



The Brough Law Firm



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May 11, 2015

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

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MAY 14 2015

RE: THE STATE VS. Randall Price

S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,

Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General
Randall Price

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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MAY 14 2015

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas**

S.C. Supreme Court

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No.: 2013-CP-42-2119

The State,

Respondent,

v.


Randall Price,

Appellant.

NOTICE OF INTENT TO APPEAL

Randall Price appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable Deadra L. Jefferson on May 7, 2015. Appellant received notice of the same on that date.

May 11, 2015


CHRISTOPHER D. BROUGH
175 Magnolia St., Suite 202
SPARTANBURG, SC 29306
(864) 585-3088
ATTORNEY FOR APPELLANT

Other Counsel of Record:
Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-11549
(803) 734-3737

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No.: 2013-CP-42-2119

The State, Respondent,

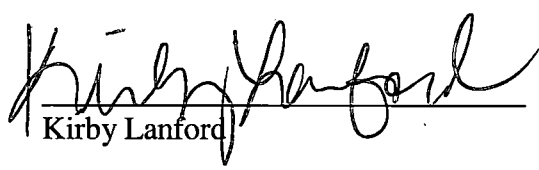
v.

Randall Price, Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on May 11, 2015, addressed as follows:

The Honorable Alan Wilson
SC Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201


Kirby Lanford

SWORN BEFORE ME THIS
11 DAY OF May, 2015.


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 8/14/24

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Randall Price, #346410,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2013-CP-42-2119

ORDER OF DISMISSAL

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Christopher D. Brough, Esquire
Respondent's Attorney:	Suzanne H. White, Esquire
Trial Counsel:	Richard H. Wheelchel, Esquire
Date of Hearing:	January 13, 2015
Court Reporter:	Pamela E. Green

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed May 9, 2013. The Respondent made its Return on or about May 8, 2014. An evidentiary hearing into the matter was convened on January 13, 2015, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Christopher D. Brough, 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. Pastor Kevin Smith, Timothy Powell, and Juanita Price testified on the Applicant's behalf. Richard H. Wheelchel, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2007 term of the Spartanburg County Grand Jury for two (2) counts of Assault and Battery with Intent to Kill (ABWIK)¹ (2007-GS-42-2836, -2837). The Applicant was represented by Richard Whelchel, Esquire. On June 10, 2011, the Applicant proceeded to a jury trial, where he was convicted of the charges. On June 10, 2011, the Honorable J. Derham Cole sentenced the Applicant to twenty (20) years' incarceration, suspended upon the service of twelve (12) years' imprisonment and three (3) years of probation on Indictment Number 2007-GS-42-2836 and a consecutive sentence of twelve (12) years' imprisonment suspended to three (3) years of probation on Indictment Number 2007-GS-42-2837.

Lanelle Cantey DuRant, Esq. of the South Carolina Commission on Indigent Defense filed a timely notice of appeal and Anders brief on the Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Price, Op. No. 2013-UP-141 (filed April 10, 2013), *available at* 2013 WL 8507849. The Remittitur was returned on May 31, 2013.

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;
 - i. Counsel only met with Applicant for a total of thirty minutes during the four years of being appointed,
 - ii. Counsel was not prepared to take the charges to trial,

¹ "The crime of assault and battery with intent to kill shall be a [most serious, violent] felony in this State and any person convicted of such crime shall be punished by imprisonment not to exceed twenty [(20)] years." S.C. CODE ANN. § 16-3-620 (2007); S.C. CODE ANN. § 17-25-45 (2007); S.C. CODE ANN. § 16-1-60 (2007).

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- iii. Counsel failed to call any character witnesses as requested by the Applicant,
 - iv. Counsel was late the morning of trial and was not able to review the case,
 - v. Counsel failed to bring evidence to prove issues with a victim's credibility,
 - vi. Counsel failed to obtain the bond hearing records to prove issues regarding the Applicant's injuries,
 - vii. Counsel failed to call witness to address the victims coming to get the Applicant to bring to their home,
 - viii. Counsel never asked the court for a continuance based upon Applicant's use of strong narcotics on the day of jury selection,
 - ix. Counsel would refuse to accept input from Applicant during the trial.
2. Trial judge in violation, in that;
- i. Court ruled in a pre-trial hearing that no pictures of victim's injuries could be entered into evidence unless ruled upon during trial, but the photos were entered by the State without any objection or ruling,
 - ii. Court never brought in jury to give instructions as to their duties when concerns about deadlock and jurors attitudes towards each other were expressed,
3. Violation of due process and equal protection rights.

In his Application, the Applicant requested the following relief: negotiated reduced sentence or vacate his sentence and grant a new trial, or both.

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 on her credibility. This Court has weighed the testimony accordingly. Set forth below are the

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

Summary of the Testimony

The Applicant testified that over the period of four and one-half (4.5) years from the date of his arrest and being appointed Counsel, he and Counsel met once for a total of only forty-five (45) minutes.² The Applicant testified that he met with Counsel one time in Counsel's office and communicated with Counsel via email, but mainly about dates for court. The Applicant denied ever really discussing his case with Counsel. The Applicant testified that Counsel utilized an investigator for his case and the Applicant spoke with the investigator.

The Applicant stated that he was accused of stabbing Dawn and Dewayne Henson with a knife in January 2007 and convicted of ABWIK; however, the Applicant claims that he was provoked and did not have the required malice to commit ABWIK. The Applicant testified that he told Counsel that he had a defense that the alleged victims robbed him, held him against his will, attacked him, took his money, and tried to kill him. The Applicant testified that because of a car accident in 2006, he suffered injuries for which he self-medicated with crack cocaine, thus beginning his drug abuse. The Applicant related the entire story that Dawn (Jennifer Dawn Henson) and Dewayne Henson (husband and wife), whom he befriended through his cousin and lived about one hundred (100) yards from, knew that the Applicant expected to receive a large sum of money from a settlement and knew that on the date of the offense, January 13, 2007 the Applicant had received a nine thousand dollar (\$9,000.00) check. The Applicant testified that he had lent the Hensons three hundred (\$300.00) dollars. The Applicant further testified that on the day of the offense on January 13, 2007, he went to go get drugs and then carried through them and

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six-hundred (\$3,600.00) dollars in one hundred (\$100.00) dollar bills to the Henson's' mobile home to "party" with them and do crack cocaine and drink alcohol. The Applicant testified that he did not know Pam Massey and her boyfriend Rodney—the two additional party attendees—prior to that occasion.

The Applicant elaborated that the victims approached him while he was at his home with his father to go party with them. The Applicant said he would go party with them "for a little while" and walked about three (3) acres over to the Henson's' mobile home, which was the third time he had visited the Henson's' home. The Applicant testified that the group did crack cocaine and drank alcohol for approximately three (3) to four (4) hours. The Applicant further clarified that he and Dewayne went to a home to get the drugs, which was when the Applicant gave Dewayne the three hundred dollars (\$300.00). The Applicant stated that three (3) people came out of the home. Then, the Applicant testified they went back to the Henson's' home, met Pam Massey, and used drugs. The Applicant testified that the four (4) party attendees would frequently get up to go to the bathroom or the kitchen.

At that point, when the Applicant prepared to leave the residence suspecting a conspiracy to rob him, the Applicant stated he was attacked by all four (4) individuals for his money. The Applicant testified that Rodney approached him and in a stern manner demanded "give me the money" twice. Then, the Applicant stated, Rodney punched him in the face and eye. The four (4) attacked the Applicant, held him up against the wall, attacked and assaulted him, and took his money. The Applicant, further testified he, was able to hold on to some of his money, which was ripped in his hand. The Applicant stated that he endured a physical beating. Thereafter, the Applicant stated, Pam continued to "come at him," he threw the rest of the broken hundred dollar

² Although the transcript reveals the Applicant asserted this allegation to the trial court, the Applicant thereafter

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bills, and then Pam came at him with a knife saying "kill the m***** f*****" and "now you gonna die m***** f*****." The Applicant stated that he retrieved his knife from his pocket and utilizing his knife in self-defense, got Pam in the neck. The Applicant testified that he then "took off" and when he made it to the back door he was knocked on his back and his knife was no longer in his hand. Thereafter, there was another struggle and the Applicant was again attacked with a knife, the individuals shouting "kill the m***** f*****." The Applicant stated that in the melee at the back door, all three (3) in the struggle fell to the ground and that Rodney and Dawn left in different directions.

The Applicant further testified that both of the knives were found in the vicinity where he was found out in the yard, but the Applicant testified that he was unaware that any testing was completed on the knives until he filed this post-conviction relief application because he did not discuss forensic testing with his attorney. The Applicant introduced, by stipulation, the SLED lab reports provided to Counsel in discovery as the Applicant's Exhibit #1. The Applicant stated that the DNA results from the knife revealed the blood of three (3) individuals; the DNA of Dawn and Rodney were not excluded, while the DNA of Pam Massey was excluded. The Applicant testified that he believes the results of those tests would have helped in his defense because the evidence would show that he was injured by Massey: the Applicant argued that the DNA evidence showing that the Applicant's blood, the blood of the victim, and the blood of one other unidentified individual on the knife confirms that he acted in self-defense. However, the Applicant testified that Counsel failed to call a SLED witness. The Applicant also testified that the State did not call the SLED witness who tested the knives, but he believes Counsel should have called them as a witness to support his claim that he was attacked by someone with one of

affirmed that he had had enough time to discuss his right to testify with his lawyer (Tr. 159:12-160:18)

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the knives. The Applicant pointed to the Applicant's Exhibit #1, the report indicating that SLED could not exclude him as a contributor to the mixture found on one of the knives, as evidence to support his claim of being attacked first and would also support his theory that Dawn was lying about the events. The Applicant admitted that Counsel told him his defense was self-defense.

The Applicant also testified that Counsel failed to properly address the jury questions and ask for the court to provide additional charges. In support, the Applicant introduced notes from the jury as Applicant's Exhibits #2-6. The Applicant claimed that the jury deliberated a few days, was deadlocked, and was verbally combative. The Applicant summarized that the jury deliberated until 9:00 PM the first night, went home, then came back the next day requesting more evidence.

The Applicant testified that he had no criminal record and no arrests. The Applicant testified that he used to own the Hidden Hill Bowling Alley and was a real estate appraiser before he was in the car accident and began abusing crack cocaine. The Applicant testified that he spoke with Counsel on several occasions about character witnesses and provided Counsel with a list of names, including Pastor Kevin Smith his pastor, Judge Donnie Blakely, Juanita Price his grandmother, Timothy Powell, his aunt, her boyfriend, and names of several police officers who could testify as to his character of being a non-violent person. The Applicant elaborated that the officers could testify that the Applicant made a statement after the incident that the individuals attacked him. However, the Applicant stated that Counsel told him that the Applicant and the hospital witness should be enough. The Applicant further stated that Counsel said he would investigate and return to get the Applicant's father's statement that Dawn and Dewayne kept coming back to the house to get him to party with them, but that Counsel never

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did. The Applicant stated that the emails he exchanged with Counsel were all about scheduling and that they never discussed the evidence or his defense.

The Applicant admitted that the success of his defense was based on the jury's credibility determinations, and that he believed his proposed character witnesses would have boosted his credibility. The Applicant further admitted that his testimony at trial was the same as his testimony during his evidentiary hearing, but that he desires the jury hear all of the evidence so that they can take his defense seriously. The Applicant also admitted Counsel cross-examined all witnesses at trial, including Officer Talanges about how the Applicant cut his hand and had a small bloody cut on his right wrist area. The testimony at trial was that the Applicant threw his arm up, which was how he got cut.

Pastor Kevin Smith, who did not testify at trial, testified during the Applicant's evidentiary hearing that he has been the Applicant's Pastor for eight (8) to nine (9) years and has always known the Applicant to be a non-violent man. However, he acknowledged that he did not know the Applicant at the time of the incident in 2007 and met him following the incident. Pastor Smith further testified that he allowed his daughter to spend the night at the Applicant's home with the Applicant's daughter after his arrest, even though he was aware of the Applicant's history, involvement in crime, and drug use. Pastor Smith related that the Applicant had given his testimony at church several times, was faithful, participated in a twelve (12) step drug rehabilitation program, and was forthcoming about everything. The Pastor opined that the Applicant would not have attacked anyone without being first provoked. However, the Pastor admitted that he was unable to comment on the Applicant's character for violence at the time of the incident.

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Timothy Metz Powell testified that he had been friends with the Applicant since they were children and for about twenty (20) to thirty (30) years. Powell testified that he knows the Applicant better than anyone except for the Applicant's grandmother. Powell testified that he has never known the Applicant to be violent or involved in fights. In fact, Powell testified, the Applicant had kept him out of trouble many times. He elaborated that the Applicant would never fight unless he was provoked, was calm, and generally kept out of trouble. Powell testified that he was aware of the Applicant's drug issues, but claimed that when the Applicant did drugs, he appeared to pull away and not become violent and that his personality did not change. Powell testified that he was not sure if he was around the Applicant much when he took drugs, but claimed that the Applicant successfully operated businesses while taking drugs. Powell admitted that the Applicant concealed his drug use and kept to himself and that he had never been with the Applicant after several hours of drug and alcohol use.

Juanita Price, the Applicant's grandmother, testified that she was more the Applicant's mother because the Applicant was with her since he was five (5) days old. Price testified that she had helped the Applicant's father raise the Applicant since the death of the Applicant's mother when he was ten (10) years old. Price testified that she never knew the Applicant to be violent, but knew that he was using drugs.

Richard H. Whelchel, trial counsel for the Applicant, testified that at the time of trial in 2011, he had been practicing law for approximately twenty-nine (29) years and had represented the Applicant for approximately four (4) to four and one half (4.5) years after his court appointment in June 2007. Counsel further stated that he has extensive experience in trials of this type. Counsel testified that the Applicant spent approximately one (1) month in jail after his

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arrest before bonding out. Counsel stated that the Public Defender's office was appointed to represent the Applicant when he was directly indicted.

Counsel testified that he does not specifically recall how many times he met with the Applicant, but recalled the Applicant coming to Counsel's office several times. In fact, Counsel had the Applicant sit in the office and write out a statement at one point, which statement was similar to the Applicant's testimony. Counsel also testified that he communicated via email with the Applicant, and testified that he didn't recall if he typed the statement, emailed the statement to Applicant or if the Applicant brought the statement in to him. During their meetings, Counsel testified that he reviewed all discovery with the Applicant and discussed the State's case and potential outcomes of the testimony. Counsel affirmed that it is his practice to review discovery with all of his clients, especially the cases that are going to trial. Counsel testified that he was fully aware of the Applicant's defense of being attacked and robbed because self-defense was the "obvious" defense. Counsel always knew that he would have to call the Applicant as a witness to support his self-defense claim but that the Applicant had no issues with his prior record for impeachment purposes. Counsel opined that there was no question that the Applicant would take the stand to establish his defense but admitted that he did not ask about the Applicant's defensive wound.

Counsel testified that he questioned the crime scene investigator about the defensive cut to the Applicant's hand and called the nurse to testify that one of the victims had approximately \$700, all in one hundred dollar bills, in her pocket at the hospital in order to prove the robbery. Counsel also testified that he believed he effectively cross-examined the victims to attack their credibility and that the witnesses did not acknowledge having the Applicant's money until redirect examination, which called into question their credibility. Counsel testified that he also

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focused his closing argument on the victims' credibility issues. Counsel testified that the jury deliberated for a long time and had questions, so he believed that they were seriously considering the self-defense claim. Counsel opined that the Applicant's case was a "close call" and a "credibility contest."

Counsel testified that the Applicant did provide him the names of some character witnesses. He further testified that he spoke with the officers whom the Applicant named. Counsel testified that one of the officers told him that he had no idea why the Applicant would want him as a character witness and the other character witnesses said that they did not know the Applicant that well. Counsel testified that it could have possibly helped to show the jury that the Applicant had been a business owner, but Counsel was more concerned about the cross examination of those witnesses and their limited knowledge of the Applicant. Counsel testified that he was concerned with calling character witnesses and opening the door to testimony regarding how the Applicant's personality and character changed with his use of crack cocaine and alcohol because he wanted to minimize evidence about the Applicant's drug use as much as possible and because character evidence "cut both ways." Although Counsel was not aware of any specific instances of the Applicant's bad or violent conduct, Counsel further testified that he represented the Applicant on two (2) sets of charges and the others were dismissed after the verdict. Counsel further testified that he elicited testimony from the Applicant and the officer about the Applicant's defensive cut and also submitted photos. However, Counsel observed that the Applicant's cut was small and the defensive nature of it questionable. Counsel further observed that the Applicant claimed that he was hurt on his side, but that there was no photographic evidence of that "at all."

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Counsel testified that he reviewed all discovery with the Applicant and talked about all of the evidence against the Applicant and its potential, especially when preparing for trial. He and the Applicant knew that the SLED report was an option, but that he did not want to call the SLED agent as a witness because in his experience, SLED scientists' testimony could easily be tailored to support the State's case. Further, Counsel testified that he believed it was likely they would testify that there was no test to determine when or in what manner the Applicant's blood was placed on that knife and it could have been there prior to that night.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. This Court found the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations raised in the application and at the hearing.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must

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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).

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. This Court finds that the Applicant has failed to meet his burden of proof as to this claim.

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, 464 S.E.2d

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312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778–79 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)). See Stokes, 308 S.C. at 548, 419 S.E.2d at 778–79 (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); Abney v. State, 408 S.C. 41, 51, 757 S.E.2d 544, 549 (Ct. App. 2014) (“While trial counsel should consult with his client, the final decision on strategy belongs to counsel.”); More v. State, 399 S.C. 641, 723 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551 (2004) (“Attorneys have a duty to consult with their clients regarding ‘important decisions,’ including questions of overarching ‘defense strategy.’ . . . This does not require counsel to obtain the defendant’s consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights [to plead guilty, waive a jury, testify on his own behalf, or take an appeal] cannot be made for the defendant by surrogate”).

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

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(4th Cir. 1977)). This Court further finds Counsel adequately conferred with the Applicant and provided thorough representation. This Court finds that Counsel's representation did not fall below an objective standard of reasonableness.

This Court finds Counsel is a criminal practitioner who has extensive experience in the trial of serious offenses. This Court finds Counsel provided credible testimony during the Applicant's evidentiary hearing. Counsel conferred with the Applicant and discussed the pending charges, the elements of the charges and what the State was required to prove, his constitutional rights, the range of penalty, the Applicant's version of the facts, and the Applicant's defense at trial. The record also reflects that Counsel zealously advocated on his client's behalf.

Failure to Present Evidence

The Applicant asserts that Counsel was ineffective for failing to call character witnesses on his behalf and submit purportedly exculpatory DNA evidence. This Court finds Counsel's testimony credible and finds that the Applicant failed to meet his burden of proof regarding this issue.

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. This Court finds that the Applicant has failed to meet his burden of proof as to this claim.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's

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performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778–79 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)). See Stokes, 308 S.C. at 548, 419 S.E.2d at 778–79 (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); Abney v. State, 408 S.C. 41, 51, 757 S.E.2d 544, 549 (Ct. App. 2014) (“While trial counsel should consult with his client, the final decision on strategy belongs to counsel.”); Moore v. State, 399 S.C. 641, 723 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551 (2004) (“Attorneys have a duty to consult with their clients regarding ‘important decisions,’ including questions of overarching ‘defense strategy.’ . . . This does not require counsel to obtain the defendant’s consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights [to plead guilty, waive a jury, testify on his own behalf, or take an appeal] cannot be made for the defendant by surrogate”).

This Court finds that Counsel was not ineffective for failing to introduce DNA evidence and exercised his discretion by making tactical, strategic decisions for the Applicant’s defense. Cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812 (2005) (citing McLaughlin v. State, 352 S.C. 476, 483–84, 575 S.E.2d 844–45 (2003)) (finding defense counsel’s decision not to call an expert witness to rebut the State’s expert witness was legitimate strategic decision, and any resulting prejudice to the Applicant would be merely speculative). This Court finds that the Applicant’s case was ultimately a credibility case. Counsel successfully and adequately elicited

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testimony regarding the Applicant's small cut, the Applicant's statement that he was attacked and provoked, and the victim's possession of seven hundred dollars (\$700.00) in cash. However, ultimately, judging credibility and believability is the province of the jury. Counsel's testimony regarding the SLED evidence was compelling and credible. This Court finds it highly probable that the SLED witness's testimony would have been more beneficial to the State. The Court further finds that the State could have neutralized the finding of Applicant's DNA by calling into question when and how the blood was placed on the knife.

Additionally, Counsel's testimony regarding his strategic decision not to call the Applicant's character witnesses was given more weight and credibility based on the testimony of each of the witnesses themselves: none of the witnesses could testify as to the events that occurred that evening, Pastor Smith met the Applicant subsequently and did not know him at the time of the crime, and Powell testified that the Applicant became secretive and withdrawn when he was on drugs. The testimony that the Applicant's personality did not change when he was on drugs was not credible based upon the common knowledge of the effects of crack cocaine and alcohol usage on the personality highlighted by each witnesses lack of knowledge of the Applicant under these circumstances. Ultimately, this Court finds that it cannot rely on hindsight in assessing the Applicant's claims in order to prove his PCR. The record reflects that Counsel has expertise as a seasoned trial attorney and effective advocate. This Court finds that the Applicant failed to meet his burden of proving Counsel was ineffective in this regard based on Counsel's credible, valid, supported, and articulated strategic decision not to introduce certain testimony. Cf. Jackson v. State, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998) (Counsel claimed he thought the testimony concerning the corroboration of respondent's statement would be more credible if presented through the testimony of the police officer instead of Stamford.

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is a valid reason for deciding not to call Stanford since Stanford's credibility would have been at issue if he testified. Thus, counsel was not ineffective for employing this strategy.”).

Further, “[i]n a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue.” Mitchell v. State, 298 S.C. 186, 188-89, 379 S.E.2d 123, 125 (1989) (citing State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966)). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). “It is well settled that when the defendant in a criminal prosecution becomes a witness in his own behalf, he places his reputation for truth and veracity in issue and may be cross-examined about any of his past transactions tending to affect his credibility, but his general character is not put in issue and may not be assailed by cross-examination or otherwise.” Taylor v. State, 258 S.C. 369, 375-76, 188 S.E.2d 850, 853 (1972) (citing State v. Knox, 98 S.C. 114, 82 S.E. 278 (1914); State v. Bolin, 177 S.C. 57, 180 S.E. 809 (1935); State v. Corn, 215 S.C. 166, 54 S.E.2d 559 (1949)). Thus, Counsel made the valid, tactical decision not to call witnesses to testify as to the Applicant's character for peacefulness or reputation for non-violence and to call the Applicant to testify on his own behalf, in order to ensure that the State could not eviscerate him on cross-examination by eliciting negative character evidence regarding the Applicant's reputation for violence or drug use.³

³ While the transcript reveals that the State inquired as to whether the Applicant had smoked crack on the day of the offense, the State was limited in its inquiry concerning only the *res gestae* of the crime, not the Applicant's history of drug use, violence, or other character in conformity therewith (Tr. 183:3-184:8). The testimony in question would not have been excluded as an impermissible reference to a prior bad act, but would have been admissible as part of the *res gestae* of the crime. 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, 580-83

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Further, the Applicant failed to present his father's purportedly beneficial testimony that the victims coaxed the Applicant into visiting their home and partying at the PCR hearing. 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). Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this allegation.

Moreover, this Court notes that even if the Applicant had proved Counsel was ineffective for failing to submit the DNA evidence or even if the Applicant had been successful on appeal, it is unlikely that he would have been granted a new trial. "In order to obtain leave from this Court to move for a new trial based on after-discovered evidence, an appellant must make a *prima facie* showing that a new trial is warranted." State v. Ford, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990) (citing State v. Butler, 261 S.C. 355, 200 S.E.2d 70 (1973); State v. Jennings, 40 S.C. 553, 18 S.E. 932 (1894)). "The requirements for a new trial are: (1) the evidence is such as will probably change the result if a new trial is granted, (2) the evidence has been discovered since

(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. 405, 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 the truth.

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the trial, (3) the evidence could not have been discovered prior to trial by the exercise of due diligence, (4) the evidence is material to the issue, and (5) the evidence is not merely cumulative or impeaching.” Id. (citing Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983); State v. Allen, 276 S.C. 412, 279 S.E.2d 365 (1981)).

Just because the Applicant exercised his rights pursuant to the Access to Justice Post-Conviction DNA Testing Act, see S.C. CODE ANN. § 17–28–10 (2014), does not mean that the Applicant has also satisfied the requirements of the Act, has met his burden of proving the DNA evidence was actually exculpatory, supports his theory of self-defense, and has established the requisite prejudice supporting the grant of a new trial. See S.C. CODE ANN. § 17–28–100 (2014) (“If the results of the DNA test are exculpatory, the applicant may use the exculpatory results of the DNA test as grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure. If the results of the DNA test are inconclusive, the court may allow for additional DNA testing or may dismiss the application.”). Cf. Bagwell v. State, 410 S.C. 259, 268, 763 S.E.2d 630, 635 (Ct. App. 2014), *reh’g denied* (Oct. 21, 2014), *cert. denied* (Feb. 27, 2015) (“Although the DNA test results indicating Bagwell’s blood was not found on the pieces of glass do not exonerate Bagwell or preclude the possibility of his guilt, we believe the jury more likely than not would have reached a different verdict had this evidence been presented at trial.”); Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 792, 178 L.Ed.2d 624 (2011) (recognizing Strickland prejudice “does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case’ ”). The Applicant has failed to show that the DNA results conclusively exculpate him and inculpate some unknown individual—who had not been submitted for DNA testing—or tend to prove his assertion of self-

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defense. Additionally, the State introduced multiple photographs of the knife and crime scene during trial for the jury's consideration and in support of the defense's theory of the case (Tr. 136:7-143:7) and Counsel effectively cross-examined the responding officer, Robert Charles Talanges regarding where the knives were found in relation to the Applicant's proximity (Tr. 143:16-149:24; 153:14-154:7).

Accordingly, this Court finds that the Applicant has failed to meet his burden of proving Counsel was ineffective in this regard.

Failure to Investigate

This Court finds that the Applicant's allegations that Counsel did not conduct an adequate pre-trial investigation or prepare enough for trial 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). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 343, 353-54

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495 S.E.2d 768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial. Thus, respondent has failed to show his counsel’s lack of preparation prejudiced him.”); Skeen v. State, 325 S.C. 210, 213–14, 481 S.E.2d 129, 131–32 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must also show specific prejudice resulting from counsel’s alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984); U. S. v. LaRouche, 896 F.2d 815, 823 (4th Cir. 1990).

The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared or had additional time prior to the case being called to trial. This Court notes that Counsel has years of experience representing clients on similar charges and remains updated on case law through research. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel’s alleged inadequate preparation or lack of investigation. Accordingly, this allegation is dismissed.

Failure to Adequately Cross-Examine Witnesses

In regards to the Applicant’s allegation that Counsel was deficient in his cross-examination of the State’s witnesses, including victims, this Court finds that the Applicant has failed to meet his burden of proof. Our courts are understandably wary of second-guessing defense counsel’s trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel’s choice of tactics will not be deemed ineffective assistance. Whitehead v.

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State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). "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. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' 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 Applicant's defense. To the contrary, Counsel effectively cross-examined crucial prosecution witnesses including the victim, Dawn Henson (Tr. 82:6-93:19); the victim, Pam Massey (Tr. 110:5-115:6); the victim's neighbor, Isaac Brewington (Tr. 127:24-132:1); and the responding officer, Robert Charles Talanges (Tr. 143:16-149:24; 153:14-154:7). Accordingly, this Court finds that the Applicant has failed to meet his burden of proving Counsel was ineffective in this regard.

Failure to Address Jury Issues

The Applicant alleges that Counsel was ineffective for failing to properly address the jury questions and ask for the court to provide additional charges to the deadlocked and combative jury. This Court finds that Counsel was not required to move for an Allen charge or misdirection. The trial judge has a duty to urge the jurors to reach a verdict, but he may not coerce them. See State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). "The typical judicial mechanism for encouraging

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an indecisive jury is the *Allen* charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors.” State v. Williams, 386 S.C. 503, 510, 690 S.E.2d 62, 65 (2010) (citing State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). S.C. CODE ANN. § 14-7-1330 (2007) provides that when a jury returns a second time without having agreed on a verdict, the trial judge cannot send the jurors out again without the jurors’ consent unless the jurors ask for further explanation of law. See Buff v. South Carolina Dep’t of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000)

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”).

The Applicant has presented no argument or authority supporting his contention that Counsel was required to make any motions regarding the jury’s deliberation or that such a request would have altered the trial’s outcome. Indeed, Counsel, the Solicitor, and the trial judge

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were constrained by S.C. CODE ANN. § 14-7-1330 (2007) in affecting the jury's deliberation. This Court finds that there Counsel was not ineffective regarding the jury deliberations. Although there were several jury notes, there was no indication to the trial court or Counsel that the jury was deadlocked or that the panel was fatally hung. The Applicant has failed to meet his burden of proof of establishing that there was any violation of statute or any prejudice suffered as a result of the jurors' initial indecision.

Trial Court Violations

This allegation raises a direct appeal issue that is procedurally barred by S.C. CODE ANN. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Further, the Applicant presented no argument regarding error of the trial court during the hearing; therefore, this ground is deemed abandoned and dismissed.

Prejudice

Specifically regarding the Applicant's claims that Counsel was ineffective for failing to call character witnesses and introduce DNA evidence: "In order to prevail on a claim of ineffective assistance of counsel, petitioner must demonstrate that but for counsel's ineffectiveness, there is a reasonable probability the result of the trial would have been different." Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Jackson v. State, 329

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S.C. 345, 348, 495 S.E.2d 768, 769 (1998). ABWIK is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation. Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002) (citing State v. Fennell, 340 S.C. 266, 531 S.C.2d 512 (2000)). ABWIK is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied. Id. Malice is a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it. Fennell, 340 S.C. at 278, 531 S.E.2d at 518. Intent to kill required to convict of ABWIK need only be a general intent demonstrated by acts and conduct from which a jury may naturally and reasonably infer intent and may be proved with evidence of the character of the means of instrument used. State v. Coleman, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000) (citing State v. Forest, 325 S.C. 12, 14, 479 S.E.2d 50, 51 (1996)).

This Court finds that the Applicant has failed to meet his burden of proof. Based on the testimony provided at the evidentiary hearing and a review of the record, this Court cannot discern any error in Counsel's performance that would undermine this Court's confidence in the jury's verdict. This Court finds it probable that a reasonable jury could find the Applicant guilty of the charged offense more specifically that the Applicant was not provoked and did have the required malice to commit ABWIK. Therefore, this Court finds that the Applicant has failed to establish prejudice supporting vacating his convictions.

Violations of Due Process and Equal Protection Rights

Although the Applicant raised this allegation in his application, the Applicant did not pursue this claim at the hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this issue.

26 *26 of 29*
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Failure to Move for Continuance

In his Application, the Applicant asserts that Counsel should have moved to continue his case because he was under the distorting effects of narcotics and was unable to meaningfully participate in his trial. However, the Applicant presented no evidence supporting his claim. Therefore, this allegation is deemed abandoned and dismissed. Moreover, this Court notes that Counsel informed the trial court that the Applicant was under the influence of medications and Counsel, the Applicant, and the Court discussed whether the Applicant was competent to pick a jury (7:4-10:15).

All Other Allegations

As to any and all allegations that the Applicant raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations, which are denied and dismissed.

CONCLUSION

This Court finds in regards to the allegations of ineffective assistance of counsel, Applicant's testimony as a whole was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness. This Court finds that the Applicant failed to meet his burden of proof to support his claims. Therefore, they are denied and dismissed.

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,

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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 his 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. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

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. 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. 453 454, 409 S.E.2d 395, 396 (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. The Applicant's 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.

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AND IT IS SO ORDERED this 30th day of April, 2015.

DL Jefferson

Deadra L. Jefferson
Presiding Judge
Seventh Judicial Circuit

Charleston, South Carolina
At Chambers

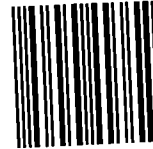
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