LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

December 12, 2014

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

RE: Christopher Commander, SCDC# 318173, vs. State of South Carolina
Appeal of Case No. 2012-CP-40-03816

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Commander. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

Kristy Goldberg

CC: Suzanne White
Assistant Attorney General
Post Office Box 11549
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 16 2014
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2012-CP-40-3816

Christopher Commander, SCDC # 318173, ... Appellant

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Christopher Commander hereby appeals from the Order of the Honorable Robert E. Hood presiding Judge for the 5th Judicial Circuit, filed December 10, 2014 and received by counsel for the Applicant on December 12, 2014 in the matter of Christopher Commander v. State of South Carolina, Case No. 2012-CP-40-3816.

December 12, 2014

Kristy Goldberg
Attorney for Plaintiff

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2012-CP-40-3816

Christopher Commander, SCDC # 318173, ... Appellant

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on December 12, 2014 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Suzanne White
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Other Counsel of Record:
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FORM 4

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

JUDGM[illegible] IN A CIVIL CASE

CASE NUMBER: 2012CP4003816

Christopher #318173 Commander

PLAINTIFF(S)

State of South Carolina

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 _____

RICHLAND COUNTY FILED 2014 DEC 10 AM 9:29 JEANETTE W. McBRIDE CLERK OF COURT

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 10 December 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Christopher #318173 Commander

Kristy Grafton Goldberg

Megan E. Harrigan

Christopher #318173 Commander

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 Christopher Commander, #318173, Applicant, v. State of South Carolina, Respondent.	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT 2012-CP-40-3816 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 1, 2012, and amendments filed July 2, 2014, and August 20, 2014. The Respondent made its Return on or about August 28, 2013. An evidentiary hearing into the matter was convened on September 2, 2014, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Dr. Kim Collins, MD, and Doug Strickler, Esquire, also testified. This Court also had before it a copy of the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, Applicant's appellate records, the trial transcript, and exhibits introduced by Applicant.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was true bill indicted at the April 2005 term of the Richland County Grand Jury for Murder (2005-

GS-40-3186). He was represented by Doug Strickler, Esquire, (hereinafter "Counsel") and Lauren Mobley, Esquire, on the charge(s). Applicant proceeded to jury trial before the Honorable James W. Johnson, Jr., on October 10, 2006. After a six day trial, Applicant was found guilty as indicted and sentenced to life imprisonment without the possibility of parole.

A timely Notice of Appeal was filed and an appeal perfected on Applicant's behalf by LaNelle DuRant, Esquire, of the South Carolina Commission on Indigent Defense, Appellate Defense Division. After the submission of briefs, the matter proceeded to oral argument on March 18, 2009. By order on or about June 11, 2009, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Commander, Op. No. 4560 (S.C. Ct. App. filed June 11, 2009).

A Petition for Writ of Certiorari was then filed in the South Carolina Supreme Court on Applicant's behalf. After the submission of briefs, the matter proceeded to oral argument on June 21, 2011. The Supreme Court affirmed the convictions and sentences as modified in an order filed October 21, 2011. State v. Commander, Op. No. 27062 (S.C. filed October 31, 2011). The Remittitur was issued November 17, 2011.

ALLEGATIONS

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

1. Ineffective assistance of counsel; in that,
   a. Counsel failed to sufficiently challenge the forensic pathologist's finding of homicide as a manner of death by failing to adequately cross examine the witness and failing to present expert testimony on defendant's behalf. Counsel failed to seek an instruction by the court regarding the definition of homicide
   b. Counsel failed to object to the Court's instruction to the jury that "malice may also rise where a deed is done with a deadly weapon," where this instruction had a tendency to confuse the issues, mislead the jury, and inappropriately shifted the burden to the

defense.

c. Counsel failed to object to witness John Presley introducing evidence of Applicant's prior arrest for a domestic violence charge against the victim. The evidence was then allowed to be emphasized by the Solicitor in his closing argument.

d. Counsel failed to object to witness John Presley's offered testimony as to his opinion regarding whether the Applicant's statements were true. The evidence was then allowed to be emphasized by the Solicitor in his closing argument.

e. Counsel failed to effectively communicate with Applicant in making the decision to not present exculpatory DNA evidence at trial. Further, Counsel failed to object and request a mistrial when the Solicitor improperly made a statement during closing argument that no DNA was found at the scene and that Applicant used the gloves.

f. Counsel failed to object and move to strike when the Solicitor asked a witness to describe the smell of the house and the witness described the scene as gruesome, statements which were overly prejudicial.

g. Counsel failed to request a mistrial when Solicitor incorrectly advised the jury that they were allowed to consider events occurring after the death of the victim and use these events to infer malice existed at the time of the death. Although the trial court correctly instructed the jurors that "malice must exist in the mind of the defendant just before and at the time that the act is committed," the court later refused to instruct the jury as to the Solicitor's version of the law creating confusion in the minds of the jurors as to what the law regarding malice allowed. Counsel again failed to request a mistrial.

h. Counsel failed to request a charge requiring the jurors to find beyond a reasonable doubt the absence of heat of passion or sudden provocation before finding a verdict for murder.

At the beginning of the hearing, Applicant and Counsel indicated to the Court that Applicant was waiving allegations "f" and "h." Therefore, this Court finds that the Applicant voluntarily abandoned those allegations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their

credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1€, SCRCP). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186,

480 S.E.2d 733, 735 (1997) (citing Strickland).

Counsel failed to sufficiently challenge the forensic pathologist's finding of homicide as a manner of death by failing to adequately cross examine the witness and failing to present expert testimony on defendant's behalf. Counsel failed to seek an instruction by the court regarding the definition of homicide

Applicant called Dr. Kim Collins, a forensic pathologist, to testify on his behalf. Dr. Collins testified that she has a BS degree from University of Georgia and a MD degree from the Medical College of Georgia. Dr. Collins has had additional training in pathology from Wake Forest, Bowman Gray School of Medicine and the Medical University of South Carolina and is board certified in both anatomical and forensic pathology. Dr. Collins testified that she has been qualified as an expert in forensic pathology in approximately 200 – 220 cases. With no objection from the Respondent, this Court found Dr. Collins qualified as an expert in pathology. Dr. Collins' Curriculum Vitae was received as Court's Exhibit #1.

Dr. Collins testified that she reviewed a variety of materials from the case in order to render an opinion, which she provided in a written report and letter dated June 29, 2014, which was introduced as Applicant's Exhibit #1. Collins reviewed the autopsy report, which was introduced as Applicant's Exhibit #2. Collins also reviewed the incident report, toxicology report, trial transcript, medical records of victim, and handwritten notes from defense counsel. Collins testified that the autopsy report indicated that the victim was found lying on the couch with a decomposed fetus expelled between her legs. The victim's organs were decomposed and there was no microscopic exam of the organs. A toxicology screen and report was completed and indicated no drugs or alcohol in the victim's system. The coroner made a determination that the victim had died of homicide by probable asphyxiation. Collins testified that from her review of the materials provided to her by Applicant's Counsel, her opinion to a reasonable degree of medical certainty would be that the victim's cause of death was undetermined.

Dr. Collins testified that the five causes of death would be: 1) natural, 2) suicide, 3) homicide, 4) accident, or 5) undetermined. Collins acknowledged that the only possible options based upon the facts in this matter were either homicide or undetermined. Collins testified that the report indicated that there was no trauma to the neck, eyes, face, or hyoid bone. Dr. Collins testified that she did not believe that a maternal death could be ruled out because of the state of decomposition of the body. However, Dr. Collins testified that the victim had been receiving pre-natal care and had seen the doctor regularly since her pregnancy. The victim did not have any known illnesses that would have caused her death, but Collins testified that a full autopsy of both the victim and fetus should have been done. Collins also testified that a full x-ray of the victim and fetus should have been done. Dr. Collins testified that there can be a finding of asphyxia with no visible signs and noted that sometimes a cause of death can be listed as an undetermined cause of death pending law enforcement investigation. Collins testified that a pathologist does not work in a vacuum, but uses the anecdotal history of the case provided by law enforcement, medical personnel, and others to make a determination. Dr. Collins testified that Dr. Nichols testified at trial that he ruled out any natural causes of death, but did not specifically list what he ruled out. Further, Dr. Collins testified that she did not believe that there was any medical or scientific evidence to support a finding of probable asphyxiation.

The Applicant testified that his prior attorney, Jeanette VanGinhoven, had contacted another expert, Dr. Conradi as a possible expert in forensic pathology. However, Applicant testified that he was informed by his attorney that Dr. Conradi would testify the same as the State expert witness with regards to probable asphyxiation.

Counsel testified that he began communicating with Jeanette about the issues with forensic pathology and DNA as early as spring 2006. Counsel testified that he determined

following his review of the files that he met with Dr. Nichols and Jeanette on or about August 9, 2006. Counsel testified that there were notes in the file from a conversation that Jeanette had with Dr. Conradi and those notes were introduced as Applicant's Exhibit #4. Counsel testified that he understood from the notes that Dr. Conradi would have testified that based on the autopsy alone, the cause of death would be undetermined, but would also have made the finding of homicide with the additional information, which was consistent with Dr. Nichols' findings. Counsel testified that he did not call Dr. Conradi as a witness because he believed she would testify against the Applicant.

This Court finds that the Applicant has failed to establish his burden of proof that Counsel was ineffective for failing to call an expert to testify as to the cause of death. Although Dr. Collins testified that she would have done additional examination and ruled the death undetermined with the information she reviewed, this Court finds the testimony of both the Applicant and Counsel credible as it relates to the fact that an expert was consulted and the strategic decision was made not to call her because of the risk of her supporting the State's expert's findings. While it is true that a criminal defense attorney has a duty to investigate, this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). It is clear that Counsel completed a reasonable investigation by contacting a possible defense expert and forwarding her almost the same materials that were reviewed in preparation by Dr. Collins for this hearing. However, because of the potential risk of the defense expert's testimony supporting the State's expert's findings, Counsel made the strategic decision to not call the expert. Counsel is not required to seek an expert until one is found that will provide the testimony that helps the defense.

This Court also finds that Counsel adequately cross-examined Dr. Nichols as to his findings, in an attempt to call into question the medical findings versus his decision being based on second-hand information provided from police, EMS, and family.

Counsel testified that he completed research on what Dr. Nichols could testify to in regarding the definition of homicide versus murder and determined that Nichols would be restrained by the definition of homicide, which did not deal with intent. Counsel testified that research had also been completed on potential alternative causes of death, but Counsel could not recall what testimony was presented on that issue. Counsel testified that he did not recall why he did not ask the court for an instruction as to the definition of homicide.

The record reflects that Dr. Nichols is board certified as both a forensic and anatomical pathologist and was the Chief Medical Examiner for Richland County. (Tr. p. 531). Dr. Nichols was called to the scene and made an initial examination of the scene and body. (Tr. p. 533-4). Nichols' explanation of his reasoning behind the determination of homicide was based not only on the autopsy, but also on the scene and facts related to the victim's disappearance. (Tr. p. 539-40). The South Carolina Supreme Court noted that Dr. Nichols used the anecdotal history relayed by officers at the scene, together with the lack of normal indicators of physical violence, to render his opinion that the cause of death was asphyxiation, which would not leave physical marks, and that the manner of death was homicide due to the suspicious nature of Victim's death. State v. Commander, 396 S.C. 254, 258, 721 S.E.2d 413, 415 (2011).

Counsel objected when Nichols gave his expert opinion that the cause of death was homicide. (Tr. p. 540, lines 3-4). Following arguments by Counsel and the Solicitor, the Court overruled the objection, but instructed the Solicitor to question Dr. Nichols on his definition of homicide. (Tr. p. 557-8). Dr. Nichols then testified that homicide referred to "a person that has

died as a result of another person's actions." (Tr. p. 558, lines 18-9). Counsel cross-examined Dr. Nichols extensively on the time of death, cause of death, and how Nichols received information related to the circumstances. (Tr. p. 562- 577). As a result, Dr. Nichols indicated that he was "not claiming intent." (Tr. p. 576).

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing Dr. Nichols' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

This Court cannot find that Counsel was deficient for failing to request a jury instruction as to the definition of homicide. Counsel testified that it may have been helpful to have the judge charge the jury with the Black's Law Dictionary definition of homicide. Dr. Nichols' testimony was that his definition of homicide did not deal with any intent, but merely meant that the victim "died as a result of another person's actions." (Tr. p. 558). He clarified that he did not believe that the death was a suicide, accidental or a natural death. (Tr. p. 558-9). However, he again clarified that he was "not claiming intent." (Tr. p. 576). Further, during closing arguments, Counsel highlighted the fact that Dr. Nichols said he was not claiming intent, but only saying that the victim's death was a result of someone else's action. (Tr. p. 873). This Court finds that

the Applicant has not met his burden of proof of establishing that Counsel was ineffective for failing to request a jury charge as to the definition of homicide.

Further, the South Carolina Supreme Court agreed with the court of appeals that the circumstantial evidence implicating Petitioner was overwhelming. State v. Commander, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011). This Court agrees and finds that the Applicant suffered no prejudice as a result of any alleged deficiencies described above.

Counsel failed to object to the Court's instruction to the jury that "malice may also rise where a deed is done with a deadly weapon," where this instruction had a tendency to confuse the issues, mislead the jury, and inappropriately shifted the burden to the defense.

The Applicant alleged that Counsel was ineffective for failing to object to the court's instruction to the jury that "malice may also rise where a deed is done with a deadly weapon." (Tr. p. 905). Applicant argued that because there had been no evidence presented to support the use of a deadly weapon, whether gun or even a pillow, this jury instruction confused the issues. Upon review of the jury instruction and jury instructions as a whole, it does not appear that there was any legal basis on which to base an objection by defense counsel. This Court does not find that the instruction confused the issue, misled the jury, or inappropriately shifted the burden to the defense. The South Carolina Supreme Court has held that the South Carolina doctrine of implied malice does not shift the burden of persuasion to the defendant. State v. Crocker, 272 S.C. 344, 346, 251 S.E.2d 764, 766 (1979).

The standard of review for appellate purposes is to consider jury instructions as a whole, and "if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). Further, "[a]n erroneous malice instruction is harmless if, based on all of the evidence presented

to the jury, it did not contribute to the verdict." Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002).

This Court finds that the Applicant failed to meet his burden of proof as to this claim. First, this Court finds that the jury charge regarding the possible inference of malice with use of a deadly weapon was not improper. However, even if this Court were to find that Counsel should have objected based upon a confusion of the issues, the jury instructions as a whole are free from error and it is unlikely that this portion of the jury charge contributed to the verdict. Therefore, this claim is denied and dismissed.

Counsel failed to object to witness John Presley introducing evidence of Applicant's prior arrest for a domestic violence charge against the victim. The evidence was then allowed to be emphasized by the Solicitor in his closing argument

John Presley testified to statements made by Applicant after being incarcerated with Applicant for a period at the Alvin S. Glenn Detention Center. Presley acknowledged at the trial that he had an extensive criminal history involving crimes of dishonesty and drugs. (Tr. p. 592; 594-5; 612-3; 615-621). Presley testified that the Applicant told him that Applicant and the victim fought a lot and had received counseling. (Tr. p. 600). Presley briefly testified that Applicant told him that he had been arrested one time for domestic violence after hitting the victim, but the victim later dropped the charges and Applicant was released. (Tr. p. 608). The allegation of domestic violence was not addressed any further by the State or Applicant.

Counsel fully cross-examined Presley on his prior criminal history, paying particular attention to his crimes of forgery and dishonesty. (Tr. p. 615-18, 620-21). Counsel was able to get Presley to admit several times that to commit his crimes he had to lie. (Tr. p. 617; 620-1). Counsel also cross-examined Presley as to his motivation for offering this information to police and the Solicitor. Specifically, Counsel referenced the letters Presley wrote asking for sentence

reduction in exchange for his information and testimony. (Tr. p. 629; 633; 639-46). The jury was charged to consider the credibility of each witness, as well as their potential motive for testifying. (Tr. p. 900-901).

Applicant testified that Presley stated that Applicant had been arrested for criminal domestic violence following a report by the victim, but Applicant stated that the statement was not true. Applicant testified that Counsel should have objected to that statement by Presley.

Counsel testified that looking at the transcript now, he should have objected to Presley's testimony regarding Applicant's prior arrest for criminal domestic violence. However, Counsel acknowledged that it was possible that he did not want to draw additional attention to that statement, especially in light of the fact that he was planning on cross-examining Presley extensively regarding his credibility issues. Counsel addressed Presley's history of lying during closing arguments. (Tr. p. 870, lines 18, 23-4; p. 878, line 2).

As a rule, evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged is inadmissible. State v. Mathis, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004). In particular, if the prior bad act is not the subject of a conviction, it must first be established by clear and convincing evidence and there must be a logical relevance between the prior bad act and the crime for which the defendant is accused. Id. (citing State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). Therefore, this Court finds that Counsel was deficient in failing to object to the testimony of Presley regarding the prior bad act of domestic violence. The domestic violence incident was not a prior conviction and there was no determination by the trial court as to whether there was clear and convincing evidence of the act and the act's relevance.

However, this Court cannot find that the Applicant met his burden of proof of establishing any prejudice as a result of Counsel's deficiency. This Court finds that whatever possible inference regarding Applicant's character the jury might have drawn from hearing of domestic violence between the Applicant and victim certainly had minimal effect on the jury's verdict. Particularly in light of the additional information and testimony that was presented regarding Applicant's actions in the months following the victim's death. The jury was provided with testimony that proved that Applicant used the victim's credit cards, checks, vehicle, and phone, to travel through multiple states connecting with various other women and used the victim's cell phone to send misleading and untruthful text messages to the victim's family during this period. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). As a result, this Court cannot find that this brief mention of a possible domestic violence incident had any effect on the jury's decision.

Counsel failed to object to witness John Presley's offered testimony as to his opinion regarding whether the Applicant's statements were true. The evidence was then allowed to be emphasized by the Solicitor in his closing argument

Presley testified that Applicant first told him that maybe the victim hit him with a stick, at which time he must have become unconscious and fallen on top of victim and accidentally smothered her, but Presley stated that he never believed the Applicant. (Tr. p. 604-6). Presley testified that he did not believe that the victim actually hit Applicant with a stick. (Tr. p. 605, lines 9-13). [A] witness permitted to give an opinion under Rule 608(a) must restrict the opinion to 'character for truthfulness,' and may not testify whether the witness believes a specific statement or account given by another witness." State v. McKerley, 397 S.C. 461, 465, 725

S.E.2d 139, 141 (Ct. App. 2012), reh'g denied (May 21, 2012). Counsel, upon review of the transcript, testified that he could not recall a reason he had for not objecting to Presley's comment as to whether he believed the Applicant.

This Court finds that Counsel was deficient for failing to object to Presley's comment on the truthfulness of Applicant; however, this Court finds no prejudice from this failure to object. The jury was given the option of believing any or all of Presley's testimony. The jury was also presented by Presley's history of lying and criminal behavior. In light of the fact that the circumstantial evidence implicating Petitioner was overwhelming, this Court finds that the failure to object did not affect the outcome of the trial.

Counsel failed to effectively communicate with Applicant in making the decision to not present exculpatory DNA evidence at trial. Further, Counsel failed to object and request a mistrial when the Solicitor improperly made a statement during closing argument that no DNA was found at the scene and that Applicant used the gloves

Applicant testified that he consented to his DNA sample being taken. Applicant testified that he was told by Counsel that the DNA report was exculpatory, but Applicant did not receive a copy of the results until after trial. Applicant testified that he spoke with Counsel regarding the DNA and the fact that the DNA found inside the gloves from the victim's home did not match Applicant. However, Applicant testified that Counsel informed him that because the State did not introduce the report and evidence during trial, if Counsel introduced the report, they would lose last argument and Counsel thought that it was in Applicant's best interest to have last argument.

The DNA report from SLED was introduced as Applicant's Exhibit #2. Counsel testified that he was provided with the report more than a year after it had been completed. Counsel testified that the report excluded Applicant as a contributor to the DNA found in the gloves at the

victim's home, but identified the victim and an unknown male's DNA. Counsel testified that he did object to testimony regarding possible DNA from fingernail scrapings from the investigator from the Richland County Sheriff's office, but based upon a lack of foundation. (Tr. p. 803, lines 6-9). Counsel testified that the absence of Applicant's DNA and presence of an unknown person's DNA on the gloves was absolutely irrelevant to the case because there was no real connection between the gloves and the victim's death.

Counsel testified that on cross-examination and in closing, he was able to point out to the jury that although DNA had been tested from both the fingernail scrapings and the rubber gloves, they never heard the results. (Tr. p. 806; p. 879-880). Counsel also raised the lack of DNA testing on the fetus during his closing argument. (Tr. p. 879). Counsel pointed out to the jury that had any of the DNA tests resulted in a match to Applicant, surely the State would have brought in people and reports to use at trial. (Tr. p. 880). Counsel emphasized the fact that if there was anything to indicate that Applicant used the gloves to clean up the scene, the State would have brought in people to testify. (Tr. p. 880).

This Court finds that the Applicant failed to meet his burden of proof as to this claim. This Court finds that Counsel's strategy of preserving last argument was a valid strategic decision, especially in the light of the fact that he could argue that the State failed to present any evidence that Applicant was a match to any DNA tested. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992).

Applicant also alleged that Counsel failed to object and request a mistrial when the Solicitor made an improper statement during closing arguments about the gloves and DNA. (Tr. p. 849, lines 19-23). Counsel, upon review of the transcript, testified that he should have

objected to this portion of the closing argument. However, this Court has reviewed the record and finds no merit to Applicant's claim that Counsel was ineffective for failing to object to this portion of closing or for failing to request a mistrial. "A solicitor's closing argument . . . should stay within the record and reasonable inferences to it." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). This Court finds that the Solicitor's closing argument was supported by reasonable inferences from the testimony and evidence presented at trial.

This Court cannot find that Counsel was deficient for failing to request a mistrial. A defendant must show both error and resulting prejudice in order to be entitled to a mistrial and a mistrial should only be granted when "absolutely necessary." State v. Thompson, 352 S.C. 552, 560-61, 575 S.E.2d 77, 82 (Ct. App. 2003). Even if Counsel was deficient for failing to object, on appeal, Applicant would have had the burden of proving that he did not receive a fair trial because of the alleged improper argument. Simmons v. State at 338, 166. This Court finds that the Applicant has failed to meet his burden of proof as to this claim.

Further, the South Carolina Supreme Court agreed with the court of appeals that the circumstantial evidence implicating Petitioner was overwhelming. State v. Commander, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011). This Court agrees and finds that the Applicant suffered no prejudice as a result of any alleged deficiencies described above.

Counsel failed to request a mistrial when Solicitor incorrectly advised the jury that they were allowed to consider events occurring after the death of the victim and use these events to infer malice existed at the time of the death. Although the trial court correctly instructed the jurors that "malice must exist in the mind of the defendant just before and at the time that the act is committed," the court later refused to instruct the jury as to the Solicitor's version of the law creating confusion in the minds of the jurors as to what the law regarding malice allowed. Counsel again failed to request a mistrial.

During closing arguments, Counsel objected to the Solicitor's statement regarding malice and the use of events following the act to infer malice. (Tr. p. 842-3). However, following a

bench conference, the objection was overruled and the Solicitor informed the jury, "you can take statements and actions made after the events have happened and infer malice existed at the time this happened." (Tr. p. 843).

The trial court then charged the jury that:

> Malice is hatred, ill-will or hostility towards another person. It is the intentional doing of a wrongful act without cause or excuse and with an intent to inflict an injury or under circumstances that the law would infer an evil intent.
>
> Malice aforethought does not require that the malice exist for any particular time before the act is committed, but malice **must exist in the mind of the Defendant just before and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent and the act.**
>
> Malice aforethought may be expressed or inferred. Now, these terms expressed and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist; that is, either by direct evidence or by inference from the facts and circumstances which are proven.
>
> . . . .
>
> Malice may be inferred from conduct showing a total disregard for human life.

(Tr. p. 903-4) (emphasis added).

Following the trial court's charge, the Solicitor requested the trial court charge the jury that "if they believe acts by the Defendant after the event . . . showed malice . . . that could be an inference of malice if they felt that was [Defendant's] state of mind at the time of the incident." (Tr. p. 913). Counsel argued against the requested amended charge and the trial court refused to amend the charge, leaving the jury with his standard malice charge. (Tr. p. 913-5).

Counsel acknowledged that he did not request a mistrial based on the Solicitor's comments during closing, but testified that he did discuss the issue with Applicant and made a strategic decision to not request a mistrial because he believed that any incorrect comment made

by the Solicitor during closing was cured by the jury instructions. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). This Court finds that the Applicant failed to meet his burden of proof as to this allegation.

Overwhelming Evidence

This Court notes that although Counsel may have been deficient in failing to object to portions of Presley's testimony, because of the overwhelming circumstantial evidence, this Court cannot find any prejudice from any deficiencies. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Smith v. State, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010). "Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

After the victim was found dead in her home, Applicant was found in New Orleans, Louisiana, after traveling through three states and using one of the victim's credit cards to secure a hotel room for several nights in each state. (Tr. p. 652). Applicant was arrested at a hotel by the New Orleans Police Department. At the time of his arrest, Applicant was in possession of the victim's vehicle, victim's birth certificate, ID card of victim's ex-husband, ultrasound photo, victim's checkbook, victim's eight credit cards, and victim's driver's license. (Tr. p. 669-671; 703-4). Police also found the keys to the victim's vehicle in Applicant's hotel room. (Tr. p. 676). Detective Dejean testified that he inspected items found in the victim's vehicle, which included a purse containing a medical appointment card for Midlands OB-GYN, checks, medical slip for Pastoral Counseling Services with the victim's name as a client, and a receipt for a Cracker Barrel in Columbia, SC, for November 29, 2004, at 9:55 am. (Tr. p. 736-8).

At trial, Captain Laviolette testified that when the police entered the hotel room, Applicant held a gun to his head and made the statement, "Get out of the room; I'm going to kill myself like I killed Vonnie." (Tr. p. 656). Sgt. Pari testified that he saw applicant hold a gun to his head and state, "Get out, I'm going to kill myself like I killed Vonnie." (Tr. p. 699). Pari also testified to three room service receipts found in the hotel room, each signed with the name of Gervonya Goodwin. (Tr. p. 705-6). Sgt. Crayton testified that he assisted in locating the victim's vehicle in the hotel parking garage (Tr. p. 719). Crayton also testified that he saw Applicant holding a gun towards his head and heard Applicant say, "Get out, I'm going to kill myself like I killed Vonnie." (Tr. p. 721).

Officer Buzali testified that he assisted in the arrest of Applicant and transport of Applicant to the police station. Buzali testified that while he was transporting Applicant, Applicant stated spontaneously, "I just did what I had to do." (Tr. p. 754).

Following the jury instructions, the jury took less than 45 minutes to return with a verdict of guilty on the charge of murder. Exhibits and verdict form was sent to jury at 3:24 pm and the jury returned to open court with their verdict at 4:10 pm. (Tr. p. 916).

The South Carolina Supreme Court, referencing disputed testimony of Dr. Nichols during the trial, found that the admission of the testimony was harmless in light of the overwhelming evidence of Commander's guilt. State v. Commander, 384 S.C. 66, 75, 681 S.E.2d 31, 35-36 (Ct. App. 2009) aff'd as modified, 396 S.C. 254, 721 S.E.2d 413 (2011) (citing State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (holding that whether error is harmless depends on the facts of each case, including the importance of challenged testimony in prosecution's case, whether the testimony was cumulative, presence or absence of evidence corroborating or

contradicting testimony on material points, extent of cross-examination otherwise permitted, and overall strength of prosecution's case)).

Based upon the overwhelming circumstantial evidence of Applicant's guilt, this Court cannot find any prejudice suffered as a result of any alleged deficiencies on Counsel's behalf. This Court finds that it is improbable that any alleged deficiencies affected the outcome of the trial. Therefore, all claims are denied and dismissed.

Cumulative Error

Applicant also argued that because there are multiple instances of deficiency on Counsel's behalf, the application should be granted based upon the open question of law in South Carolina regarding cumulative error. This Court finds that the doctrine of cumulative error, although often raised in post-conviction relief proceedings, contradicts the use of the Strickland two prong test, requiring both deficiency and prejudice for a finding of ineffective assistance of counsel. Therefore, this Court finds that it is not an appropriate test for a determination of ineffective assistance of counsel.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. This Court finds that the Applicant's allegation that he was denied effective assistance of trial counsel is without merit. When an ineffectiveness claim is presented the defendant must show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). In addition, the Applicant must show that the outcome of his proceeding was prejudiced and it is reasonably probable that the outcome

would have been different had counsel's performance not been deficient. Strickland, 466 U.S. at 694. This Court finds that the Applicant's attorney demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, supra; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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 must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 5 **day of** December, **2014.**

Re Hood

Robert E. Hood
Presiding Judge

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