LAW OFFICE OF

TARA DAWN SHURLING, PA

Attorney and Counselor at Law
3614 Landmark Drive
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(803) 738-8622
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February 24, 2016

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Clinton Folkes, #216506 v. State of South Carolina; 2010-CP-40-7500.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I am also enclosing a Petition to Disqualify SCCID from representing this client on appeal. There were significant allegations of ineffective assistance of appellate counsel raised in this case including some addressing claims against Bob Dudek. I would appreciate your returning two (2) clocked copies to me in the envelope provided. I was court-appointed in this matter. I will wait to turn this file over to the Appellate Division of the South Carolina Commission on Indigent Defense for perfection of this appeal until I hear from the Court concerning the conflict petition. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures
cc: Robert M. Dudek, Chief Appellate Defender for SCCID
Zoe C. Sanders, Esquire
Megan Harrigan Jameson, Assistant Attorney General
Loriene French, South Carolina Office of Appellate Defense
Clinton Folkes, #216506
Lilieth Folkes

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February 24, 2016

Megan Harrigan Jameson, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

RE: Clinton Folkes, #216506 v. State of South Carolina; 2010-CP-40-7500

Dear Ms. Jameson:

Enclosed please find for your records a copy of a Notice of Appeal and a conflict petition that were filed in the above-captioned matter. I was court-appointed in this matter and would normally forward this file to the Appellate Division of the South Carolina Commission on Indigent Defense within a few days. Since I filed a conflict petition for this client, I will hold on to my file until a decision is made on that request. It was a pleasure working with you on this case. I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosure
cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina ✓
Zoe C. Sanders, Esquire
Clinton Folkes, #216506
Lilieth Folkes

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 26 2016
SC SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Presiding Judge

2010-CP-40-7500

CLINTON FOLKES, #216506 Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Petitioner in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal filed on January 14, 2016 denying his Post-Conviction Relief Application, which was not received for Petitioner until January 25, 2016.

Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR PETITIONER

This 24th day of February, 2016.

Other Counsel of Record:

Megan Harrigan Jameson, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Presiding Judge

2010-CP-40-7500

CLINTON FOLKES, #216506 Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Megan Harrigan Jameson, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 24th day of February, 2016.

Tara Dawn Shurling
Attorney and Counsel at Law

SWORN TO BEFORE me this 24th day
of February, 2016.

Notary Public for South Carolina (L.S.)
My Commission Expires: 2/28/24

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2010CP4007500

Clinton #216506 Folkes
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

JEANETTE W. McBRIDE C.C.P. & G.S. RICHLAND COUNTY FILED 2016 JAN 15 AM 9:45

ORDER INFORMATION

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

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

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

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 15 January 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Clinton #216506 Folkes — Tara Dawn Shurling — Brian T. Petrano

Clinton #216506 Folkes
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

JAN 25

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Clinton Folkes, #216506, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2010-CP-40-7500 **ORDER OF DISMISSAL**

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed October 26, 2010. Respondent made its Return on February 8, 2011, requesting an evidentiary hearing be held. An evidentiary hearing was convened July 17, 2014 and September 25, 2014, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office.

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 Richland County Clerk of Court. Applicant was indicted during the November 2007 term of the Richland County Grand Jury for assault and battery with intent to kill (2007-GS-40-06654). E. Deon O'Neil, Esquire, and Luke Shealey, Esquire of the Richland County Public Defender's Office represented Applicant. The State was represented by Assistant Solicitors Heather Weiss and Andrew Rogers for the Fifth Circuit Solicitor's Office. On July 7-9, 2008, Applicant proceeded to jury trial before the Honorable James R. Barber, III, where he was convicted as indicted. On

July 9, 2008, Judge Barber sentenced Applicant to life imprisonment without parole pursuant to S.C. Code Ann. § 17-25-45 based on his prior convictions.

Applicant appealed his conviction and sentence. Appellate Defender M. Celia Robinson of the South Carolina Commission of Indigent Defense-Division of Appellate Defense represented him on this appeal. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Clinton Folkes, 2010-UP-420 (filed September 24, 2010). The Remittitur was sent on October 18, 2010.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations of ineffective assistance of counsel:

1. Ineffective assistance of counsel
   a. "Counsel failed to call key witnesses for the defense;"
   b. "Counsel failed to properly investigate presented by applicant;"
   c. "Counsel failed to object to the use of a knife in the courtroom (State's 25) that was not even used in the crime"; and
   d. "Counsel failed to object to other issues, like closing argument from Solicitor See State v. Simmons."
2. Judicial Error
   a. "The court failed to inform him of his right to put up a defense without having to testify, only that he could remain silent."

On March 12, 2014, Applicant filed an amended application alleging the following additional grounds for relief:

> 1. Trial counsel was ineffective for failing to object to a closing argument by the State in which they told the jury that the difference between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature was whether or not malice existed.
>
> 2. Trial Counsel was ineffective for failing to object when the prosecution erroneously advised the jury that if they found malice existed, they could not find the Applicant guilty of the lesser included offense of ABHAN.
>
> 3. Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the

Applicant of his right to seek certiorari in the Supreme Court of South Carolina.

4. Trial Counsel was ineffective for failing to advise the Applicant of his right to put up a defense regardless of whether he himself testified at his trial.

5. Trial Counsel was ineffective for failing to object to the State introducing testimony concerning other knives alleged to have been carried by the Applicant where said testimony bore no logical relevance to the Applicant's case and constituted evidence of prior bad acts. Trial Tr. p. 190, 11. 5-11.

6. Trial Counsel was ineffective for failing to challenge the position taken by the prosecutor assigned to this case, Heather Weiss, that "this is a mandatory life without parole, so I can't make an offer." Email from Weiss dated November 21, 2007.

7. Trial Counsel provided the Applicant ineffective assistance of counsel when he neglected to investigate Assistant Solicitor Weiss's claim that she could not extend any plea offers in this case due to the Applicant's exposure to a mandatory life without parole sentence.

8. Trial Counsel was ineffective for advising the jury in closing argument that the trial judge was going to instruct [the jury] that the absence of malice is not an element of assault and battery of a high and aggravated nature with determining in advance that the Court would in fact issue such an instruction.

9. Trial Counsel was ineffective for neglecting to remind the jury that, not only was there no blood visible on the shirt the State alleged belonged to the Applicant, but the State's own witness testified that no DNA was found on the shirt when it was analyzed. Trial Tr. p. 295, 1 15-296, 1. 1 and Trial Tr. p. 404, 1.23- p. 405, 1. 7.

10. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel when he conceded that the Applicant was not entitled to advance a claim of self-defense where under a reasonable interpretation of the facts in this case the Applicant had a colorable claim to that defense. Trial Tr. p. 330,11. 8-13.

11. Trial Counsel erred in failing to object to hearsay testimony from Investigator Robert McCracken advising that when he was dispatched to the scene he "was told someone was cut severely." Trial Tr. p. 300, 11. 7-13.

12. Trial Counsel was ineffective for neglecting to argue that State's Exhibit No. 31, a beer bottle seized at the time of the Applicant's arrest, should not be admitted into evidence where the bottle, broken after it was in the possession of law enforcement, was sealed in a bag and could not be examined by the jury, and where the Investigator who identified this exhibit prior to its admission could not positively identify what type of beet the bottle was from. Trial Tr. p. 308, 1. 17- p. 310, 1. 12.

13. Trial Counsel was ineffective for failing to object to the introduction of State's Exhibit No. 32, the tote bag seized from the Applicant at the time of his arrest, where the bag was introduced with clothing in it which was not in the bag at the time it was seized. Trial Tr. p. 323, 1. 24- p. 324, 1. 22.

14. Trial Counsel provided the Applicant ineffective assistance of counsel when he failed to introduce testimony from City of Columbia Police Department Officer Battiste to establish that the clothing packed under the sleeping bag inside of State's Exhibit 32 was in fact placed there by him after the Applicant's clothing was taken from him when he was made to strip and put on detention center uniform at the time he was booked.

15. Trial Counsel was ineffective for failing to establish for the jury that the clothing locked in the bottom of State's Exhibit No. 32 was the clothing the Applicant was wearing at the time of his arrest and had not been hidden by him under the sleeping bag found in that exhibit.

16. Trial Counsel was ineffective for failing to demonstrate that the clothing introduced inside State's Exhibit No. 28, a tote bag, was the same clothing worn by the Applicant in a photograph of the Applicant taken by law enforcement at the scene after he was taken into custody.

17. Trial Counsel was ineffective in failing to object to the use of a knife. State's Exhibit No. 25 for ID only, in their examination of the victim where the knife was not the one used in the incident which led to the Applicant's charge and was identified by the victim as being only similar to the weapon used in this case.

18. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel when he neglected to introduce testimony, and employment records, which would have demonstrated that the Applicant was gainfully employed the week the incident involved in the Applicant's charges occurred, and that he had been at work just prior to going to Finley Park.

19. Trial Counsel erred in failing to obtain motel records which would have proven that at the time of this incident the Applicant had been living in a motel and was not homeless as the State claimed.

20. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence. Trial Tr. p. 394, 11.11-19.

21. Appellate Counsel was ineffective in that she neglected to brief the error of the trial court in overruling the Applicant's objection to the jury instruction, and supplemental charge, given on ABHAN and limited her presentation on direct appeal to the failure of the trial court to issue the specific charge on ABHAN requested by Trial Counsel. Objection at Trial Tr. p. 422, 11. 17-23.

At the evidentiary hearing, Applicant proceeded forward on the twenty-one allegations as set forth in this amended application. In support of his application, he testified on his own behalf and presented testimony from Chief Appellate Defender Robert Dudek, former Appellate Defender M. Celia Robinson, Officer David Battiste, and trial counsels Deon O'Neil and Luke Shealey.

SUMMARY OF EVIDENCE ADDUCED AT TRIAL

On the evening of July 22, 2007, Applicant arrived at Finley Park very intoxicated and looking for a fight. Applicant first approached James Reddick and confronted him, seemingly unhappy with Reddick's hat selection. Applicant pulled a knife and Reddick backed away. Applicant then approached Karem Jones in an aggressive manner. Jones and Applicant were familiar with each other and worked together at Action Labor. Applicant appeared to be angry with Jones for talking to his former girlfriend, Tiffany Briggs, with whom he had recently broken up. Applicant began arguing with Jones and made various threats of physical harm. Applicant held a bottle of beer in a brown paper bag in one hand; he swung out at Jones with this hand and the bottle came out of the bag but did not hit Jones. Applicant then swung his fist and hit Jones in the eye. Jones responded by hitting Applicant twice, once with each hand. Applicant then fell

and Jones either fell on top of him or leaned down over him. Applicant then pulled a knife out and reached out and cut Jones across the throat. Jones also sustained another cut to his throat and one to his arm. Jones testified he feared for his life and thought he was going to die from the neck injury.

Applicant then jumped up and screamed "I'm going to fucking kill you" while charging Jones. Jones ran into a phone booth and called the police. Several witnesses approached Jones and assisted with his wounds. Applicant then struck Briggs in the back and fled the scene, throwing the shirt he was wearing in the trashcan on his way out of the park. Law enforcement arrived shortly thereafter and took witness statements from several bystanders, including Briggs. Briggs identified Applicant as the assailant and provided a description of him. Law enforcement found Applicant nearby a short time later and arrested him. Jones was taken by ambulance to Richland Memorial Hospital, where his wounds were treated and he was admitted. While at the hospital, Jones spoke with investigators and identified Applicant as his assailant. Jones was released from the hospital the following evening.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented testimony from Chief Appellate Defender Robert Dudek, former Appellate Defender M. Celia Robinson, Officer David Battiste, and trial counsels Deon O'Neil and Luke Shealey. Chief Appellate Defender Robert Dudek testified first. He testified that he has been with the Division of Appellate Defense for over twenty-four years and that he became chief of the division in 2009. He testified that he has handled over 2,400 appeals personally. Dudek testified that he did not handle Applicant's appeal, which was assigned to Appellate Defender Celia Robinson. He testified that he has not read the transcript of Applicant's trial and has no knowledge of Applicant's case. He testified that Robinson left the

division on September 14, 2010. He testified that the South Carolina Court of Appeals' decision affirming Applicant's conviction and sentence was issued on September 24, 2010, after Robinson had left the office. He testified that the opinion from the Court of Appeals is a very brief, unpublished summary opinion citing only a few cases. He testified that he does not recall assigning another attorney to handle Applicant's case after Robinson left the office and is unsure if he personally reviewed the Court of Appeals decision. However, he testified he does recall reviewing Robinson's opinions as they arrived following her departure. He testified that he had no recollection as to whether he decided not to petition for rehearing and ultimately for certiorari to the South Carolina Supreme Court in Applicant's case. He testified that he does not petition for rehearing and certiorari on every case where he is unsuccessful and estimated he files petitions in approximately sixty percent of the cases he loses. He testified that the Supreme Court grants certiorari in a very small amount of cases, which he estimated to be between ten to fifteen percent. He testified that certiorari is more likely to be granted from published Court of Appeals opinions, unlike Applicant's unpublished opinion. He testified that he does not agree with the Court of Appeals' decision in Applicant's case but acknowledged that this is often the case. He testified that his office is unsuccessful on a vast majority of appeals due to the high burden an appellant faces. He testified that his job is "probably one of the hardest jobs in the world" because of this. He testified that it is solely the attorney of record's decision to decide to petition for rehearing and certiorari and that the Court no longer accepts *pro se* petitions.

He testified that he had no independent knowledge of a September 28, 2010, letter sent to Applicant from the division purportedly signed by Robinson. He testified that Robinson had left the office on the date the letter was written and that it was likely signed by her paralegal. He testified that there is no office policy allowing non-attorneys to sign on behalf of attorneys. He

testified that the letter is a form letter that is traditionally sent to applicants who have been unsuccessful on their PCR appeals and was sent to Applicant in error. He testified that the letter provides erroneous information to Applicant that his petition for certiorari has been denied and counsel has been relieved. He testified that Robinson was the first attorney to leave the office while he was division chief and there was no procedure in place to ensure that correct procedures were followed when an attorney left. He testified that since Applicant's case, procedures and safeguards have been put in place to ensure that attorneys review opinions and make a decision as to whether to petition for rehearing and certiorari when the assigned attorney has left the office.

Following Dudek's testimony, Applicant's appellate counsel Celia Robinson testified. She testified that she was an appellate defender at the Division of Appellate Defense for approximately three years and that she left the office in 2010. She testified that she was no longer at the division when the Court of Appeals issued its opinion in Applicant's case. She testified that she did not sign the September 28, 2010, letter sent to Applicant and that the handwriting appeared to belong to her former paralegal. She testified that she was not contacted by anyone at the Division of Appellate Defense regarding Applicant's case and conceded that she did not follow-up with the division regarding Applicant's case or any of her other pending cases. She testified that she does not know if any of her cases were reviewed after she left the division or what happened to her pending cases. She testified that she did not make a decision as to whether to seek certiorari in Applicant's case but would have petitioned for rehearing and certiorari if she had still been at the office. She testified that she thought Applicant's case was a "winner" and should have been reversed by the Court of Appeals. She elaborated that she believed the trial court's jury instructions on ABWIK and ABHAN were in error and properly preserved for

appellate review. However, she acknowledged that she was successful at the Court of Appeals "very infrequently" and that a vast majority of convictions are upheld on appeal, even when she believes there is a meritorious ground for reversal.

Next, Applicant called Officer David Battiste from the Columbia Police Department. Battiste testified that he vaguely recalled his involvement in Applicant's case and that he could not recognize Applicant. He testified that he did recall being the officer who took Applicant to the Alvin S. Glenn Detention Center following his arrest. He testified that he took all of Applicant's clothing and shoes at the direction of the investigating officer. He could not recall if Applicant had a bag or any other items with him when he was taken into custody. He testified that he took Applicant's clothing to the property room at the detention center and logged the items individually. He could not recall what he did next with the clothing. Battiste recognized his handwriting on the inventory tag to one of the bags, which indicated a sleeping bag was inside of it, but he has no independent recollection of inventorying the bag or what else was inside, if anything. He testified that he has no recollection as to what Applicant was wearing when he was arrested.

Trial counsel Deon O'Neil testified next. He testified that he was appointed to represent Applicant during his tenure at the Richland County Public Defender's Office. He testified that he was not the first public defender assigned to Applicant's case and had taken over representation when Applicant's former attorney left the office. He testified that he asked fellow public defender Luke Shealey to act as second chair a few months prior to Applicant's July 2008 trial. He testified that previous counsel had investigated Applicant's prior charges to establish that he was properly eligible for LWOP. He testified that he argued to the jury that the wounds the

victim received were not serious and his client should not be convicted of ABWIK based on such minor injuries.

Regarding Applicant's first and second allegations, he testified that he did not object to the State's closing argument regarding the difference between ABWIK and ABHAN being an absence of malice because he generally tries to reserve his objections during closing arguments to egregious violations and he did not believe this argument to be egregious. He also testified that he did not object because he had the final closing argument and could instead respond to the State's argument in his own closing. He testified that it was his position at the time of trial that the jury could still convict Applicant of the lesser included offense of ABHAN if malice existed, which he argued to the trial court unsuccessfully. He elaborated that he submitted a jury instruction to the trial court stating that it was not necessary for the jury to find absence of malice to convict Applicant of the lesser included offense but the trial court refused to charge it.

Regarding allegation number four, O'Neil testified that he discussed Applicant's right to testify with him, as well as the benefits and drawbacks to him taking the stand in his defense. He testified that he advised Applicant that he could be impeached with some of his prior offenses but that he would move to exclude some offenses as unduly prejudicial. He testified that he explained to Applicant that even if he did not testify, he could still present other witnesses and evidence. He testified he advised Applicant that if he did not put up any witnesses or present any of his own evidence, he would get to have the final closing argument and the benefits of this. He testified that he advised Applicant it would have been very beneficial to his defense if he testified, but Applicant did not want to take the stand. He testified that he knew a few months before trial that Applicant did not want to testify, as the case was originally called to trial in May then continued until July.

Concerning allegation number five, O'Neil testified that he recalled the State questioning a witness about Applicant carrying other knives and whether Applicant was known to arm himself. He testified that he did not object to this line of questioning because the witness did not give a clear answer and the solicitor was unable to elicit the desired response from the witness. He elaborated that the witness was extremely soft spoken and the jury could not hear what she was saying, as evidenced by the trial court asking the witness to speak up during this line of questioning. He testified that he did not object because he did not want to highlight this issue to the jury, particularly in light of the jury not being able to understand the witness' response.

When questioned regarding allegations number six and seven, O'Neil testified that he explored plea deals with the State with the lead prosecutor, Heather Weiss. He testified he received an email dated November 26, 2007, from Weiss, which was forwarded from Applicant's former counsel, where Weiss indicated she could not make any offers because the State was seeking mandatory life without parole (LWOP) based on Applicant's prior record. He testified that he recalled the Fifth Circuit Solicitor's Office typically would not make any offers once LWOP notice had been served, but would generally make offers to a numerical sentence prior to service. He testified that he was not surprised by this email and stance from Weiss, as it was in accordance with their office policy at the time. He elaborated that even after receiving that email he continued negotiating a plea on Applicant's behalf and received three additional offers from Weiss: one for a ten year sentence, one for a twenty year sentence, and one for a fifteen year sentence that came on the eve of trial. He testified that he presented all of these offers to Applicant and explained that if he accepted an offer for a numerical term of years, he would not receive a life sentence. He testified that Applicant turned each offer down, insisting

that he would only accept an offer for a probationary sentence. He testified that he vigorously negotiated for a probationary sentence, but that the State refused to extend such a lenient offer.

Regarding allegation number eight, O'Neil testified that he advised the jury during his closing argument that the trial court was going to instruct the jury that the absence of malice is not an element of ABHAN. He testified he had requested the court give this charge, but had not received a ruling from the court prior to argument. He testified that another one of his requests along with his proposed jury instructions was for a ruling from the court prior to argument if it planned to deny the request. He testified that when he did not receive a denial from the court prior to his argument, the court had agreed to charge his requested instructions.

As to allegation number nine, O'Neil testified that he reminded the jury during his closing argument that no blood was found on Applicant's shirt, but he was unsure as to why he did not tell the jury no DNA was recovered from the shirt. However, he testified that he thinks his argument that no blood was found covered this issue sufficiently. He elaborated that Applicant disputed that the shirt in question, which was found in a trashcan, was even his, despite numerous witnesses testifying it was his. He testified that such an argument regarding DNA would have been irrelevant to Applicant's case, as all the witnesses and victim knew Applicant and identity was not an issue in the case. He testified he does not like to harp on collateral issues of little to no importance because it annoys and frustrates the jury, and the DNA argument likely would have done so since identity was not at issue. Furthermore, he testified that he is not sure if the shirt was ever tested for Applicant's DNA but likely was not tested for DNA because multiple witnesses all testified he was wearing that shirt during the attack.

Regarding allegation number ten that he failed to argue Applicant was entitled to a self-defense charge, O'Neil testified that he agreed with the trial court that Applicant was not entitled

to a self-defense charge because the evidence showed he swung first and initiated the fight. He elaborated that because Applicant refused to take the stand, there was no evidence to combat the victim's allegation that Applicant was the aggressor. He acknowledged that the victim was on top of Applicant when he was cut and the victim was younger, fitter, and larger. He testified that he made this argument to the jury during his closing. However, he stressed that there was no testimony to combat the victim and witness testimony that Applicant was the aggressor because Applicant elected not to testify. He elaborated that if Applicant had testified, he would have requested a self-defense charge.

When questioned regarding allegation number eleven, O'Neil testified that he did not object to the characterization of the victim's injury as a severe cut because he was able to show the injury was actually very minor during the medical testimony. He testified that based on his experience, juries give more significance to medical testimony so he does not think this comment by law enforcement was prejudicial to his client. He expounded that the wound was classified as one level more serious than superficial, making it a very shallow, non-invasive wound. He testified that one of the treating doctors said the wound was "simply superficial" and required copious irrigation.

In response to allegation number twelve about the broken beer bottle, O'Neil testified that he did not think to object to its admissibility based on it being broken based on a lack of brand indication. He testified that Shealey did object based on the bottle being in an altered state, which was overruled by the trial court.

In response to allegations number fifteen and sixteen, O'Neil testified that he discussed what happened to Applicant's clothing when he was arrested with his client. He testified Applicant informed him that law enforcement took all of his clothing when he was arrested. He

testified that he did not move to introduce the clothing Applicant was wearing into evidence because any minimal benefit to be derived would have been significantly outweighed by the loss of the last argument. He testified he inquired with the detention center to see if it had Applicant's clothing and learned the jail did not have the clothing. He testified that he reviewed all the physical evidence with the State prior to trial but is unsure if clothing was included or if he examined it.

Regarding allegation number seventeen, O'Neil testified that the knife was only used for demonstrative purposes and was not introduced into evidence. He testified that he successfully objected to the knife coming into evidence. He testified that the knife used in the demonstration was not the actual knife used to cut the victim, although it was similar to the witness descriptions.

When questioned regarding allegations eighteen and nineteen, O'Neil testified that he had obtained employment records for Applicant showing that he was working at Action Labor prior to his arrest. He testified that the records also showed that he had worked eight hours the day of the incident. He testified that he tried to find a supervisor or other manager who could independently corroborate that Applicant had worked that day or what hour he had worked, but he was unsuccessful because no supervisors recalled seeing Applicant that day. He testified that due to this lack of independent verification, he decided not to introduce the records because they would have been of little value. He elaborated again that identification was not at issue, as all witnesses and the victim knew Applicant. He also testified that any small benefit gleaned from introducing the records would be outweighed by the loss of the last argument. He testified that Applicant also told him that he had been living in a motel prior to his arrest. O'Neil testified he went to the motel and talked to potential witnesses but decided against delving into this. He

elaborated that where Applicant lived was not pertinent to the case and would have distracted from the case theory, as well as cost Applicant the final argument.

Following O'Neil's testimony, Applicant called Luke Shealey to testify. Shealey acted as second-chair on Applicant's case and handled roughly half of the witnesses and argument at trial. He testified that O'Neil asked him to assist a couple of months prior to the trial and that he reviewed all the evidence and discovery material prior to trial. He testified that their initial trial strategy was that Applicant was not involved in the fight, but that the strategy evolved to a goal of showing the jury the injury was minor and did not amount to ABWIK. He testified that he was not involved with preparing the proposed jury instructions. He testified that in hindsight, he would have now objected to the court's jury instructions on ABWIK and ABHAN but acknowledged that O'Neil had requested these jury instructions and the court decline to give the requested charges. He testified that in hindsight, he would have insisted on a ruling from the court regarding the proposed jury instructions prior to closing arguments. He testified this could have avoided O'Neil arguing to the jury that the court would instruct something that was never instructed. He testified he also would have objected to the prosecutor's closing argument regarding ABHAN and ABWIK now in hindsight. He testified that his trial technique regarding closings is to object to everything, regardless of how egregious the error.

Shealey testified he did not recall speaking to Applicant regarding his decision to testify, but indicated that was something O'Neil would have handled. He also testified that O'Neil handled plea negotiations with the State. He testified that he should have objected to testimony regarding Applicant's tendency to carry a knife. He testified that he now thinks it would have been prudent to mention the lack of DNA on Applicant's shirt in closing argument, not just the lack of blood. He conceded he was unsure if the shirt was ever tested for Applicant's DNA. He

theory was that Applicant was not the assailant, but if he were, then it was only a minor injury not warranting an ABWIK conviction. He acknowledged that numerous witnesses all testified that Applicant not only was involved in the fight, but also was the instigator. He acknowledged that James Reddick, a witness to the altercation, testified at trial that Applicant had also pulled a knife on him immediately before the stabbing. He testified he would have moved for a pre-trial immunity hearing if he had the case today.

Applicant testified on his own behalf. He testified that he was advised before trial that he would receive a mandatory life without parole sentence if convicted of ABWIK based on his prior record. He testified he was aware of various plea offers from the State, including the offer for a ten year determinate sentence. He testified that he wanted to plead guilty to the lesser included offense of ABHAN to avoid LWOP. He testified that his attorneys never advised him regarding impeachment with his prior record if he testified or that they would move to exclude the use of his prior convictions similar to this conviction. He testified that he would have been willing to testify in his defense if his attorneys had better explained self-defense to him. He testified that he had not been drinking at all on the day of the incident.

Regarding appellate counsel, Applicant testified that he was never notified that Robinson left the division of appellate defense and was no longer representing him. He testified he was never contacted regarding petitioning for rehearing or certiorari. He testified he would have wanted his attorney to petition for rehearing and certiorari to have his case reviewed by the South Carolina Supreme Court.

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 hearings. This Court has further had the opportunity to

testified he also would have objected to the statement from law enforcement dispatch describing the victim's cut as severe. He testified he could not recall whether the defense objected to the knife reenactment but that he should have objected if the knife were a different weapon, particularly a "nastier-looking weapon." He testified that the record reflects the knife used for demonstrative purposes was similar to the weapon described by witnesses. He testified he objected to the introduction of the beer bottle due to its altered state.

Shealey testified that he was aware Applicant worked the day of the incident and that the defense had obtained records showing this. He testified in hindsight that the defense should have introduced these records to combat the State's characterization of Applicant as intoxicated. He testified that he is not sure what time Applicant started working that day or what time he finished working. He testified that he was unsure if the defense tried to obtain any motel records, but that likely would have been a task O'Neil would have handled. He testified motel records would have been useful to combat the State's assertions that Applicant was homeless and stored clothing in Finley Park. He testified he could not recall if Applicant told him that he was living in a motel and not homeless. He acknowledged that whether Applicant was homeless was not the central issue to the case.

Regarding the lack of a self-defense instruction, Shealey testified that now, with seven more years of practicing law and the benefit of hindsight, the defense should have requested a self-defense instruction. He testified that he would have stressed the laws of self-defense to Applicant and how advantageous they could be in his case. He testified that he would have explored the issue of self-defense with Applicant more to see if it was a viable defense. He testified that when he became involved with the case, Applicant had consistently said he was not involved in the incident, not that he acted in self-defense. He testified that this is why the defense

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668

After careful review of the entire record, including the testimony and exhibits presented at the evidentiary hearing, based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's rulings in regards to each of Applicant's specific allegations of ineffective assistance of counsel:

Allegation No. 1: Trial counsel was ineffective for failing to object to a closing argument by the State informing the jury that the difference between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature was whether or not malice existed

Applicant alleges that trial counsel was ineffective for failing to object to the State's closing argument that the decisive factor between ABWIK and the lesser-included offense of ABHAN is whether malice exists. During its closing argument at Applicant's trial, the State argued the law of ABWIK to the jury and the requisite element of malice. Specifically, the State argued:

> Now I'm going to talk about the actual charge itself. The defendant has been charged with assault and battery with intent to kill. It's actually a misnomer. The law calls it assault and battery with intent to kill. But when it's defined, it does not include a specific intent to kill.
> What the law says, what the judge will instruct you, that although this is the title, what the State must prove beyond a reasonable doubt is that there was an unlawful act of violent physical injury to the person of another with malice aforethought, express or implied. Express or implied malice.
>
> The judge is also going to charge assault and battery of a high and aggravated nature. Ladies and gentlemen, I submit to you that's not what this is. If it's assault and battery of a high and aggravated nature with malice, it's assault and battery with intent to kill.

Tr. p. 387-88. The State then argued:

> What is in dispute today is whether there was malice aforethought, express or implied. And that's going to be the difference between assault and battery of a high and aggravated nature and assault and battery with intent to kill.

Tr. p. 389. The State then explained express and implied malice to the jury and argued that it had proven Applicant was guilty of ABWIK based on either express or implied malice. Tr. p. 388-391. Applicant argues that this was an improper statement of the law, that counsel should have objected to this charge, and that counsel's failure to object was ineffective.

This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. Specifically, this Court finds that the State's argument was proper based on the law of South Carolina and any objection by counsel would have been overruled.

The offense of ABWIK is defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007); see State v. Sutton, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000) ("AB[W]IK is an unlawful act of violent nature to the person of another with malice

aforethought, either express or implied. The often cited language to describe AB[W]IK is: if the victim had died from the injury, the defendant would have been guilty of murder. Furthermore, a specific intent is not required to commit ABIK." (citations omitted)). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005). The four possible mental states encompassed by malice aforethought are: (1) an intent to kill; (2) an intent to inflict grievous bodily harm; (3) extremely reckless indifference to the value of human life; and (4) an intent to commit a felony. Kinard, 373 S.C. at 503-04, 646 S.E.2d at 169. ABWIK is a general intent crime, demonstrated by acts and conduct from which a jury may naturally and reasonably infer intent. State v. Coleman, 342 SC 172176, 536 S.E.2d 387, 389 (Ct. App. 2000). Malice is "the wrongful intent to injure another and indicates a wicked or depraved spirit intent on wrongdoing." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998); See also Foust, 325 S.C. at 16, n. 4, 479 S.E.2d at 52 ("[E]vidence of the character of the means or instrument used, **manner in which it was used**, purpose to be accomplished, **resulting wounds or injuries**, etc., are admissible to show intent with which the assault was committed." (emphasis added)).

Similarly, ABHAN is defined as an unlawful act of violent injury accompanied by circumstances of aggravation. State v. Geiger, 605, 635 S.E.2d 669, 672 (Ct. App. 2006). As an element of ABHAN, circumstances of aggravation include the use of a deadly weapon, intent to commit a felony, and the infliction of serious bodily injury. Id. at 605-606, 635 S.E.2d at 672. Case law in South Carolina has found that absence of malice is not an element of ABHAN. See generally State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000); State v. Pilgrim, 320 S.C. 409, 465 S.E.2d 108 (Ct. App. 1995) (Pilgrim I), aff'd as modified State v. Pilgrim, 326 S.C. 24, 482 S.E.2d

562 (1997) (Pilgrim II); State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002); Hill v. State, 350 S.C. 465, 567 S.E.2d 847 (2002). However, in each of these cases, ABHAN was not charged as a lesser included offense of ABWIK, a crucial distinction in Applicant's case.

A defendant is only entitled to an instruction on a lesser included offense when the evidence warrants such an instruction. See State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999) ("A lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge a lesser included offense where there is no evidence that the defendant committed the lesser rather than the greater offense."). If the jury finds that the State has proven the requisite elements of the greater offense as indicted rather than the lesser included offense, the jury must convict the defendant of the greater offense. Therefore, when a defendant is indicted for ABWIK and the court charges the jury on the lesser included offense of ABHAN, the jury is compelled to convict him of ABWIK rather than the lesser included offense if it finds the State has proven all elements of ABWIK beyond a reasonable doubt. Accordingly, the only logical deduction is that the crucial difference between ABWIK and ABHAN when ABHAN is charged as a lesser included offense is whether the defendant acted with malice.

In Applicant's case, the State's argument was a proper application of the law and was not objectionable. Counsel acted in accordance with professional norms when he did not object to the argument in question. Also, Applicant cannot establish any prejudice stemming from this allegation, as the argument was proper and any objection from counsel would have been overruled. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 2: Trial Counsel was ineffective for failing to object when the prosecution erroneously advised the jury that if they found malice existed, they could not find the Applicant guilty of the lesser included offense of ABHAN

Similar to allegation number 1, Applicant alleges that trial counsel was ineffective for failing to object to the State's closing argument that the jury must find Applicant guilty of ABWIK if they found he acted with malice. As discussed above, this Court finds that this was a proper argument for the State to make to the jury. Accordingly, Applicant cannot establish either deficiency or any resulting prejudice. This allegation must be denied and dismissed with prejudice.

Allegation No. 3: Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the Applicant of his right to seek certiorari in the Supreme Court of South Carolina

Applicant alleges that appellate counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals and an eventual Petition for a Writ of Certiorari to the South Carolina Supreme Court. At the evidentiary hearing, Applicant's appellate counsel Celia Robinson testified that she would have petitioned for rehearing at the Court of Appeals and then for certiorari at the Supreme Court but that she had already left the Division of Appellate Defense when the Court of Appeals issued its opinion in Applicant's case. Both she and Chief Appellate Defender Dudek acknowledged that the Court's opinion in Applicant's case was unpublished and summary in nature. Both also acknowledged that it is an attorney's decision, not a defendant's, whether to petition for rehearing and certiorari to the Supreme Court. Both also acknowledged that a review by the Supreme Court would have been discretionary and that Applicant did not have a right for Supreme Court review of his case.

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

"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).

An individual has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review. Wainwright v. Torna, 455 U.S. 586, (1982) (no Sixth Amendment right to counsel in pursuing discretionary appeal); see also Ross v. Moffitt, 417 U.S. 600 (1974) (no Fourteenth Amendment right to counsel when pursuing discretionary appeal after an appeal of right); State v. Clinkscales, 318 S.C. 513, 458 S.E.2d 548 (1995) (Sixth Amendment right to counsel "extends only to the first right of appeal").

The South Carolina Supreme Court has explicitly held that appellate counsel has no duty "to pursue regrading and or to pursue rehearing and/or certiorari following the decision of the Court of Appeals in a criminal direct appeal." Douglas v. State, 369 S.C. 213, 215-16, 631 S.E.2d 542, 543-44 (2006). The Court further stated:

> The imposition of such a duty would conflict with this Court's explanation in In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 471 S.E.2d 454 (1990), that the Court of Appeals was created to reduce the State's appellate backlog." Id. A holding that certiorari must be sought whenever requested would increase this Court's workload by increasing the number of criminal writs of certiorari to the Court of Appeals. This Court "reviews [Court of Appeals] decisions by writ of certiorari only where special reasons justify exercise of that power." Id. We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion. Cf. Jones v. Barnes, 463 U.S. 745 (1983) (Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal).

Id.

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 . . . 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 . . ."). Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "'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)).

Applying Douglas and its progeny of cases to this case, this Court finds that this allegation must be denied and dismissed with prejudice. Appellate counsel had no duty to petition for rehearing or to the Supreme Court for discretionary review. Furthermore, Applicant had no right to appellate review from the Supreme Court following his full and complete review by the Court of Appeals. Applicant cannot establish deficiency or prejudice as to this allegation, which must be denied and dismissed with prejudice.

Allegation No. 4: Trial Counsel was ineffective for failing to advise the Applicant of his right to put up a defense regardless of whether he himself testified at his trial

Applicant alleges that trial counsel failed to advise him that he could present a defense irrespective of whether he testified. At the evidentiary hearing, Applicant testified he would have testified on his own behalf if counsel had fully explained self-defense to him and stressed the importance of his testimony to a self-defense claim. O'Neil testified that he discussed Applicant's right to testify with him, as well as the benefits and drawbacks to him taking the stand in his defense. He testified that he advised Applicant that he could be impeached with some of his prior offenses but that he would move to exclude some offenses as unduly prejudicial. He testified that he explained to Applicant that even if he did not testify, he could still present other witnesses and evidence. He testified he advised Applicant that if he did not put up any witnesses or present any of his own evidence, he would get to have the final closing argument and the benefits of this. He testified that he advised Applicant it would have been very beneficial to his defense if he testified, but Applicant did not want to take the stand. He testified that he knew a few months before trial that Applicant did not want to testify, as the case was originally called to trial in May then continued until July. Counsel testified that he made the strategic decision not to put up a defense after Applicant decided not to testify, as any marginal

benefit would be significantly outweighed by the loss of the final argument. After having an opportunity to weigh the credibility of Applicant and O'Neil, this Court finds that O'Neil's testimony regarding this allegation should be afforded great weight. This Court finds that O'Neil fully advised Applicant of his right to testify, his right to remain silent, and his right to put up a defense regardless of whether he testified. This Court also finds that counsel explained the benefits and drawbacks of putting up a defense with Applicant, and then he made a strategic decision not to put up a defense after weighing those benefits and drawbacks. This Court finds that trial counsel's performance was not deficient. See Smith, 386 S.C. at 568, 689 S.E.2d at 633 (holding when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."

Furthermore, this Court finds that Applicant cannot establish any resulting prejudice, as the result of Applicant's proceeding would not have been different but for counsel explaining Applicant that he was entitled to put on a defense even if he did not testify. The only evidence that Applicant presented beyond his assertions of self-defense at the evidentiary hearing is that he was not homeless and he was employed, which are both collateral issues at best. Neither would have had any impact on his case. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation No. 5: Trial Counsel was ineffective for failing to object to the State introducing testimony concerning other knives alleged to have been carried by Applicant

Applicant alleges that trial counsel was ineffective for failing to object to testimony regarding Applicant's habit of arming himself with knives. Applicant contends that this testimony "bore no logical relevance to his case" and "constituted evidence of prior bad acts." The particular testimony that Applicant finds problematic was introduced through Jerome

Patrick, a witness for the State who worked with Applicant at Action Labor and witnessed the altercation at the park. See Tr. p. 190 lines 5-11. During Applicant's trial, Patrick testified that he and Applicant were assigned knives at their roofing job and that they used the knives daily. Tr. p. 190. Patrick testified that he left his knives on the job site, but that he had seen Applicant with the knifes outside of work. Tr. p. 190. During this line of questioning, the trial court instructed the witness to speak up.

When questioned regarding this allegation at the evidentiary hearing, O'Neil testified that he did not object to this line of questioning because the witness did not give a clear answer and the solicitor was unable to elicit the desired response from the witness. He elaborated that the witness was extremely soft spoken and the jury could not hear what she was saying, as evidenced by the trial court asking the witness to speak up during this line of questioning. He testified that he did not object because he did not want to highlight this issue to the jury, particularly in light of the jury not being able to hear the witness' response.

This Court finds that this allegation must be denied and dismissed with prejudice, as there is no reasonable likelihood that this testimony had any impact on Applicant's case. Numerous witnesses testified that they saw Applicant with a knife at the park on the day of the incident. The uncontested testimony is that Applicant previously pulled the knife on James Reddick in a threatening manner before eventually using the knife on Jones. Whether Applicant had a habit of carrying his work knives after hours is of no significance in light of the overwhelming and uncontroverted testimony that he was indeed armed with a knife on the day in question. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice. See Strickland 466 U.S. 668 ("A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.")

Allegation No. 6: Trial Counsel was ineffective for failing to challenge the position taken by the prosecutor assigned to this case that she could no extend any plea offers because Applicant was eligible for LWOP

Applicant asserts that trial counsel was ineffective for failing to challenge the prosecuting assistant solicitor's position that she could not extend any plea offers to Applicant because he was eligible for LWOP based on his prior convictions. In support of this allegation, Applicant entered into evidence an email from prosecuting assistant solicitor, Heather Weiss, sent to Applicant's former counsel Kristy Grafton, which was then subsequently forwarded to O'Neil. However, this allegation is sharply refuted by testimony of trial counsels and the case notes entered as an exhibit for Applicant, both which indicate plea negotiations were ongoing after this email and the State made three plea offers to Applicant.

O'Neil testified that he explored plea deals with the State with the lead prosecutor, Heather Weiss. He testified he received an email dated November 26, 2007, from Weiss, forwarded from Applicant's former counsel, where Weiss indicated she could not make any offers because the State was seeking mandatory LWOP based on Applicant's prior record. He testified that he recalled the Fifth Circuit Solicitor's Office typically would not make any offers once LWOP notice had been served but would generally make offers to a numerical sentence prior to service. He testified that he was not surprised by this email and stance from Weiss, as it was in accordance with their office policy at the time. He elaborated that even after receiving that email he continued negotiating a plea on Applicant's behalf and received three additional offers from Weiss: one for a ten year sentence, one for a twenty year sentence, and one for a fifteen year sentence that came on the eve of trial. He testified that he presented all of these

offers to Applicant and explained that if he accepted an offer for a numerical term of years, he would not receive a life sentence. He testified that Applicant turned each offer down, insisting that he would only accept an offer for a probationary sentence. He testified that he vigorously negotiated for a probationary sentence, but the State refused to extend such a lenient offer. O'Neil's case notes, entered into evidence as an exhibit by Applicant, corroborate this testimony.

This Court finds that counsel performed diligently in trying to secure a favorable plea offer for his client, even after receiving the email in question from Weiss. Counsel was able to negotiate three plea offers, one for a little as ten years, which were all rejected by Applicant. Counsel was not derelict in his duties to Applicant in regards to this allegation, which must be denied and dismissed with prejudice.

Allegation No. 7: Trial Counsel was ineffective for neglecting to investigate Weiss' claims that she could not extend any plea offers to Applicant based on his LWOP eligibility

As previously discussed above in allegation number six, this Court finds that Applicant was extended three plea offers after the email in question. Therefore, this allegation is wholly without merit and must be denied and dismissed with prejudice.

Allegation No. 8: Trial counsel was ineffective for advising the jury in closing argument that the trial judge was going to instruct them that the absence of malice is not an element of assault and battery of a high and aggravated nature without determining in advance that the Court would in fact issue such an instruction

Applicant asserts that counsel was ineffective for telling the jury that the trial court would instruct them that the absence of malice was not an element of ABHAN. Applicant also argues that trial counsel was ineffective for making this argument before securing a ruling from the trial court as to whether it would give this charge as requested by trial counsel. O'Neil testified that he advised the jury during his closing argument that the trial court was going to instruct the jury that the absence of malice is not an element of ABHAN. He testified he had requested the court

give this charge but had not received a ruling from the court prior to argument. He testified that another one of his requests along with his proposed jury instructions was for a ruling from the court prior to argument if it planned to deny the request. He testified that when he did not receive a denial from the court prior to his argument, the court had agreed to charge his requested instructions.

This Court finds that this allegation must be denied and dismissed with prejudice, as there is no reasonable likelihood that the result of Applicant's trial would have been different absent this purported deficiency. During closing arguments from the State and Applicant, the jurors were reminded that the judge would instruct them on the correct law to use during deliberations and that any argument from either counsel was not evidence to be considered. Additionally, the trial court instructed the jury to only apply the law as instructed during its charge. The trial court then gave the jurors instruction that was legally sound and correct. Applicant cannot establish any prejudice, and therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 9: Trial counsel was ineffective for failing to remind the jury that no DNA was found on Applicant's shirt

Applicant argues that trial counsel was ineffective for neglecting to remind the jury during his closing argument that no DNA was found on the shirt purportedly worn by Applicant during the assault. Applicant acknowledges that counsel argued to the jury that no blood was found on the shirt despite claims of a serious cut but asserts that counsel was derelict in his duties when he did not also remind the jury that no DNA was found on the shirt.

At the evidentiary hearing, O'Neil testified that he reminded the jury during his closing argument that no blood was found on Applicant's shirt, but he was unsure as to why he did not tell the jury no DNA was recovered from the shirt. However, he testified that he thinks his

argument that no blood was found covered this issue sufficiently. He elaborated that Applicant disputed that the shirt in question was his, despite numerous witnesses testifying that he was wearing it during the attack. He testified that such an argument regarding DNA would have been irrelevant to Applicant's case, as all the witnesses and victim knew Applicant and identity was not an issue in the case. He testified he does not like to harp on collateral issues of little to no importance because it annoys and frustrates the jury, and the DNA argument likely would have done so since identity was not at issue. Furthermore, he testified that he is not sure if the shirt was ever tested for Applicant's DNA but likely was not tested for DNA because multiple witnesses all testified he was wearing that shirt during the attack.

This Court agrees with counsel's assessment and finds that this potential argument to the jury would have had no impact on Applicant's case. This Court finds that Applicant's identity was not at issue and the undisputed testimony showed Applicant was wearing this shirt during the attack and removed it immediately thereafter. Had Applicant elected to testify and asserted that he was not present at the park, not involved in the fight, or even not wearing that shirt, perhaps this argument might have been of some benefit, but that was not the case. This Court finds that the result of the proceeding would not have been different absent this allegation, which must be denied and dismissed with prejudice.

Allegation No. 10: Trial counsel was ineffective for conceding that Applicant was not entitled to a self-defense charge

Applicant avers that trial counsel was ineffective for conceding that he was not entitled to advance a claim of self-defense. He argues that under a "reasonable interpretation of the facts," he had a "colorable claim to [self] defense." This Court disagrees and finds that Applicant was not entitled to a self-defense instruction based on the uncontroverted evidence presented at trial.

At the evidentiary hearing, O'Neil testified that he agreed with the trial court that Applicant was not entitled to a self-defense charge because the evidence showed Applicant swung first and initiated the fight. He elaborated that because Applicant refused to take the stand, there was no evidence to combat the victim's allegation that Applicant was the aggressor. He acknowledged that the victim was on top of Applicant when he was cut and the victim was younger, fitter, and larger. He testified that he made this argument to the jury during his closing. However, he stressed that there was no testimony to combat the victim and witness testimony that Applicant was the aggressor because Applicant elected not to testify. He elaborated that if Applicant had testified, he would have requested a self-defense charge.

Four elements must be present to establish the defense of self-defense in South Carolina. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). Those required elements are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must either have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or have actually been in imminent danger; (3) if the defense is based on the belief of imminent danger, the belief must have been the same as one that would have been entertained by a reasonably prudent person of ordinary firmness and courage in the same situation; if the defendant was in actual imminent danger, the circumstances must have been such that would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to prevent serious bodily injury or loss of life; and (4) there was no other probable means of avoiding the danger than to act as the defendant did in the situation. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (citing State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1982)). "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." State v. Bixby, 388 S.C.528, 554, 698 S.E.2d 572, 586 (2010).

Here, the undisputed testimony is that Applicant was the initial aggressor who brought upon the difficulty, thereby disqualifying him from asserting a claim of self-defense. As O'Neil testified, perhaps Applicant could have raised a self-defense claim had he elected to take the stand, but he elected not to do so at his trial. The only evidence presented at the trial squarely established that Applicant was not entitled to a self-defense instruction; therefore, counsel was not deficient for acknowledging this.

Furthermore, there is nothing in the record, either from Applicant's trial or the testimony presented at the evidentiary hearing, to credibly establish that Applicant was acting in self-defense. The record before this Court establishes that Applicant brandished his knife in a threatening manner at James Reddick before eventually provoking a fight with Jones and cutting him in the neck and arm. This Court finds that had counsel requested a self-defense instruction, it would have been denied by the trial court. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 11: Trial counsel was ineffective for failing to object to testimony from Investigator McCracken that dispatch informed him "someone was cut severely"

Applicant asserts that trial counsel should have objected to testimony from State's witness Investigator Robert McCracken that he was informed by dispatch that "someone was cut severely," as this testimony was hearsay. See Tr. p. 300. Applicant argues that this testimony was prejudicial because the cut was not severe, but rather, was quite minor. When questioned regarding this allegation, O'Neil testified that he did not object to the characterization of the victim's injury as a severe cut because he was able to show the injury was actually very minor during the medical testimony. He testified that based on his experience, juries give more significance to medical testimony so he does not think this testimony had any impact on

Applicant's case. He expounded that the wound was classified as slightly more serious than superficial, making it a very shallow, non-invasive wound. He testified that one of the treating doctors said the wound was "simply superficial" and required copious irrigation.

This Court finds that counsel's failure to object to this testimony had no reasonable outcome on Applicant's case, particularly in light of the medical evidence presented. Counsel was able to elicit favorable testimony during the cross-examination of Dr. Steven Fann regarding the lack of severity of Jones' wounds. Additionally, Counsel highlighted this to the jury in his closing argument. Therefore, this Court finds that Applicant has failed to establish any prejudice from this allegation, which must be denied and dismissed with prejudice.

Allegation No. 12: Trial counsel was ineffective for failing to argue that State's Exhibit No. 31 should not be admitted into evidence due to its altered condition.

Applicant argues that counsel should have argued against the introduction of State's Exhibit No. 31, the beer bottle Applicant was drinking during the incident, because it was broken while in the State's custody and therefore the type of beer could not be established. In response to this allegation, O'Neil testified that he did not think to object to its admissibility based on it being broken based on a lack of brand indication. He testified that Shealey did object based on the bottle being in an altered state, which was overruled by the trial court. See Tr. p. 308-310. This Court finds that this allegation is without merit and must be denied, as there is no conceivable likelihood that the type of beer had any impact on Applicant's case. Furthermore, Shealey did object to the introduction of State's Exhibit No. 31 based on its altered condition, which was overruled by the trial court. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 13: Trial counsel was ineffective for failing object to the introduction of State's Exhibit No. 32 on the basis that it had additional items not contained within when it was seized

Applicant alleges that trial counsel was ineffective for failing to object to the introduction of his backpack or tote bag into evidence as State's Exhibit No. 32 on the basis that it contained clothing that was not inside when Applicant and the bag were taken into custody. Applicant asserted that counsel was deficient for failing to inspect the bag prior to trial and cites to transcript pages 323-324 in support of this allegation. Applicant also called Officer Battiste who ultimately testified that he had no independent recollection of Applicant's case and could not recall if the clothing was in the bag at the time of Applicant's arrest or if it was placed inside afterwards. Both O'Neil and Shealey testified that they reviewed the physical evidence prior to Applicant's trial.

This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. Applicant was unable to demonstrate that the clothing listed within the bag was placed inside following his arrest, making his claims speculative at best. Additionally, identity was not at issue in the case, as the victim and several witnesses knew Applicant prior to the incident, making whether or not he changed clothing a collateral matter with no significant impact on the case. This Court finds that there is no reasonable likelihood that the result of Applicant's trial would have been different absent this alleged deficiency. Furthermore, both trial counsels testified they reviewed all physical evidence prior to the trial. Therefore, this allegation is denied and dismissed with prejudice.

Allegation No. 14: Trial counsel was ineffective for failing to present testimony from Officer Battiste regarding the clothing in State's Exhibit No. 32

Applicant asserts that trial counsel should have called Officer Battiste to testify as to his clothing being placed into the bag after he was taken into custody. Officer Battiste testified at the

evidentiary hearing. Battiste testified that he vaguely recalls his involvement in Applicant's case and that he could not recognize Applicant. He testified that he did recall being the officer who took Applicant to the Alvin S. Glenn Detention Center following his arrest. He testified that he took all of Applicant's clothing and shoes at the direction of the investigating officer. He could not recall if Applicant had a bag or any other items with him when he was taken into custody. He testified that he took Applicant's clothing to the property room at the detention center and logged the items individually. He could not recall what he did next with the clothing. Battiste recognized his handwriting on the inventory tag to one of the bags, which indicated a sleeping bag was inside of it, but he has no independent recollection of inventorying the bag or what else was inside, if anything. He testified that he has no recollection as to what Applicant was wearing when he was arrested.

This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. After listening to Officer Battiste's testimony at the evidentiary hearing, this Court finds that there is no reasonable likelihood that the result of Applicant's trial would have differed if Battiste had testified. Battiste could not recall much of his involvement in Applicant's case, which is reasonable and expected after the passage of time and his rote involvement processing Applicant as he likely has with hundreds of other arrested individuals. Furthermore, Applicant's identity was not at issue in his trial, so whether he changed clothes between the attack and his arrest was a collateral issue. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 15: Trial counsel was ineffective for failing to establish that the clothing at the bottom of State's Exhibit No. 32 was not hidden by him

Similar to allegations number 13 and 14, Applicant asserts that trial counsel was ineffective for failing to establish that the clothing in State's Exhibit No. 32 was the clothing he was wearing at the time of his arrest and not hidden there by Applicant following the attack. This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. As previously discussed above, this Court finds that there is no reasonable likelihood that the result of Applicant's trial would have differed if counsel had established that the clothing in the bag was the clothing Applicant was wearing when arrested. Also, there is no credible, probative evidence in the record to establish that the clothing in the bag was taken from Applicant's person and put in the bag, as Applicant asserts. Furthermore, Applicant's identity was not at issue in his trial, so whether he changed clothes between the attack and his arrest was a collateral issue. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 16: Trial counsel was ineffective for failing to demonstrate that the clothing inside State's Exhibit No. 28 was the same clothing Applicant was wearing when arrested

Similar to allegations number 13, 14, and 15, Applicant asserts that trial counsel was ineffective for failing to establish that the clothing in State's Exhibit No. 28 was the clothing he was wearing at the time of his arrest and not hidden there by Applicant following the attack. This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court notes the inconsistency in allegations number 15, which alleges the clothing Applicant was wearing were placed inside State's Exhibit No. 32, and this allegation, which argues that those same clothes were put into State's Exhibit No. 28. As previously discussed above, this Court finds that there is no reasonable likelihood that the result

of Applicant's trial would have differed if counsel had established that the clothing in the bag was the clothing Applicant was wearing when arrested. Also, there is no credible, probative evidence in the record to establish that the clothing in the bag was taken from Applicant's person and put in the bag, as Applicant asserts. Furthermore, Applicant's identity was not at issue in his trial, so whether he changed clothes between the attack and his arrest was a collateral issue. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 17: Trial counsel was ineffective for failing to object to the use of an unrelated knife for demonstrative purposes

Applicant asserts that trial counsel was ineffective for failing to object to the use of State's Exhibit No. 25 (for identification only) during a demonstration/reenactment of the attack. O'Neil testified that the knife was only used for demonstrative purposes and was not introduced into evidence. He testified that he successfully objected to the knife coming into evidence. He testified that the knife used in the demonstration was not the actual knife used to cut the victim, although it was similar to the witness descriptions. Shealey testified similarly, adding that he and O'Neil should have objected because it was a "nastier-looking weapon."

This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court finds that counsel's performance was not deficient, as counsel successfully kept the knife out of evidence following his objection. Furthermore, the knife that was used for demonstrative purposes was similar to the knife described by witnesses, rather than a "nastier-looking weapon" as Shealey speculated after admitting he could not recall the type of weapon used for State's Exhibit No. 25 (for identification only). Applicant cannot show any prejudice, as the knife used for the in-court reenactment matched witness descriptions and any objection to its demonstrative use would have

been overruled. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation No. 18: Trial counsel was ineffective for failing to introduce Applicant's employment records to show he was employed and worked the day of the incident

Applicant asserts that trial counsel was ineffective for failing to introduce Applicant's employment records from Action Labor to show that he was gainfully employed during the weeks leading up to the incident and that Applicant worked a full eight-hour day before the attack. Applicant introduced his employment records from Action Labor into evidence, which were located in counsel's trial file. O'Neil testified that he had obtained employment records for Applicant showing that he was working at Action Labor prior to his arrest. He testified that the records also showed that he had worked eight hours the day of the incident. He testified that he tried to find a supervisor or other manager who could independently corroborate that Applicant had worked that day or what hour he had worked, but he was unsuccessful because no supervisors recalled seeing Applicant that day. He testified that due to this lack of independent verification, he decided not to introduce the records because they would have been of little value. He elaborated again that identification was not at issue, as all witnesses and the victim knew Applicant. He also testified that any small benefit gleaned from introducing the records would be outweighed by the loss of the last argument.

This Court finds that Applicant has failed to meet his burden of proof as to this allegation, which must be denied and dismissed with prejudice. This Court finds that counsel made a strategic and well-reasoned decision not to introduce these records after diligently obtaining the records and speaking to supervisors at Action Labor. See Smith, 386 S.C.at 567, 689 S.E.2d at 632 (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517 ("[W]hen counsel

articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.")). This Court finds counsel's performance reasonable and in accordance with professional standards. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice from this clearly collateral matter. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 19: Trial counsel was ineffective for failing to introduce motel records to show that Applicant was living in a motel and not homeless

Similar to allegation number 18, Applicant asserts that trial counsel was ineffective for failing to introduce motel records to show that he was living in a motel and not homeless when the incident occurred. Applicant did not produce any motel records but instead argued that the motel was no longer in operation, therefore making it difficult to locate any records. O'Neil testified that Applicant told him that he had been living in a motel prior to his arrest. O'Neil testified he went to the motel and talked to potential witnesses but decided against delving into this as it was not pertinent to the case theory. He elaborated that where Applicant lived was not a pertinent to the case and would have distracted from the case theory, as well as cost Applicant the final argument.

This Court finds that Applicant has failed to meet his burden of proof as to this allegation, which must be denied and dismissed with prejudice. This Court finds that counsel made a strategic and well-reasoned decision not to introduce this evidence regarding the motel after diligently speaking to those working at the motel. See Smith, 386 S.C.at 567, 689 S.E.2d at 632 (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517 ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.")). This Court finds counsel's performance reasonable and in accordance with

professional standards. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice from this clearly collateral matter. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 20: Trial counsel was ineffective for failing to object to a portion of the State's closing argument

Applicant argues that counsel was ineffective for failing to object to the following portion of the State's closing argument:

> What did he do when he left? As he's going out he tries to conceal his shirt, possible evidence. He doesn't know I guess what's on that shirt, but he knows he can be identified from it, throws it in a trashcan, takes off his shirt, changes his clothes. Clothes which are kept in that backpack are kept in that area down there that he's walking up trying to leave the park. Who knows where he got them, but he changed his clothes.

Tr. p. 394 lines 11-19. Applicant argues that this portion of the closing argues facts not in the record and should have been objected to by counsel. At the evidentiary hearing, counsel argued that he generally does not object during closing argument unless it is an egregious error so as to not draw attention to any negative issue. He testified that he also tries to respond to the State's closing argument in his final argument immediately after, which is his preferred method over objecting to minor errors or discrepancies in the State's closing.

This Court finds that Applicant has failed to meet his burden of proof as to this allegation, which must be denied and dismissed with prejudice. This Court finds that Applicant cannot establish any resulting prejudice, as this portion of the closing argument was not objectionable and there is no reasonable likelihood that it had an impact on Applicant's case. As previously discussed above, Applicant's identity was not at issue and this and other allegations raised by Applicant pertaining to his clothing are wholly collateral and would have had no

reasonable impact on the outcome of his case. Furthermore, this Court finds that this portion of the closing argument was not objectionable, as it is based on testimony and reasonable inferences to evidence presented at trial. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 21: Appellate counsel was ineffective for failing to brief the issue of the trial court overruling Applicant's objection to its jury instruction and supplemental jury instruction on AHBAN

Applicant alleges that appellate counsel was ineffective for failing to raise on appeal and brief whether the trial court erred in its jury instruction and supplemental jury instruction regarding ABHAN. Applicant asserts that trial counsel properly objected to both charges, thereby preserving the issue for appellate review. At the evidentiary hearing, appellate counsel Robinson testified that she should have raised that issue on appeal and did not provide any reason for not doing so. She did acknowledge that she raised a similar issue in her brief. This Court finds that Applicant has failed to establish his burden of both deficiency of appellate counsel and requisite prejudice entitling him to relief and that this allegation must be denied and dismissed with prejudice.

A defendant is entitled to effective assistance of appellate counsel. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (citing Southerland, 337 S.C. at 615, 524 S.E.2d at 836). 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.'" Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (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, 302 S.C. at 539, 397 S.E.2d at 526 (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, 357 S.C.at 476, 594 S.E.2d at 167. "'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).

This Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient, where there is no standard requiring

appellate counsel to brief every possible meritorious issue and counsel appropriately raised three stronger, meritorious issues on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had this issue been raised.

Both the United States Supreme Court and the South Carolina Supreme Court have consistently ruled that appellate counsel has no duty to raise all meritorious issues on appeal. See Jones, 463 U.S. 745; Smith, 528 U.S. at 288; Tisdale, 357 S.C. 474, 594 S.E.2d 166. In the present case, appellate counsel reviewed the record and determined which issues could be raised based on both preservation and merit. When appellate counsel reviews all possible issues and elects to raise those issues she deems most meritorious, she has performed in accordance with professional standards and is not deficient. Therefore, this Court finds that Applicant has failed to establish both deficiency and prejudice in regards to the allegation that appellate counsel was ineffective for failing to raise this issue in his appeal. This allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. 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 of this Order by counsel of record 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:

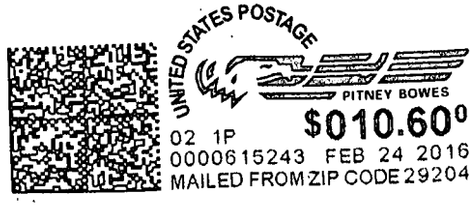
1. That this application for post-conviction relief must be denied and dismissed with prejudice; and

2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 14 day of Jan., ~~2016~~

L. CASEY MANNING
Presiding Judge
Fifth Judicial Circuit

Cordova, South Carolina



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