



LAW OFFICE OF TRICIA A. BLANCHETTE

January 6, 2016
VIA HAND DELIVERY

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

RECEIVED

JAN - 6 2016

SC SUPREME COURT

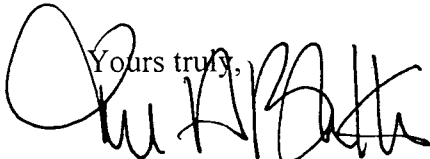
RE: Antwine Matthews v. State; Docket No.: 2013-CP-45-006

Dear Sir:

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

- (1) Proof of service on the Respondent.
- (2) A copy of the Order of Dismissal and Order denying Applicant's Motion Pursuant to Rule 59, SCRCP.

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

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Daniel Gourley, Assistant Attorney General
Williamsburg County Clerk of Court
Office of Appellate Defense
Antwine Matthews

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Steven H. John, III Circuit Court Judge

RECEIVED

JAN - 6 2016

SC SUPREME COURT

Case No.: 2013-CP-45-006

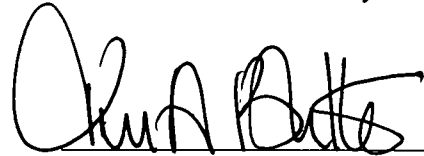
Antwine Matthews,.....Petitioner,

vs.

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

NOTICE OF APPEAL

Antwine Matthews, Petitioner, appeals the Order of Dismissal issued by the Honorable Steven H. John on September 2, 2015 and filed on September 16, 2015. Petitioner also appeals the Order signed and filed by the Honorable Steven H. John on November 23, 2015. Petitioner, through counsel, received written notice of the entry of the Order on December 15, 2015.



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008

January 6, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Steven H. John, III Circuit Court Judge

Case No.: 2013-CP-45-006

RECEIVED

JAN - 6 2016

SC SUPREME COURT

Antwine Matthews,.....Petitioner,

vs.

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

CERTIFICATE OF SERVICE

I, Jacqueline Venezia, Law Clerk to Tricia A. Blanchette, Esq., certify that a copy of a Notice of Intent to Appeal was hand delivered this 6th day of January, 2016, to Daniel Gourley of the Attorney General's Office, at:

Office of the Attorney General
ATT: Daniel Gourley, Ast. AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Jacqueline Venezia
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Law Clerk

January 6, 2016

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP4500006

RECEIVED

JAN - 8 2016

SC SUPREME COURT

Antwine Matthews vs. State of South Carolina

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), SCRCPP; Rule 41(a), SCRCPP (Vol. Nonsuit); Rule 43(k), SCRCPP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRCPP; Bankruptcy: Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other: _____

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

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Kingstree, South Carolina, this.

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 23rd day of November, 2015, and a copy mailed first class this 15th day of December, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Antwine Matthews ,
Tricia A. Blanchette PO Box 12725 Columbia, SC
29211

State of South Carolina ,

Sharon W. Stagers
Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
2013-CP-45-006

ANTWINE MATTHEWS, #340876)

A CERTIFIED TRUE COPY
Sharon W. Staggars
SHARON W. STAGGARS
CLERK OF COURT
WILLIAMSBURG COUNTY

ORDER DENYING MOTION TO RECONSIDER

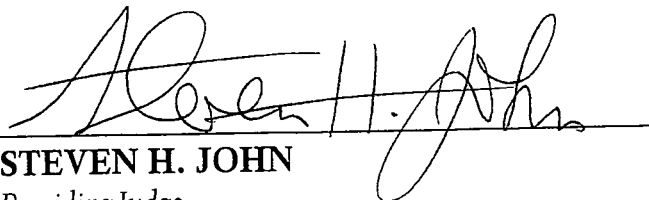
v.)

STATE OF SOUTH CAROLINA)

Respondent.)

Following the Court's September 2, 2015 Order, Antwine Matthews, by and through his attorney, Tricia A. Blanchette, Esq., requested the Court by his motion dated October 30, 2015, to reconsider the previous Order denying and dismissing the Application for Post-Conviction Relief with prejudice. The Court has reviewed the Applicant's Motion and the Respondent's Return and finds that the Court's Order of Dismissal contained the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP, and the Court properly ruled on all issues presented at the post-conviction relief hearing. Therefore, it is

ORDERED that the Applicant's Motion to Reconsider is denied, and the prior Order of Dismissal is reaffirmed *in toto*.



STEVEN H. JOHN
Presiding Judge
Third Judicial Circuit

November 23, 2015
Conway, South Carolina



ALAN WILSON
ATTORNEY GENERAL

October 21, 2015

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 12725
Columbia, SC 29211

RECEIVED
JAN - 6 2016
SC SUPREME COURT

Re: Antwine Matthews, #340876 v. State of South Carolina
2013-CP-45-006

Dear Mrs. Blanchette:

Enclosed please find a copy of the signed and filed **Order of Dismissal** in the above mentioned Post Conviction Relief case. Therefore, with this letter, we are closing our post-conviction relief file in this matter.

Sincerely,

Daniel Gourley
Assistant Attorney General

DG/cc
Enclosure(s)

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)
)
Antwine Matthews, #340876,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2013-CP-45-006

FILED
JUL 16 2015
CLERK OF COURT

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 8, 2013 and amended on June 12, 2015. Respondent made its return on June 17, 2013. An evidentiary hearing in to the matter was convened on July 16, 2015, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. The Applicant was true billed indicted at the May 2009 term of the Williamsburg County Grand Jury for Assault with Intent to Kill, Attempted Armed Robbery, Possession of a Weapon during a Violent Crime, and Criminal Conspiracy (2009-GS-45-90). Charles D. Barr, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable D. Craig Brown. Applicant was found guilty of Attempted Armed Robbery and Criminal Conspiracy, and on May 14, 2010, Applicant was sentenced to fifteen years for Attempted Armed Robbery and to a consecutive term of five years for Criminal Conspiracy.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tristan Shaffer, Esquire and Susan Hackett, Esquire. The South Carolina Court of Appeals dismissed the appeal. State v. Matthews, Op. No. 2012-UP-508 (Ct. App. filed September 5, 2012). The Remittitur was issued on September 24, 2012.

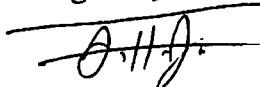
ALLEGATIONS

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

1. Ineffective assistance of trial counsel.
 - a. "Failure to prepare and investigate."
 - b. "Failure to make contemporaneous objections."
2. Ineffective assistance of appellate counsel
 - a. "Failure to raise all meritorious issues on appeal."

Applicant amended his application on June 12, 2015, alleging that he was being held unlawfully based on the following allegations:

1. Ineffective assistance of trial counsel for failure to have Applicant present at his preliminary hearing and for failure to make a viable argument for dismissal.
2. Ineffective assistance of trial counsel for failure to properly prepare and investigate prior to trial.
3. Ineffective assistance of trial counsel for failure to properly advise Applicant regarding the State's case, available defenses and likely prison sentence before rejecting the ten year plea offer.
4. Ineffective assistance of trial counsel for failure to object to a switch in the presiding judge during the course of trial. See Transcript p. 196.
5. Ineffective assistance of trial counsel for the handling of the cross-examination of Investigator Lail regarding the statements obtained from Melvin Segars, which resulted in the trial court overruling a hearsay objection on the grounds that trial counsel opened the door to the line of objectionable testimony on redirect.
6. Ineffective assistance of trial counsel for failure to properly cross-examine Jeffrey Dawkins and Kim Hannah. Specifically, as to Jeffrey Dawkins, ineffective assistance of counsel for opening the door to the reading of his statement on redirect. Transcript p. 93.
7. Ineffective assistance of trial and/or appellate counsel for failure to address the missing portion of the testimony of Kim Hannah in the transcript and issue with the tape recordings. Transcript pp. 126, 132.

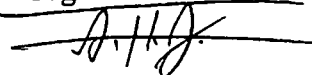


8. Ineffective assistance of trial counsel for failure to move to suppress the forensic evidence recovered from the crime scene and/or object to the testimony of Deputy Scott that exceeded the scope of a lay witness.
9. Ineffective assistance of trial counsel to argue more fully for a directed verdict on the attempted armed robbery charge.
10. Ineffective assistance of trial counsel for failure to object to the State's closing argument due to vouching/bolstering the credibility of a witness and attempting to invoke the passions and prejudice of the jury. Transcript pp. 293-5.
11. Ineffective assistance of trial counsel for failure to request a charge on lesser included offenses.
12. Ineffective assistance of trial counsel for failure object to the jury charge. Transcript pp. 326-9. Ineffective assistance of trial and/or appellate counsel for failure to address the missing portion of the court's charge form the transcript. Transcript p. 331.
13. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, including but not limited to the following:
 - a. Objection to Jeffrey Dawkin's reading his statement. Transcript pp. 93.
 - b. Motion for mistrial due to Brady violation. Transcript p. 119.
 - c. Objection to the line of questioning regarding Melvin Segar's statement. Transcript p. 261.
 - d. Motion for a new trial. Transcript p. 339.

During the evidentiary hearing, PCR Counsel amended Applicant's PCR application to allege an additional claim of ineffective assistance of counsel for failing to object to the recharge of the jury.

SUMMARY OF TESTIMONY PRESENTED

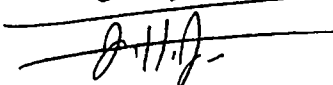
At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Abigail Cooper. The State presented testimony from Charles Barr, Esquire. (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Williamsburg County Clerk of Court records, Applicant's South Carolina Department of Correction records,



appellate records, the PCR application, and return. During the evidentiary hearing, Applicant introduced various exhibits.

Applicant was called to testify on his own behalf. Applicant stated that he retained Charles Barr to represent him at trial. Applicant stated that he had two co-defendants, Jeffrey Dawkins (hereinafter "Dawkins") and Melvin Seagers (hereinafter "Seagers"). Applicant stated that he was found not guilty of assault with intent to kill and possession of a weapon during the commission of a violent crime. Applicant stated that he was convicted of attempted armed robbery and criminal conspiracy. Applicant stated Tristan Shaffer, Esquire, and Susan Hackett, Esquire, represented him during the appellate process. Applicant stated that they filed an Anders brief on his behalf. Applicant stated that he raised various issues in his *pro-se* response. Applicant stated that he wants a new trial.

Applicant stated that he was not present for his preliminary hearing. Applicant stated that he was out on bond during this time. Applicant stated Trial Counsel represented him at his preliminary hearing. Applicant stated Trial Counsel did not talk to him about the preliminary hearing. Applicant noted that the preliminary hearing transcript revealed that Trial Counsel waived Applicant's presence. Applicant stated that he never authorized Trial Counsel to waive his presence for his preliminary hearing. Applicant further noted that the preliminary hearing transcript revealed that the magistrate judge did not have signed warrants. However, Applicant stated Trial Counsel stated that they would go forward, despite the fact that the warrants were not signed. Applicant stated that the preliminary hearing transcript reveals that Trial Counsel conceded that the State could proceed on the attempted armed robbery charge. Applicant noted that his co-defendant's attorney, Wayne Floyd, argued that the charges did not rise to armed robbery. However, Attorney Floyd argued that attempted armed robbery was the more



appropriate charge. Applicant stated Trial Counsel merely joined in with Attorney Floyd's argument. Applicant stated that he would have liked Trial Counsel to present arguments on his own behalf. Applicant further stated that he would have liked to be present for his preliminary hearing and would not have waived his right to be present.

Applicant stated that he met with Trial Counsel four times. Applicant stated that he did not get a copy of discovery from Trial Counsel. Applicant stated Trial Counsel was working on securing a ten year plea offer. However, Applicant stated that the State thought he was the shooter.

Applicant stated that Trial Counsel advised him that he had a strong case. Applicant stated that Trial Counsel advised him that he felt Judge Newman would not give him more than fifteen years if he proceeded to trial and was found guilty. Applicant stated that he decided to risk going to trial because he felt an additional five years was worth the gamble. Applicant stated that he would have taken the ten year plea offer had he known that Kim Hannah was going to testify because she linked him to the gun. Applicant further stated that the plea offer came in before Judge Brown took over the trial. Applicant stated Trial Counsel had experience with Judge Newman, but no experience with Judge Brown.

Applicant stated that he saw Judge Brown sitting on the bench with Judge Newman at the start of trial. Applicant stated Trial Counsel did not object when Judge Brown took over the trial. Applicant referenced page 196 line 19 of the trial transcript which reveals that Judge Newman advised the jury that Judge Brown would be presiding over the remainder of the trial. Applicant stated Judge Brown presided over various objections and motions. Applicant referenced the introduction of Seagers' statement, Trial Counsel's directed verdict motion, and Trial Counsel's motion for a new trial. Applicant stated Judge Brown charged the jury.

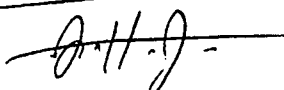
A.H.J.

Applicant further stated Judge Brown answered various questions received from the jurors during deliberations. Applicant stated Judge Brown also sentenced him. Applicant concluded that he would not have wanted Judge Brown to preside because Trial Counsel had no experience with him.

Applicant further referenced a motion hearing where Judge Newman excused himself because he was the presiding judge during Applicant's trial. Applicant stated that Judge Newman explained that Judge Brown was sitting with him during the trial. Applicant stated Judge Brown was elected in February 2010. Applicant stated Judge Brown was not assigned to Applicant's trial. However, Applicant stated Judge Newman's calendar revealed that Judge Brown was sitting with Judge Newman during Applicant's trial.

Applicant noted that Seagers did not testify during his trial. Applicant stated that he never saw Seagers' statement prior to trial. Applicant accused the police of lying during Seagers' interview. Applicant noted that the police informed Seagers that Applicant had already spoken to them about the incident. Applicant stated that he never gave a statement to the police. Applicant stated Trial Counsel told him that Seagers' attorney was not going to allow him to testify against Applicant. Applicant referenced page 260-262 of the trial transcript and noted that Trial Counsel opened the door to Seagers' second statement coming in at trial. Applicant stated Trial Counsel did not ask questions that he would have liked Trial Counsel to ask. Specifically, Applicant would have wanted Trial Counsel to cross-examine Investigator Lail about her telling Seagers that Applicant had already spoken to police.

Applicant stated that Trial Counsel should have cross examined Dawkins about him consistently using the term "we" when testifying. Applicant stated Dawkins tried to place the blame on him. Applicant stated Trial Counsel should have pursued the issue of whether



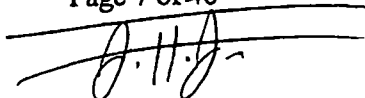
Dawkins was "coached" by the Solicitor. Applicant further stated that Trial Counsel should not have opened the door to Dawkins' statement being read by Dawkins during trial. Applicant further stated Trial Counsel should have objected to a Brady violation when Kim Hannah testified. Applicant stated that he had never seen her statement.

Applicant stated Trial Counsel or Appellate Counsel should have raised the issue that there were missing portions of the transcript due to the tapes being switched out during the trial. Applicant referenced page 126 line 23 and page 132 line 13. Applicant stated that he did not know that there were only a certain number of days to raise this issue.

Applicant stated Trial Counsel was ineffective for failing to move to suppress the forensic evidence recovered from the crime scene. Applicant stated that there was no forensic evidence to tie the bullet recovered at the scene to the crime at issue. Applicant argued Agent Roberts exceeded the scope of his qualifications when he discussed the trajectory of the bullet. Applicant stated there was no "trajectory expert" at trial. Applicant claimed that an expert would have been able to tell how long the bullet had been present at the scene.

Applicant stated Trial Counsel should have argued harder for the dismissal of the attempted armed robbery charge during the directed verdict motion. Applicant stated Trial Counsel should have pointed out that there was only 18 cents on for the counter and it was never taken from the store. Applicant stated Trial Counsel should have referenced victim's testimony that this was not a typical stick up because there was never any demands made by the defendants.

Applicant stated Trial Counsel should have objected to the State's closing argument because it was bolstering. Specifically, Applicant stated Trial Counsel should have objected to the State arguing Kim Hannah was truthful and the State's reference to "awesome God."



Applicant further stated Trial Counsel should have requested a jury charge on the lesser included offense of strong armed robbery.

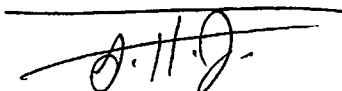
Applicant stated Trial Counsel was ineffective for failing to object to the jury charges as read by Judge Brown. Applicant noted that Judge Brown read the armed robbery charge then switched to assault and battery with intent to kill, then back to armed robbery. Applicant further stated Judge Brown failed to charge the jury on:

A conspiracy may be shown by circumstantial evidence and the conduct of the parties. In order to convict the defendant of conspiracy, the state must prove beyond a reasonable doubt not only that defendant knew of the unlawful conduct but that the defendant agreed to combine with the other persons for the purposes of accomplishing the unlawful conduct.

(Tr. p. 329 line 16—p. 330 line 15). However, Applicant noted that the transcript notes that a portion of Judge Brown's charge was inaudible. Applicant further alleged Trial Counsel should have requested that the jury questions be placed on the record.

Applicant stated Appellate Counsel was ineffective for failing to brief the issue of whether the trial court erred in allowing Dawkins to read his statement. (Tr. p. 93). Applicant stated Appellate Counsel was ineffective for failing to brief the issue of whether the trial judge abused his discretion in denying the mistrial due to a Brady violation. (Tr. p. 119). Applicant argued Appellate Counsel was ineffective for failing to brief the objection made by trial counsel to the line of questioning regarding Seagers' statement. (Tr. p. 261). Applicant argues Appellate Counsel was ineffective for failing to brief the issue of whether the trial court abused his discretion in denying Trial Counsel's motion for a new trial.

Applicant stated that he retained Trial Counsel and did fire him because he felt he was a good attorney at the time of his representation. Applicant claimed that he was unaware of all his grievances with Trial Counsel prior to and during the trial. Applicant noted that Trial Counsel

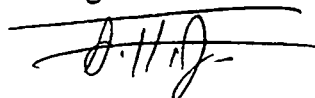


had represented him on other charges. Applicant stated this was not his first time being charged with criminal offenses.

Applicant stated that he never addressed the issue about being present at the preliminary hearing with Trial Counsel. Applicant claimed that he had no grievances with Trial Counsel until after he was sentenced. Applicant stated that he wanted the charges dismissed at his preliminary hearing. Applicant noted that he was indicted by the Williamsburg County Grand Jury following his preliminary hearing.

Applicant stated that Trial Counsel should have gone over the discovery material prior to trial. Applicant admitted that he was present during the robbery and that the victim shot him during the robbery. Applicant admitted that he was the driver of a white crown Victoria. Applicant stated that he would have taken a ten year plea offer, but would not have admitted his guilt. Applicant stated he would have told the judge that he was not guilty but that he could be found guilty due to the evidence against him. Applicant explained that he went in to the store three or four minutes after his co-defendants. As soon as he walked into the store, the victim fell to the ground and jumped up with a gun. Applicant claimed that the victim started shooting. Applicant claimed that he did not see any of his co-defendants with guns. Applicant acknowledged that Kim Hannah placed him with a gun prior to the robbery. Applicant stated that he went to Charles Bishop's house to seek medical attention. Applicant stated Charles Bishop was not employed in the medical field. Applicant stated Charles Bishop called the ambulance and he was taken to the hospital.

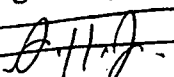
Applicant stated that he wanted Trial Counsel to bring out the fact that the investigator lied to Seagers. Applicant noted that Trial Counsel cross examined Dawkins about his plea deal with the solicitor's office.



Following Applicant's testimony, Trial Counsel was called to testify. Trial Counsel stated that he has been practicing law for thirty-five years. Trial Counsel stated that his practice includes both criminal and civil. Trial Counsel stated that he practices in Charleston, Horry, Georgetown, Sumter, Clarendon, Marion, Richland, and Williamsburg. Trial Counsel stated that he has an office in Kingstree, SC. Trial Counsel stated that this was a "local" case. Trial Counsel stated that he remembered the case. Trial Counsel stated that he was retained on January 15th or 16th, 2009. Trial Counsel stated he had represented Applicant on prior charges in Marion County. Trial Counsel stated that he got Applicant acquitted of the Marion County charges. Trial Counsel opined that he was prepared to try Applicant's case.

Trial Counsel stated that he recalled the preliminary hearing. Trial Counsel stated Applicant was not present because the magistrate judge was holding the preliminary hearing for his co-defendant. Trial Counsel stated Applicant requested a preliminary hearing, but the paperwork had not been processed. Trial Counsel stated he happened to be in the court room during co-defendant's preliminary hearing and Trial Counsel chose to waive Applicant's presence and proceed with the preliminary hearing at that time. Trial Counsel stated that it is better to have the client present, but you have to make a judgment call. Trial Counsel opined that they were not likely to receive a preliminary hearing because the Assistant Solicitor was prepared to present the indictment to the grand jury. Trial Counsel stated that it is not his typical practice to waive a preliminary hearing because you never know what information will come out during the preliminary hearing. Trial Counsel stated that a preliminary hearing is a good discovery tool.

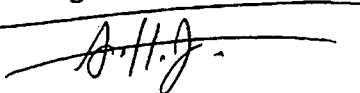
Trial Counsel noted that the argument against the armed robbery charge was the exact same as his co-defendant. Trial Counsel noted Applicant would have been indicted by the grand



jury even if there was no probable cause found during the preliminary hearing. Trial Counsel stated the preliminary hearing is a good way to gain more information about the State's case. Trial Counsel stated that he immediately called Applicant following the preliminary hearing and requested that they set up a time to meet. Trial Counsel stated that he ordered the transcript from the preliminary hearing and went over it with Applicant.

Trial Counsel stated that he obtained discovery from Assistant Solicitor Barr and sent Applicant a letter that same day informing him of the receipt of the discovery. Trial Counsel stated Applicant knew exactly what was going on at trial. Trial Counsel recalled that there was a plea offer. Trial Counsel then stated that Applicant decided to "roll the dice" and proceed to trial. Trial Counsel opined that Applicant could have easily gotten acquitted of the charges. Trial Counsel stated Judge Newman would not accept negotiated pleas. Trial Counsel stated his clients always plead to a negotiated offer, except for compelling circumstances. Trial Counsel stated it was Applicant's decision to accept or reject a plea offer.

Trial Counsel stated that knowing who the presiding judge will be during trial is always a consideration. Trial Counsel stated it was not atypical to see two circuit judges presiding over a trial. Trial Counsel stated that this was the first time he has ever heard of two judges presiding over a trial being raised as an issue. Trial Counsel noted that Judge Newman and Judge Brown both presided over Applicant's trial. Trial Counsel opined that Applicant would get a fair shot with either Judge Newman or Judge Brown. Trial Counsel stated that Judge Brown tried a "good case." Trial Counsel stated that he was a little surprised when Judge Brown ran the five year sentence for weapons consecutively to Applicant's other charges. Trial Counsel could not recall whether Judge Newman stayed during the entire trial. Trial Counsel was certain Judge Brown



presided over the entire trial and did not leave the courtroom. Trial Counsel opined that there was simply no basis to object to Judge Brown presiding over Applicant's trial

Trial Counsel stated that he shared office space with his brother, Verdell Barr. Trial Counsel noted that the public index record showed that Judge Brown handled pleas on May 12, 2010, in Williamsburg County. Trial Counsel reiterated that Judge Brown never left the court room while the trial was taking place. Trial Counsel opined that there was no jurisdictional issue with Judge Brown presiding over Applicant's case. Trial Counsel stated that he did not object to Judge Brown presiding over the case because he did not see any procedural issue.

Trial Counsel stated that he had no intent to call Melvin Seagers as a witness. Trial Counsel stated that Seagers' attorney informed him that Seagers did not have a plea deal and his attorney was not going to allow him to testify. Trial Counsel noted that Seagers was the only person who could tell exactly what happened during the armed robbery, Trial Counsel stated that he did not continue to question Investigator Lail about Seagers' statement because he feared that Assistant Solicitor Barr would offer Seagers a plea deal to testify. Trial Counsel opined that he did not open the door to any harmful information during his cross examination of Investigator Lail.

Trial Counsel noted that Dawkins testified during trial. Trial Counsel opined that he successfully impeached Dawkins during trial. Trial Counsel noted that Dawkins admitted that he never heard a conversation between Applicant and Seagers about their intent to rob the victim.

Trial Counsel stated that he could not specifically recall the jury questions. However, Trial Counsel stated that had he felt that additional instructions were warranted then he would have requested them.

D. H. J.

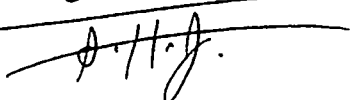
Trial Counsel stated that a motion to suppress the forensic evidence recovered at the crime scene was not necessary. Trial Counsel noted that Applicant's entire defense was mistaken identity. Trial Counsel explained that whether a robbery occurred was not in dispute. As such, there was no reason to suppress the forensic evidence recovered at the scene because none of it linked Applicant to the crime. Trial Counsel noted that Applicant told him that he fired the gun at victim's head from point blank range. Trial Counsel stated that Applicant knew that he shot the bullet.

Trial Counsel stated that Kim Hannah could not put Applicant at the scene with a gun. Trial Counsel further noted that Dawkins did not know who shot the bullet. Trial Counsel opined that he did an excellent job of cross examining Dawkins.

Trial Counsel stated that he did not prepare his directed verdict argument ahead of time. Trial Counsel stated that Directed Verdict motions are made after the State presents their evidence. Therefore, Trial Counsel opined that he would not be able to fully prepare a directed verdict motion prior to the State's presentation of its case in chief. Trial Counsel stated that he did not request the lesser included offense of strong armed robbery because he did not feel the evidence would have warranted the charge.

Trial Counsel stated that he did not hear anything objectionable during Assistant Solicitor Barr's closing argument. Trial Counsel opined that Assistant Solicitor Barr's argument did not bolster Hannah's testimony. Trial Counsel further noted that he uses religious comments in most of his closing arguments. Trial Counsel stated that he would have objected to anything that he felt was prejudicial during closing arguments.

Trial Counsel stated that Judge Brown's jury instructions were not confusing. Trial Counsel opined that Judge Brown gave a proper jury instruction. Trial Counsel stated that he

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typically does not object because he does not want to emphasize things. Trial Counsel opined that there were no egregious errors during Judge Brown's jury charge.

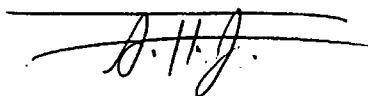
Following Trial Counsel's testimony, Abigail Cooper (hereinafter "Mother") was called to testify. Mother stated that she was Applicant's mom. Mother stated that there was a ten year plea offer. Mother stated that she sat through the trial. Mother stated Judge Brown was not there at the beginning of jury selection. Mother stated that Judge Newman left the trial on Wednesday and did not return.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Specifically, this Court finds Trial Counsel's testimony credible and Applicant and Mother's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

OVERWHELMING EVIDENCE

Initially, this Court notes that Applicant can show no resulting prejudice stemming from any allegations of ineffective assistance of counsel as there is clear evidence of overwhelming guilt. See Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001) (finding that where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial). Specifically, this Court notes the Victim identified Applicant as one of three defendants who robbed him. (App. p. 40 lines 18-25). Victim stated that he saw a white car outside running shortly before he was robbed. (App. p. 30 line 17—p. 31 line 2). Dawkins testified that Applicant owned a white Crown Victoria.

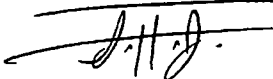


(App. p. 60 line10-13). Although Victim could not positively identify Applicant as the shooter, it was undisputed that Applicant was in the store when the armed robbery took place. (App. p. 41 lines 8-12).

Further, Dawkins stated that he and Applicant committed the armed robbery. (App. p. 57 line 16—p. 58 line 16; p. 71 lines 7-12; p. 90 lines 10-13). Dawkins stated that he, Segars, and Applicant had run out of marijuana and they planned to rob the Victim in order to get more money to purchase marijuana. (App. p. 67 lines 2-25). Dawkins stated that Applicant was driving his white Crown Victoria when he robbed Victim. (App. p. 70 lines 12-14). During the robbery, the Victim fired several shots at the Applicant and his co-defendants using a .38 caliber pistol. (App. p. 33 line 22—p. 34 line 9). Dawkins testified that Applicant got shot by the Victim during the robbery. (App. p. 74 lines 21-22). Further, James Green of the South Carolina Law Enforcement Division (hereinafter "SLED") testified that the bullet recovered from Applicant's abdomen matched that of a .38 or .357 weapon.

Kim Hannah testified that she spent most of the day riding around with Applicant and his co-defendants. (App. p. 106-108). Hannah testified that Applicant was driving his white crown victoria. (App. p. 106 line 13—p. 107 line 6; p. 111 line 20-22). Hannah stated that she noticed a gun on the nightstand while she and Applicant were having sex. (App. p. 108 lines 17-25). Hannah stated that she noticed Applicant had the gun in his lap in the car on the drive back from Lake City, South Carolina. (App. p. 109 line 15—p. 110 line 12). Hannah stated that she never saw the gun in anyone else's possession other than Applicant. (App. p. 117 lines 2-11).

Notably, Applicant addressed the court prior to sentencing and apologized for everything that happened. (App. p. 341 lines 24-25). Applicant indicated that he learned from the mistakes he made and being shot was essentially a wakeup call for him to change his life. (App. p. 342



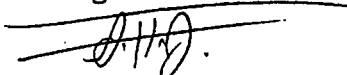
lines 1-3). See State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct.App.2010) (noting the defendant proclaimed his desire "to apologize to the Court for getting [himself] in this trouble"). Based off of the foregoing, there is clear evidence of overwhelming guilt. As a result, Applicant can show no prejudice from any of alleged allegations of ineffective assistance of counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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



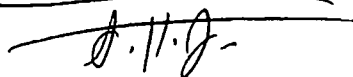
but for counsel's unprofessional errors, the result of the proceeding would have been different."

Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

1. Ineffective assistance of trial counsel for failure to have Applicant present at his preliminary hearing and for failure to make a viable argument for dismissal.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to make a viable argument for dismissal is wholly meritless. This Court notes that Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. 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, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (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, 417 S.E.2d 529 (1992).

Trial Counsel stated that he happened to be present during Applicant's co-defendant's preliminary hearing and made the tactical decision to waive Applicant's presence and join in his co-defendant's preliminary hearing. Trial Counsel reasoned that a preliminary hearing is a great discovery tool. Trial Counsel stated that he feared that the Assistant Solicitor would present the



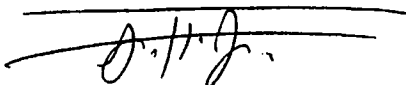
case to the grand jury and forego the preliminary hearing process. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance.

2. Ineffective assistance of trial counsel for failure to properly prepare and investigate prior to trial.

This Court finds Applicant’s allegation that he received ineffective assistance of counsel due to Trial Counsel’s failure to properly investigate and prepare for trial is meritless. This Court finds credible Trial Counsel’s testimony that he reviewed discovery, met with Applicant, prepared a defense, and was prepared for trial. Notably, Applicant was acquitted of two of the four charges. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, this Court notes Applicant did not offer any credible evidence as to how Trial Counsel’s alleged lack of preparation prejudiced him. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (noting mere speculation and conjecture on the part of respondent is insufficient to substantiate allegation that counsel’s deficient performance was prejudicial to respondent).

3. Ineffective assistance of trial counsel for failure to properly advise Applicant regarding the State’s case, available defenses and likely prison sentence before rejecting the ten year plea offer.

This Court finds Applicant’s allegation that he received ineffective assistance of counsel due to Trial Counsel’s failure properly advise Applicant of the State’s case prior to him rejecting

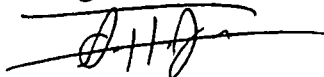


the State's plea offer is without merit. This Court notes Applicant acknowledges that he was offered a ten year plea offer and chose to reject the offer based off of the advice of Trial Counsel. Applicant alleges that Trial Counsel advised him that he would most likely be sentenced to fifteen years if convicted at trial. Applicant further alleged that Trial Counsel advised him that he had a decent chance of getting acquitted at trial. Trial Counsel stated that he was surprised when Judge Brown gave Applicant a consecutive five years for criminal conspiracy. Trial Counsel testified that it was ultimately Applicant's decision to accept or reject the plea offer and Applicant chose to "roll the dice."

Notably, Applicant was sentenced to a total of twenty years. Furthermore, Applicant was acquitted of two of his four charges. This Court finds nothing about Trial Counsel's advice to Applicant regarding the plea offer fell below reasonable professional norms. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel's performance.

**4. Ineffective assistance of trial counsel for failure to object to a switch in the presiding judge during the course of trial.
See Transcript p. 196.**

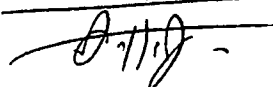
This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to object to a switch in the presiding judge is wholly meritless. This Court finds credible Trial Counsel's testimony that Judge Brown presided over the entire trial. This Court notes that while it may be unusual for two circuit court judges to preside over a trial, Applicant has failed to meet his burden as defined by Strickland. Specifically, for an



applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient, and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court finds that Trial Counsel's performance was not deficient, and therefore was not ineffective. Furthermore, this Court finds Applicant has failed to present any credible evidence as to how he was prejudiced by Judge Brown presiding over his trial. Based off of the foregoing, this Court finds this allegation should be denied and dismissed with prejudice.

5. Ineffective assistance of trial counsel for the handling of the cross-examination of Investigator Lail regarding the statements obtained from Melvin Segars, which resulted in the trial court overruling a hearsay objection on the grounds that trial counsel opened the door to the line of objectionable testimony on redirect.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's cross examination of Investigator Lail regarding Segars' statement is meritless. Specifically, Applicant argues Investigator Lail was allowed to discuss Segars' second statement about a gun over Trial Counsel's objection. (Tr. p. 262). This Court has reviewed the re-direct examination and finds nothing was so prejudicial as to affect the outcome of trial. Investigator Lail was not allowed to go into the substance of Segars' statement, but was merely able to acknowledge that Segars gave a second conflicting statement about a gun. At best this is merely impeaching Segars and casting doubt on his credibility towards law enforcement due to his conflicting statements. Based off of the foregoing, this Court finds this allegation should be denied and dismissed with prejudice.



6. Ineffective assistance of trial counsel for failure to properly cross-examine Jeffrey Dawkins and Kim Hannah. Specifically, as to Jeffrey Dawkins, ineffective assistance of counsel for opening the door to the reading of his statement on redirect. Transcript p. 93.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to properly cross examine Jeffrey Dawkins and Kim Hannah is meritless.¹

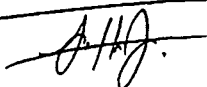
i. Ineffective assistance of counsel for opening door Dawkins reading his statement on redirect.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel opening the door to Dawkins reading his statement on redirect is meritless. This Court has noted that Trial Counsel properly conducted a thorough cross-examination of Dawkins. Specifically, Trial Counsel attempted to impeach Dawkins by pointing out various discrepancies in his trial testimony as compared to his two statements given to the police. Despite Applicant's assertion to the contrary, the Assistant Solicitor is allowed to rehabilitate Dawkins on redirect by allowing Dawkins to reference his two statements. Nothing about Dawkins referencing his prior statements on redirect was improper. Based off of the forgoing, this Court finds Applicant has failed to prove that Trial Counsel's cross-examination of the state's witness was deficient. Furthermore, Applicant failed to present any credible evidence that he was prejudiced.

ii. Ineffective assistance of counsel for failing to properly cross-examine Kim Hannah.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to properly cross examine Kim Hannah is meritless. This Court notes that the manner and extent of cross-examination should not be second-guessed. See Sallie

¹ This Court addresses this allegation as two separate allegations of ineffective assistance of counsel.

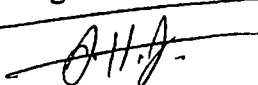


v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Marzullo not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness); United States v. Nersesian, 824 F.2d 1294, 3121 (2d Cir. 1987) (“decisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature” and will not support an ineffective assistance claim). This Court has reviewed the cross-examination of Kim Hannah conducted by Trial Counsel and finds nothing deficient. This Court notes Trial Counsel is a seasoned criminal defense attorney who has tried countless criminal trials and conducted numerous cross-examinations.

Furthermore, Applicant failed to show how Trial Counsel’s failure to “adequately cross-examine” Kim Hannah was prejudicial. Specifically, this Court notes Applicant failed to produce Kim Hannah for the additional questioning that Applicant alleges should have been asked. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). This Court cannot speculate as to how Kim Hannah would have responded to the additional questions Trial Counsel should have asked during cross examination. See Glover v. State, supra, 318 S.C. at 498-99, 458 S.E.2d at 540. (Applicant’s mere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.) Based off of the foregoing, this Court finds that this allegation should be denied and dismissed with prejudice.

7. Ineffective assistance of trial and/or appellate counsel for failure to address the missing portion of the testimony of Kim Hannah in the transcript and issue with the tape recordings. Transcript pp. 126, 132.

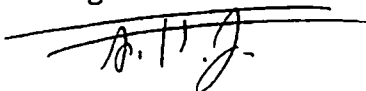
This Court finds Applicant’s allegation that he received ineffective assistance of counsel due to Trial Counsel’s/Appellate Counsel’s failure to object to the missing portion of the transcripts is meritless. It is incumbent upon Applicant to present some sort of credible evidence showing that the information missing from the transcript was somehow prejudicial in either the



trial or appellate process. See Glover v. State, supra, 318 S.C. at 498-99, 458 S.E.2d at 540. (Applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice). Instead, Applicant merely pointed to the excerpts missing from transcript without presenting any credible evidence as to what actually took place during the portions that were missing. Because Applicant failed to present any credible evidence on this issue, this Court finds the allegation must be denied and dismissed with prejudice.

8. Ineffective assistance of trial counsel for failure to move to suppress the forensic evidence recovered from the crime scene and/or object to the testimony of Deputy Scott that exceeded the scope of a lay witness.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to move to suppress the forensic evidence is wholly meritless. This Court notes no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. 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, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (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, 417 S.E.2d 529 (1992).

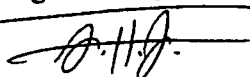


In the instant case, Trial Counsel testified that their trial strategy was to challenge the identification of Applicant. Trial Counsel stated that they were not attempting to dispute whether a robbery took place or whether someone shot at the Victim. Therefore, it would have been superfluous to try and suppress the forensic evidence found at the scene of the crime. This Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test -- that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Furthermore, this Court notes Applicant simply makes the bare assertion that Trial Counsel should have filed a motion without providing any credible evidence that a motion to suppress the forensic evidence recovered would have been successful. It is incumbent upon Applicant to provide this Court with the appropriate arguments and evidence proving that the forensic evidence would have been suppressed had Trial Counsel made the motion. This Court finds Applicant has fallen well short of his burden of proof as required by Strickland. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

9. Ineffective assistance of trial counsel to argue more fully for a directed verdict on the attempted armed robbery charge.

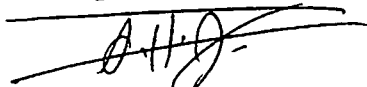
This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to more fully argue his directed verdict motion is meritless. This Court notes Trial Counsel is an experienced criminal defense attorney who has participated in numerous trials and argued several directed verdict motions. This Court has reviewed the directed verdict motion and finds nothing about Trial Counsel's argument fell below professional norms. Furthermore, this Court notes Applicant failed to show that Trial Counsel's alleged errors or omissions during the directed verdict arguments resulted in the denial of the directed verdict



motion. To the contrary, this Court has reviewed the entire transcript and finds that there was ample evidence to overcome any directed verdict argument presented. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991) (when ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight). Based off of the foregoing, this Court finds Applicant's allegation should be denied and dismissed.

10. Ineffective assistance of trial counsel for failure to object to the State's closing argument due to vouching/bolstering the credibility of a witness and attempting to invoke the passions and prejudice of the jury. Transcript pp. 293-5.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to object to the solicitor's closing arguments is without merit. This Court notes a "closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853 (1975)). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362,

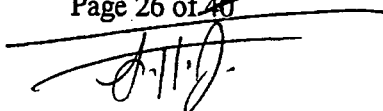


373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.

This Court, having reviewed the entire argument, finds it not to have been objectionable. This Court finds that the Solicitor made a valid argument regarding credibility and the oath taken by the victim to tell the truth to the jury. Based off of the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance.

11. Ineffective assistance of trial counsel for failure to request a charge on lesser included offenses.

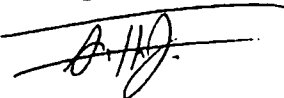
This Court finds Applicant’s allegation that he received ineffective assistance of counsel due to Trial Counsel’s failure to request a lesser charge on the lesser included offense of strong armed robbery is meritless. Strong arm robbery is defined under common law “as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.” State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003). The trial court is required to charge a jury on a lesser included offense “if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed.” State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). However, the trial court should refuse to charge on a lesser included offense when there is no evidence that the defendant committed the lesser rather than the greater offense. State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994).

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This Court agrees with Trial Counsel's opinion that strong armed robbery was not appropriate charge given the factual circumstances in this case. Notably, Applicant and his co-defendants used a deadly weapon to rob the Victim. Therefore, strong armed robbery would not be an appropriate charge. Based off of the foregoing, this Court finds this allegation should be denied and dismissed because there was no evidence that the Applicant committed the lesser included offense of strong armed robbery rather than the greater offense of armed robbery.

12. Ineffective assistance of trial counsel for failure to object to the jury charge. Transcript pp. 326-9.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to object to the jury charge is meritless. "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* at 318, 577 S.E.2d at 464; State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error). A jury charge that is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). This Court has reviewed the jury charge *as a whole* and finds that the jury charge was free from error. Based off of the foregoing, this Court finds that Trial Counsel was not deficient for failing to object to the jury charge; this allegation should be denied and dismissed with prejudice.

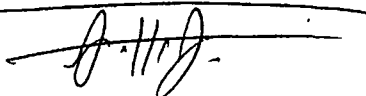


13. Ineffective assistance of trial for failure to address the missing portion of the court's charge from the transcript. Transcript p. 331.

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to address the missing portion of the transcript is wholly meritless. It is incumbent upon Applicant to present some sort of credible evidence or arguments showing that the information missing from the transcript was somehow prejudicial in either the trial or appellate process. See Glover v. State, supra, 318 S.C. at 498-99, 458 S.E.2d at 540. (Applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice). Instead, Applicant merely pointed to the excerpts missing from transcript without presenting any evidence or testimony as to what actually took place during the portions that were missing. Because Applicant failed to present any credible evidence or testimony on this issue, this Court finds the allegation must be denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

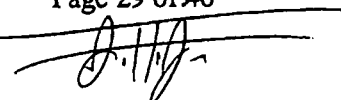
A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on



appeal that constituted reversible error).

“Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is ‘difficult to demonstrate that counsel was incompetent.’” United States v. Mason, No. 3:06-607-CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

“To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

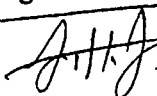


14. Ineffective assistance of Appellate counsel for failure to address the missing portion of the court's charge from the transcript, Transcript p. 331, failure to raise the objection to Jeffrey Dawkin's reading his statement, Transcript pp. 93, failure to raise the motion for mistrial due to Brady violation, Transcript p. 119, failure to raise the objection to the line of questioning regarding Melvin Segar's statement, Transcript p. 261, and failure to raise the motion for a new trial, Transcript p. 339.

This Court finds Applicant's allegation that he received ineffective assistance of appellate counsel for failing to address the missing the portion of the court's jury charge is meritless. This Court notes Applicant merely pointed to the excerpts missing from transcript without presenting any evidence as to what actually took place during the portions that were missing. Notably, Applicant presented no testimony from Appellate Counsel as to why he chose not to address this issue on appeal. This Court notes that Applicant's appellate counsel submitted and Anders brief on Applicant's behalf.

This Court finds Applicant's allegation that he received ineffective assistance of appellate counsel for failing to address the objection to Jeffrey Dawkins reading his statement on redirect is meritless. Notably, Applicant presented no testimony from Appellate Counsel as to why he chose not to address this issue on appeal. Furthermore, Applicant has not shown he was prejudiced by appellate counsel's decision not to brief the issue of Dawkins reading his statement during redirect examination because the Court of Appeals' dismissal of the Anders brief indicates it found no reversible error due to the judge overruling counsel's objection. Furthermore, because Applicant failed to present any credible evidence on this issue, this Court finds the allegation must be denied and dismissed with prejudice.

This Court also finds Applicant's allegation that he received ineffective assistance of appellate counsel for failing to address the motion for a mistrial due to Brady violation is



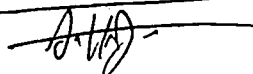
meritless. Furthermore, Applicant has not shown he was prejudiced by appellate counsel's decision to file an Anders brief because the Court of Appeals' dismissal indicates it found no reversible error in denying trial counsel's motion for a mistrial. Accordingly, Applicant has not demonstrated appellate counsel was ineffective. Furthermore, because Applicant failed to present any credible evidence on this issue, this Court finds the allegation must be denied and dismissed with prejudice.

This Court also finds Applicant's allegation that he received ineffective assistance of appellate counsel for failing to address the objection to the line of questioning regarding Melvin Segars' statement is meritless. Furthermore, Applicant has not shown he was prejudiced by appellate counsel's decision to file an Anders brief because the Court of Appeals' dismissal indicates it found no reversible error in the trial court overruling counsel's objection. Furthermore, because Applicant failed to present any credible evidence on this issue, this Court finds the allegation must be denied and dismissed with prejudice.

This Court also finds Applicant's allegation that he received ineffective assistance of appellate counsel for failing to raise the motion for a new trial is meritless. Furthermore, Applicant has not shown he was prejudiced by appellate counsel's decision to file an Anders brief because the Court of Appeals' dismissal indicates it found no reversible in the trial court denying Trial Counsel's motion for a new trial. Furthermore, because Applicant failed to present any credible evidence on this issue, this Court finds the allegation must be denied and dismissed with prejudice.

In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), the South Carolina Supreme Court outlined the Anders procedure as follows:

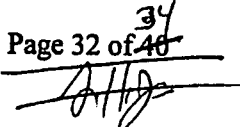
[A]ccording to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the



reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant 'the assistance of counsel to argue the appeal.' The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal.

McKennedy, 348 S.C. at 279, 559 S.E.2d at 855. A presumption of regularity attaches to judicial proceedings, and this presumption should extend to the Court of Appeal's review under the Anders procedure. See Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986) (citations omitted). Accordingly, this Court must presume the Court of Appeals reviewed these issues before dismissing Applicant's direct appeal. See McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) ("Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991))). If the Court of Appeals believed the missing portions of the transcript were problematic, it would have directed counsel to file a merits brief.

Furthermore, the United States Supreme Court has indicated applicants face a difficult burden to prove prejudice in cases where counsel has filed an Anders brief. Smith v. Robbins, 528 U.S. 259, 287 (2000) ("[I]n most cases in which a defendant's appeal has been found, pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous."). The burden is high because "it is reasonable to presume that when the court affirms an Anders appeal it has fully considered and rejected all potential issues that were apparent on the face of the record." Towbridge v. State, 45 So. 3d 484, 487 (Fla. Dist. Ct. App. 2010). The Anders procedure requires the court to independently examine the trial proceedings and consider "any errors apparent on the face of the record." Id. at 486-87 (citations omitted); see also McHam, 404 S.C.



at 475, 746 S.E.2d at 46 (appellate court reviews all preserved issues for merit). The issue of the missing portion of the transcript is clearly apparent from the face of the transcript. Applicant presented no evidence that the Court of Appeals overlooked this issue. Therefore, this Court must presume the Court of Appeals' compliance with the Anders procedure included a review of the missing portion of the transcript, and the Court of Appeals dismissal of the appeal indicated it found no fault with missing portion of the transcript. Accordingly, Applicant has not demonstrated appellate counsel was ineffective. Furthermore, because Applicant failed to present any credible evidence on this issue, this Court finds the allegation must be denied and dismissed with prejudice.

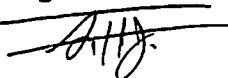
ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

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. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-

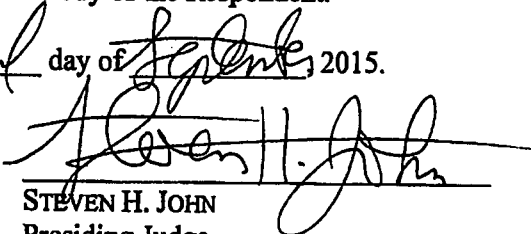



conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

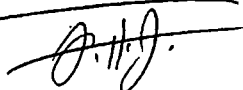
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief 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 2nd day of September, 2015.


STEVEN H. JOHN
Presiding Judge
Third Judicial Circuit


South Carolina



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

ANTWINE MATTHEWS, #340876

Applicant,

v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

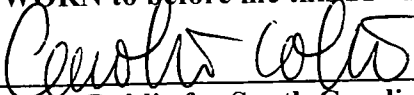
**Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 12725
Columbia, SC 29211**

This 21st day of October, 2015.



DANIEL GOURLEY
Attorney for Respondent

SWORN to before me this 21st day of October, 2015.



Notary Public for South Carolina.
My Commission Expires: 5/20/2025