; Rule 501, Canon 3(E)(1)(a), SCACR.

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. Murphy v. Murphy, 319 S.C. 324, 331, 461 S.E. 2d 39, 42 (1995). Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case. Reading v. Ball, 291 S.C. 492, 494, 354 S.E.2d 397, 398 (Ct. App. 1987). It is not enough for the party seeking

disqualification to simply allege bias. Id. The party seeking disqualification must show some evidence of bias or prejudice. If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Mallett v. Mallett, 323 S.C. 141, 145–46, 473 S.E. 2d 804, 807–08 (Ct. App. 1996); Roper v. Dynamique Concepts, Inc., 316 S.C. 131, 139, 447 S.E. 2d 218, 222–23 (Ct. App. 1994), Koon v. Fares, 379 S.C. 150, 156, 666 S.E. 2d 230, 234 (2008).

Alleged bias or prejudice requiring a judge to recuse himself or herself must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge. Canon 3(E)(1)(a), SCACR. Jackson, 353 S.C. at 627, 578 S.E. at 745. A motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench. Mallett, 323 S.C. at 145–46, 473 S.E. 2d at 807–08 (citing U.S. v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698 (1966); Berger v. U.S., 255 U.S. 22, 31, 41, S. Ct. 230, 232 (1921)). The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held that the judge committed error in his rulings. Mallet, 323 S.C. at 147, 473 S.E. 2d at 808 (citing Reading, 291 S.C. at 494, 354 S.E.2d at 398).

This Court finds the Applicant has failed to show a basis for Counsel to move to recuse Judge McMahon as trial judge. This Court finds further the Applicant has failed to carry his burden of showing Judge McMahon's daughter worked at the Solicitor's Office during the time of his trial or had any involvement in the prosecution of his case. This Court finds the Applicant has presented no evidence to show prejudice or bias existed. This Court further finds that if Judge McMahon thought that his daughter was involved in the matter, it is likely he would have

raised the issue *sua sponte* at trial and unlikely he would have recused himself. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to move to recuse Judge McMahon at trial.

B. Failure to Investigate

The Applicant alleges Counsel was ineffective for failing to investigate the taxi records to see whether his mother, the victim, took a taxi home prior to the incident in order to avoid drinking and driving as she claimed. (Tr. 112: 12–13, 139: 12). Additionally, the Applicant complains that Counsel failed to investigate a possible witness, John Preston, who he alleges was at the trailer with him at the time in question. This Court finds these allegations are without merit.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), *overruled on other grounds*, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385–86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521–22, 123 S. Ct. 2527, 2535 (2003).

Our Courts have repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the

PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant's mere speculation as to what a witness' testimony would have been by itself, cannot satisfy the Applicant's burden of showing prejudice. Id. (citing Glover, 318 S.C. at 498–99, 458 S.E.2d at 540). See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 ("So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient."); Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

i. Failure to Investigate Taxi Records

This Court finds the Applicant has failed to show what an investigation by Counsel into taxi records would have yielded and this Court will not speculate as to the result of such investigation. Counsel provided credible testimony that she would have investigated the evidence had she thought it was helpful to the Applicant's case. This Court also finds Counsel for the Applicant was able to adequately impeach the credibility of the victim at trial without this evidence. At trial, Counsel impeached the victim's credibility with the fact that the victim had been convicted of Forgery and was receiving disability for her back while also working for a cleaning business. (Tr. 137:3–10, 138:5–17). Further, this Court notes that, had Counsel obtained the taxi records, it is unlikely the receipts in question would have shown what the Applicant was looking for in order to impeach his mother. Moreover, the Applicant has failed to provide this

Court with any actual records tending to prove his assertions at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to investigate the victim's taxi records.

ii. Failure to Investigate Witness

This Court finds the Applicant has failed to show what an investigation by Counsel into the potential witness, John Preston, would have yielded and this Court will not speculate as to the result of such investigation. Counsel provided credible testimony that she would have investigated this witness had she thought he was helpful to the Applicant's case and that her notes in her file indicated that she did, in fact, have her investigator look into the potentiality of calling John Preston to testify on the Applicant's behalf. Ultimately, the Applicant has failed to produce the putative witness and present his purportedly beneficial testimony at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). Thus, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to investigate a potential witness.

C. Failure to Request Continuance to Investigate

The Applicant alleges Counsel was ineffective for failing to request a continuance in order to investigate the taxi records as possible impeachment evidence against the victim. This Court finds this allegation is without merit.

The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citing Bridwell v. Bridwell, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983)). See Hudson v. Blanton, 282 S.C. 70, 74, 316 S.E.2d 432, 434 (Ct. App. 1984) (noting a moving party must show the absence of some material evidence and due diligence on his part to obtain such evidence to justify a continuance). Cf. Beasley v. Kerr–McGee Chem. Corp., 273 S.C. 523, 532, 257 S.E.2d 726, 730 (1979) (finding a movant failed to show due diligence to justify a continuance when he had eight months from filing of the complaint until trial to prepare). See State v. Lytchfield, 230 S.C. 405, 411, 95 S.E.2d 857, 860–61 (1957) (no abuse of discretion in denial of the motion to continue on the ground of witness absence). Cf. State v. Lunsford, 318 S.C. 241, 243, 456 S.E.2d 918, 920 (1995); State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (no dismissal or mistrial when, after receiving discovery material, defense counsel allowed time to review material during break in trial and before examination of witnesses continued).

This Court finds that Counsel's testimony that had the Applicant requested she investigate the taxi records, she would have obeyed his request is credible and finds the Applicant's testimony that he asked Counsel to investigate the taxi records and she refused is not credible. As noted above, the Applicant has failed to produce the favorable evidence at the PCR hearing. This Court fails to discern how producing this evidence would have been beneficial to the Applicant at trial. Moreover, this Court finds that even had Counsel requested a continuance, the trial judge likely would have denied that request. The record reflects that Counsel was well prepared to proceed with trial and in the light most favorable to the Applicant he did not mention this matter until after the trial had progressed. The record further reflects that had trial counsel

perceived this information to be beneficial there was sufficient time to procure it prior to the Applicant's mother's testimony, thereby eliminating the necessity of a continuance request. Thus, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to request a continuance to investigate.

D. Failure to Effectively Conduct Jackson v. Denno Hearing

The Applicant alleges Counsel was ineffective for failing to challenge the officer's testimony during the Applicant's Jackson v. Denno hearing. The Applicant also alleges Counsel was ineffective for failing to call the Applicant as a witness during the Applicant's Jackson v. Denno hearing. Ultimately, the Applicant complains that his statements were admitted into evidence. This Court finds these allegations are without merit.

i. Jackson v. Denno Standard

In Jackson v. Denno, the United States Supreme Court declared it axiomatic that a defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury. See Jackson v. Denno, 378 U.S. 368, 376–77, 84 S. Ct. 1774, 1781–82 (1964). Thus, where there is conflicting evidence about a statement, the court must first make a finding as to the validity of the statement. "[A] defendant is entitled to a 'reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence.'" State v. Parker, 381 S.C. 68, 84, 671 S.E.2d 619, 627 (Ct. App. 2008); State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976); State v. Miller, 375 S.C. 370, 381, 652 S.E.2d 444, 450 (Ct. App. 2007)).

"In order to introduce into evidence a confession arising from custodial interrogation, the State must prove [to the court] by a preponderance of the evidence that the statement was made

freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). The jury must determine whether the statement was freely and voluntarily given beyond a reasonable doubt." State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977); State v. Washington, 296 S.C. 54, 55–56, 370 S.E.2d 611, 612 (1988)). See State v. Creech, 314 S.C. 76, 86–87, 441 S.E.2d 635, 640–41 (Ct. App. 1993); State v. Howard, 296 S.C. 481, 488, 374 S.E.2d 284, 287 (1988) (citing State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979)) ("The trial court must examine the "totality of the circumstances" surrounding a statement to determine whether the statement is voluntary. . . . A trial court's decision will not be disturbed absent an error of law."); State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (2010) (citing State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009)).

ii. Failure to Effectively Cross Examine Witnesses

Initially, this Court clarifies that the Applicant alleges that Counsel was ineffective for failing to effectively challenge the admission of various statements made by the Applicant during his Jackson v. Denno hearing. The Applicant made three (3) statements to the officers involved in his detention and arrest: (1) Officer Pontieri testified that the Applicant stated he "smoked" the money he took from his mother (Tr. 8:1–6); (2) Officer Kiker testified that the Applicant stated to his mother "that he had killed a person two (2) days ago, and that he didn't have any problem killing her." (Tr. 13:14–22); (3) Officer Kiker testified the Applicant stated he had entered the house through a back window (Tr. 14:13–14).

The Applicant specifically argues that Counsel was ineffective for failing to emphasize the inconsistencies in where the officers were standing when the Applicant was allegedly Mirandized during her cross examination. This Court finds Counsel effectively highlighted the

officers' vague memories of the logistics. (Tr. 10:6–18). Counsel also effectively cross examined Officer Kiker that she never Mirandized the Applicant and failed to record certain logistical facts in her report (Tr. 16:10–23). Additionally, the Applicant's statements were not offered to prove the truth of the matter asserted—that he smoked crack or killed someone in the days prior to the burglary—but were offered to prove elements of the offense of Armed Robbery and First Degree Burglary, entering a dwelling without consent and placing the victim in fear by threats and use of a dangerous instrument or weapon. See S.C. CODE ANN. § 16–11–311, –330(A) (2005). This Court further finds that Counsel requested the Jackson v. Denno hearing and made contemporaneous objections to the admission of the Applicant's statements at trial. (Tr. 113:22–25; 114:1–14; 161: 24–25, 162: 1–2; 192:25–193:11). Therefore, this Court finds Counsel preserved this issue for appellate review. Additionally, this Court finds that the Applicant has failed to show any basis for Counsel to request a mistrial or curative instruction. See **Section F.**, Below. This Court further finds that the Applicant's statements became part of the *res gestae* of the incident and were found by the trial court to be admissible at trial. See id. Therefore, counsel performed as required by requesting and having a Jackson v. Denno and making a contemporaneous objection at trial thereby preserving the issue for appellate review.

This Court finds Counsel adequately challenged the introduction of the Applicant's statements prior to trial and preserved error for appellate review. The record reflects Counsel thoroughly cross-examined both of the State's witnesses during the hearing. Counsel elicited testimony from both police officers about how the Applicant was not read his Miranda warnings; did not sign a waiver of rights form; did not provide a written statement; and was not allowed to read his Miranda rights before giving a statement. (Tr. 9:10–20; 10:19–25; 11:1; 15:15–21). Counsel also argued that the State provided no proof that the Applicant was given Miranda

warnings and the Applicant did not sign a written statement or waiver form. (Tr. 22:7–24). Ultimately, this Court finds Counsel effectively impeached the officers, but the evidence showed that the Applicant was, in fact Mirandized, whether witnesses to the Miranda warnings were either physically standing closely or passing by.

Even though this Court need not address the Applicant's argument that the Applicant was prejudiced at trial by Counsel's failure to call and question witnesses during his Jackson v. Denno hearing, this Court finds that Counsel was able to effectively cross-examine officers Pontieri and Kiker and attack and highlight their vague recollections and reports, ultimately throwing into question whether the State had proven beyond a reasonable doubt that the Applicant made a post-Miranda statement freely, voluntarily, knowingly, and intelligently. (Tr. 173: 12–21; 194: 23–25; 195: 1–9, 20–25; 196: 1–12). Therefore, this Court finds no prejudice resulted from Counsel's performance at the Applicant's Jackson v. Denno hearing or in regards to the admission of the Applicant's statements.

iii. Failure to Call Witnesses

This Court also finds Counsel was not ineffective for failing to call the Applicant and the canine officer, Officer Cobbs, as witnesses during the Applicant's Jackson v. Denno hearing.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778–79 (1992) (finding counsel's decision not to call witnesses reasonable where their testimony would have been of no value to the case and witnesses were not credible). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not

ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

Counsel provided credible testimony that she did not think the Applicant's testimony about not being given Miranda warnings would have been helpful. This Court finds Counsel's observations were valid and it is unlikely the Applicant's testimony would have been necessary or beneficial during the hearing. This Court finds that the only conceivable argument the Applicant could have made during his purported testimony would be that he simply was not Mirandized. This Court further finds that Counsel was able to elicit the substance of this assertion without calling the Applicant to testify. This Court finds further the Applicant was not prejudiced by Counsel's failure to call him as a witness at the hearing considering the preponderance standard pretrial and that ultimately the voluntariness of his statement is to be decided beyond a reasonable doubt by the jury at trial not the trial judge. This Court further finds that counsel was effective in raising these inconsistencies before the jury and arguing that the State had failed to meet its burden of proof in that regard. This Court finds the Applicant has failed to carry his burden of proving Counsel's performance during the Applicant's Jackson v. Denno hearing was deficient in any way.

Moreover, "[A] PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)). The Applicant's mere speculation as to what a witness' testimony would have been by itself, cannot satisfy the Applicant's burden of showing prejudice. Id. (citing Glover, 318

S.C. at 498–99, 458 S.E.2d at 540). See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 ("So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient."); Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Although this Court need not reach the issue of whether the Applicant was prejudiced by Counsel's performance, the Applicant specifically argues that the lack of other proof that he was Mirandized augments Counsel's failure to call the Applicant and the canine officer to testify. The Applicant argues that had Counsel called the Applicant and canine officer to testify during the hearing, the testimony would have verified the Applicant's story and provided independent corroborating proof that the Applicant was not Mirandized and, ultimately, would have affected his decision whether to testify on his own behalf at trial. Thus, the Applicant argues, based on the compounded nature of Counsel's errors, he was prejudiced. This Court finds the Applicant has failed to meet his burden of proving Counsel was ineffective such that the Applicant was prejudiced by Counsel's errors. This Court finds that even if Counsel would have called witnesses to testify during the Jackson v. Denno hearing, in light of the lesser burden of proof it is doubtful the trial court would have determined that the Applicant's statements were inadmissible, independent from the jury's determination of whether the State proved the Applicant freely, voluntarily, knowingly, and intelligently made a post-Miranda statement beyond a reasonable doubt. Moreover, the Applicant has failed to present the favorable testimony proving to the PCR Court that the Applicant was not Mirandized. See Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468

(1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)). Therefore, this Court finds no prejudice resulted from Counsel's performance at the Applicant's Jackson v. Denno hearing or in regards to the admission of the Applicant's statements.

E. Failure to Object, Move for Mistrial, or Curative Instruction

The Applicant alleges Counsel was ineffective for failing to object or move for a mistrial when the victim referred to the Applicant being incarcerated at trial. This Court finds this allegation is without merit and Counsel adequately challenged the admission of this statement by the victim at trial.

> Although the decision is vested in the sound discretion of the trial court, a mistrial is proper only where it is dictated by "manifest necessity" or "the ends of public justice." Whether a mistrial is manifestly necessary is a fact specific inquiry. "It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." A trial judge's decision to grant or deny a mistrial will not be reversed on appeal absent an abuse of discretion amounting to an error of law.

State v. Rowlands, 343 S.C. 454, 457–58, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). See State v. Baum, 355 S.C. 209, 214–15, 584 S.E.2d 419, 422 (2003); State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203–04 (2010) (State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial"); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 444, 345–46 (1991) (counsel's failure to request curative instruction upon admission of evidence

of applicant's prior bad acts to show criminal propensity or poor character constituted deficient performance).

The record reflects the victim testified at trial that the Applicant put a knife to her throat and said "I'm going to prison anyway because- he said -I just killed someone yesterday." (Tr. 113:21–24, 114:18–20). This Court finds and the record reflects Counsel objected to this statement by the victim prior to the beginning of trial. Counsel moved to exclude this statement by the victim because its probative value is substantially outweighed by the danger of unfair prejudice to the Applicant. (Tr. 25:1–11). The Court ruled the victim's statement was admissible and Counsel preserved error and contemporaneously objected to the statement when made by the victim during the trial. (Tr. 93:17–25; 94:1–3; 113:21–25–114:1–14). Counsel also provided credible testimony that the admission of the statement was not a basis to move for a mistrial or to request a curative instruction. This Court finds Counsel's performance was not deficient and she adequately challenged the admissibility of this statement by the victim and preserved the issue for appellate review. The record also reflects Counsel made certain to have excluded other pieces of evidence that referred to the Applicant's past incarceration under Rules 403 and 404(b), SCRE. (Tr. 81: 18–25; 82:1–5; 90:7–25; 91:1–15). This Court finds the Applicant failed to carry his burden of proving Counsel was ineffective for failing to move for a mistrial or request a curative instruction based on this statement by the victim at trial. See Geter v. State, 305 S.C. 365, 367–68, 409 S.E.2d 344, 345–46 (1991) (although the PCR court found Counsel's performance deficient for failing to object to evidence of the Applicant's prior bad acts under Rule 404(b), SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), the error was harmless because evidence of the Applicant's guilt was overwhelming); State v. Freiburger, 366 S.C. 125,

135–36, 620 S.E.2d 737, 742 (2005) (finding no prejudice to PCR applicant from speculative comment that he was stationed at Fort Leavenworth military prison).

Moreover, this Court finds that it is unlikely the testimony in question would not have been excluded as an impermissible reference to a prior bad act, as the trial record reflects that the statements were admitted as part of the *res gestae* of the crime and admitted to establish an element of the offense charged. See Rule 404(b), SCRE; State v. Blackburn, 271 S.C. 324, 327–28, 247 S.E.2d 334, 336–37 (1978) ("In order to qualify as a part of the *res gestae*, a statement must be substantially contemporaneous with the litigated transaction and be the spontaneous utterance of the mind while under the active, immediate influence of the event."); State v. Dennis, 321 S.C. 413, 417–18, 468 S.E.2d 674, 676–77 (1996) (citing State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995)) (same); State v. King, 334 S.C. 504, 512–13, 514 S.E.2d 578, 582–83 (1999) (citing State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996)) ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred."); see also, State v. Gagum, 328 S.C. 560, 563 & n.2, 492 S.E.2d 822, 823 & n.2 (1997) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Bolden, 303 S.C. 41, 43, 398 S.E.2d 494, 495, n.1 (1990)) ("While there are times when evidence may be admissible under *Lyle* and Rule 404(b) and the *res gestae* exception, the *res gestae* exception is properly viewed as independent of *Lyle*—that is, some evidence that would be inadmissible under *Lyle* and Rule 404(b) would be admissible as part of the *res gestae*."). In addition, the Applicant's statements are more aligned with non-hearsay admissions rather than inadmissible character evidence and statements offered for their truth.

This Court finds the Applicant was not prejudiced because it is unlikely a mistrial would have been granted based on this testimony. This Court also finds it is unlikely a curative instruction would have been beneficial to the Applicant since curative instructions at times tend to highlight errors to the jury. See Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes, 308 S.C. 546, 419 S.E.2d 778 (1992)) (finding valid strategy not to request curative instruction "because they tend to bring into focus precisely the item the objector has kept out"). Accordingly, this Court can discern no deficiencies in Counsel's performance in this regard; therefore, this Court finds the Applicant was not prejudiced. This Court finds the Applicant has failed to carry his burden of proving Counsel's performance was ineffective in this regard.

F. Failure to Advise Regarding Letters

The Applicant alleges Counsel was ineffective for failing to advise the Applicant about the risk of writing incriminating letters to his family. This Court finds this allegation is without merit. The record reflects Counsel challenged the admission of an incriminating letter the Applicant wrote to his aunt prior to trial which was used against the Applicant by the State at trial. (Tr. 79:22–93). This Court finds Counsel provided credible testimony that she told the Applicant to write his aunt to seek leniency and to request that she speak with his mother, the victim. This Court does not find credible the Applicant's testimony that he was "encouraged" by Counsel to write a letter to his aunt confessing to the crime. This Court finds Counsel should not be held accountable for a letter sent by the Applicant that she did not see or know about prior to it being sent by mail. This Court finds Counsel had no obligation to advise the Applicant not to mail incriminating letters to his family members. This Court finds it was common sense for the Applicant to know sending incriminating statements by mail would not be beneficial especially

when Counsel testified the Applicant showed her another letter he had written and intended to send to the Solicitor's Office and she advised him not to send it. Further, the record reflects that the Applicant's aunt forwarded his letter to the victim. (Tr. 121: 22–23). This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to advise the Applicant of the risks associated with writing incriminating or inculpatory letters to family members.

F. Failure to Advise Regarding Right to Testify

The Applicant alleges Counsel failed to provide adequate advice regarding his right to testify at trial. The Applicant specifically argues that based on the totality of the record and Counsel's cumulative errors concerning admission of the Applicant's statements at the Jackson v. Denno hearing, the Applicant was not fully informed in deciding whether to testify that he was not Mirandized and his statement was not voluntarily made. This Court finds this allegation is without merit and the Applicant was adequately advised by the court and trial counsel of the risks associated with testifying at trial. The record reflects the court advised the Applicant of the following: his constitutional right to testify on his own behalf, that the decision to testify at trial was solely his decision, that the court would tell the jury they could not hold his silence against him if he did not testify at trial, and that if he were to testify, the Solicitor could potentially use any criminal history he had against him to attack his credibility. (Tr. 223:8–25; 224:1–7; 225:1–10). The record reflects the Applicant told the court he discussed his right to testify with Counsel, he did not need any additional time with Counsel to discuss testifying, had no further questions for the court or his attorneys, he understood his right to testify, and he decided not to take the stand. (Tr. 224:8–25; 225:1–22). The record reflects the Applicant freely, voluntarily, knowingly, and intelligently waived his right to testify at trial.

This Court also finds Counsel advised the Applicant of the risks associated with testifying at trial. Counsel provided credible testimony that she advised the Applicant not to take the stand based on his extensive prior criminal record. This Court finds Counsel provided valid advice to the Applicant regarding taking the stand since the Applicant's criminal record was extensive and included at least four (4) impeaching offenses—Forgery in 1986, Burglary-Second Degree in 1986, Petit Larceny in 1996, and Common Law Robbery in 1996. (Tr. 280:13-25). See Rule 609, SCRE. This Court finds the Applicant's prior history would have significantly compromised his credibility before the jury at trial, especially in light of the similarity of the offenses. Further, even if the trial court limited impeachment to the convictions without specific reference to the actual offenses, the fact that he had a record would have significantly impaired his credibility making the risk of exposure to the State's questioning an inviable option. This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to provide adequate advice regarding the Applicant's right to testify at trial. Thus, this Court can discern no prejudice resulting from the Applicant's decision not to testify and Counsel's alleged errors.

This Court also finds that the Applicant's assignment of error to Counsel's failure to request a ruling on the admissibility of specific convictions is without merit. This Court finds that the Applicant was not new to the system, was not under-informed of the criminal process, was able to ask his attorney about the ruling, and was able to request a formal ruling from the court at least four (4) times. Rather, the record reflects that the Applicant fully understood each aspect of his right to testify and the benefits associated with exercising that right. Moreover, the Applicant has failed to present any proof that his testimony would have made a difference at trial. Returning to the Applicant's argument that because of Counsel's compound failures, he

chose not to testify that he was not Mirandized prior to giving his statements and was, therefore, prejudiced, this Court finds that the Applicant ultimately was not prejudiced by Counsel's failure to elicit this particular testimony at trial. As mentioned above, this Court finds Counsel effectively cross-examined the reporting officers and, ultimately, the jury was able to determine whether the State met its burden of proving the Applicant's statements were freely and voluntarily made beyond a reasonable doubt. Therefore, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to advise the Applicant of his right to testify.

G. Ineffective Examination of a Witness

The Applicant alleges Counsel was ineffective for calling his cousin Teresa Singley as a witness at trial. This Court finds this allegation is without merit.

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

Counsel provided credible testimony that she pursued a line of questioning with Teresa Singley about the Applicant's mother working while receiving disability with the hopes of impeaching the victim at the Applicant's request. Counsel testified she would not have called

Singley to testify for the defense had the Applicant not insisted she do so. This Court finds Counsel was not deficient for calling Singley to testify at trial. The record reflects Counsel elicited the testimony from Singley that she was seeking and the Applicant has failed to show how he was prejudiced by Singley's testimony. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for calling Teresa Singley as a witness at trial.

This Court also finds the Applicant has failed to show how any alleged deficiencies by Counsel affected the outcome of his proceeding. Specifically, the Applicant has provided the Court no proof that Counsel did not adequately prepare the witness and that last argument would have influenced the outcome of his case. Further, the Applicant may not now complain of his requested course of representation. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. "Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." Id. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id.

II. Failure to Establish Prejudice

Moreover, this Court finds there exists overwhelming evidence of the Applicant's guilt, which precludes the Applicant from showing Counsel's performance could have affected the result of the Applicant's trial. The presence of overwhelming evidence of guilt negates any claim that Counsel's performance could have reasonably affected the result of the defendant's trial. Franklin v. Catoe, 346 S.C. 563, 570 n.3, 552 S.E.2d 718, 722 n.3 (2001). At trial, the State presented the following as evidence of the Applicant's guilt: the Applicant's mother, the victim, who testified the Applicant put a knife to her throat, told her to give him all her money, tied her

to a bed with tape and pantyhose, and took all the phones in her house (Tr. 113:3–24); the victim's neighbor who testified the victim came to his house in the middle of the night and told him the Applicant tried to kill her (Tr. 147:2–4, 21–23); and the Applicant's statements to police in which he admitted to entering the victim's home through a back window and smoking the money taken from the victim (Tr. 162:4–18; 193:12–25; 194:1–2). This Court finds the Applicant has failed to carry his burden of proving prejudice resulted from Counsel's performance at trial.

At the evidentiary hearing, the Applicant argued that he was prejudiced based on hindsight and Counsel's cumulative errors. The Applicant neglects to argue the proper standard as articulated in Strickland and South Carolina's PCR jurisprudence. Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by Counsel's representation. See id. Moreover, this Court finds Counsel's representation was effective based on her ability to obtain an acquittal on one of the Applicant's charges. Therefore, the Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such

allegations. Accordingly, this Court finds the Applicant abandoned such allegations. Therefore they are hereby denied and dismissed.

CONCLUSION

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

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

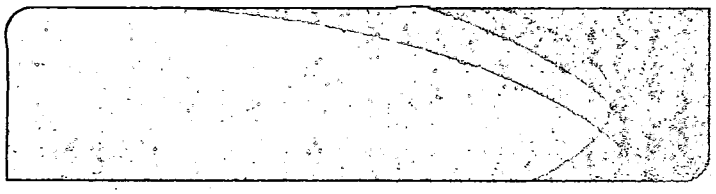
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25th day of Sept., 2014

Deadra L. Jefferson
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.



Lowcountry Law Office

4000 Faber Place Drive, Suite 300
Charleston, SC 29405
Phone: 843-323-4353 Fax: 843-323-4101
E-Mail: Davis@LowcountryLawOffice.com

October 27, 2014

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Ferris Singley v. State of South Carolina, Case No.: 2011-CP-10-4113

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

(1) Proof of service of the Notice of Appeal on the respondent &

(2) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar #: 12396
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com

CC: Ashleigh Wilson
Assistant Attorney General

Kimberly McCall
Appellate Division, SCCID