EXHIBIT

B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Quincy McCants, S.C.D.C. No. 318280,	)	C.A. No. 2009-CP-32-4236
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 18, 2009. Respondent subsequently filed its responsive pleadings. An evidentiary hearing into the matter was convened on April 13, 2013 at the Lexington County Courthouse. Applicant was present and was represented by Tricia Blanchette, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the December 2005 term of the Court of General Sessions for Lexington County for armed robbery (2005-GS-32-4674). He was represented by Jonathan Harvey, Esq., and Stanley Myers, Esq. On October 16, 2006, the State called its case for trial where the jury found Applicant guilty as indicted. The Honorable R. Knox McMahon sentenced Applicant to twenty-two (22) year term of imprisonment.

A timely notice of appeal was filed on Applicant's behalf and perfected pursuant to Anders by Wanda Carter, Esq., of the Office of Appellate Defense. The South Carolina Court of

Appeal's affirmed his sentence in conviction in an unpublished opinion. State v. McCants, 2009-UP-194 (S.C. Ct. App. filed May 6, 2009). The Remittitur soon followed.

SUMMARY OF FACTS AND TESTIMONY FROM APPLICANT'S TRIAL

Prior to jury selection, Attorney Harvey made various pre-trial motions. He made a motion pursuant to Rule 403, SCRE, to redact portions of Applicant's statements that concerned his drug use. Attorney Harvey then further challenged the admissibility of the statements based on relevance. Attorney Harvey made am expoliation motion to suppress identification of prints found on a chip bag at the scene as Applicant's prints. The objection was renewed when the State's expert examiner testified on the matter. Attorney Harvey also moved to suppress substitute photographs that the State submitted as evidence in lieu of the presenting the evidence itself. The Trial Judge denied the objection and found the chip bag constituted a fungible food item. A Neil v. Biggers hearing was held regarding the victim's out-of-court identification. The Trial Judge ultimately ruled that the identification procedure was not unduly suggestive. The objection was renewed during the victim's testimony.

The victim clerk identified Applicant and testified that he was the only person in the convenience store during the armed robbery. She recalled the tan cutlass that Applicant had driven. She also witnessed him touch two chip bags during the course of the offense. Detective Simms determined that the vehicle belonged to Applicant's mother, Gloria Hall. The prints on the chip bag were identified as Applicant's prints.

The defense put up a case. Brown, a DSS employee and Applicant's aunt, testified that the suspect captured on tape was not Applicant. She based her opinion on her review of the tape in Attorney Harvey's office prior to trial.

The jury returned a guilty verdict. Applicant confessed to committing a strong armed robbery and thanked his attorneys for their hard work. The trial judge also commended the quality of representation provided to Applicant.

SUMMARY OF TESTIMONY AND EVIDENCE OFFERED AT THE PCR HEARING

Applicant's testimony

Applicant testified counsel that he retained Attorney Harvey in 2006 to represent him on a host of armed robbery charges. He first met with counsel in January that year and met with him numerous times prior to trial. Applicant kept a log of Harvey's visits that detailed twelve meetings prior to trial. See **Respondent's Exhibit 16.** He claimed that he did not fully understand their conversations but would inform Attorney Harvey of his miscomprehensions. Applicant testified that some of their meetings were bad, but others were not so. Correspondence reflects Applicant's substantial involvement in his case. See **Respondent's Exhibit 14**. He was unaware if Attorney Harvey knew the extent of his educational attainment.

Applicant testified that Attorney Harvey provided him with the discovery materials but failed to take the time to explain the import of the State's evidence. Applicant stated that he was surprised when the solicitor presented video recording from the convenience store's surveillance system at trial. Applicant stated that he had no knowledge that the State would present the video during its case.

Applicant testified Attorney Harvey was deficient in the manner he investigated, communicated to Applicant, and presented fingerprint evidence at trial. Police lifted latent prints from a bag of chips held by the assailant. Applicant opined that the bag of chips and latent prints were critically important pieces of evidence. In a meeting that occurred in May of 2006, Applicant stated Attorney Harvey told him that there was no identification or 'hit' to the prints in

the State's AFIS database. Applicant stated that SLED issued a report dated November 24, 2005 that he believed established his innocence. See **Applicant's Exhibit 2**. He stated that he would have wanted Attorney Harvey to present the SLED report at trial and is now dismayed Attorney Harvey did not pursue the strategy. Applicant stated that he only received a copy of the State's latent print examination report after his conviction. Lexington County law enforcement utilized its own expert that identified Applicant as the source of the prints on the chip bag. He stated that the police initially got a 'hit' to Applicant's prints through its own database. See **Applicant's Exhibits 5-7**. Applicant stated he was upset Attorney Harvey did not introduce the conflicting SLED report that rendered a match 'inconclusive' from its own AFIS database. However, he recalled that Attorney Harvey retained an independent expert, Don Girndt to evaluate the State's expert findings on the matter.

Applicant testified he was surprised when Attorney Harvey made a motion to suppress the fingerprint evidence based on an insufficient chain-of-custody. Applicant opined that there was no need in retaining an independent expert if damaging evidence was inadmissible.

Applicant testified that Attorney Harvey never explained how the solicitor would use his custodial statement against him. He did not recall if he discussed the statement with Attorney Harvey; yet he was certain that Attorney Harvey never explained to him how the solicitor would present his verbal statement. See **Applicant's Exhibits 3-5**.

Applicant testified Attorney Harvey failed to tell him until the eve of trial that the victim clerk from the convenience store identified him as the perpetrator. The solicitor made a late disclosure that an unknown officer utilized a single photograph and conducted a 'show-up' identification procedure with the victim soon after the armed robbery. See **Applicant's Exhibit 10.** Applicant stated Harvey ensured him the victim clerk would not be able to testify because

she improperly identified him. He was also surprised that the victim would testify in narrative manner while the surveillance video was played for the jury. The jury requested to view the surveillance video again during its short deliberations.

Applicant testified that Attorney Harvey failed to utilize the investigative bulletin issued by the Lexington County police soon after the armed robbery to locate a suspect. He stated that he discussed the matter with Harvey. He told Harvey that the sketch looked nothing like him and that had no connection to the purported vehicle used by the assailant. See **Applicant's Exhibit 9**. He recalled that Attorney Myers declined to present evidence on this matter because he was worried about exposing the jury to Applicant's additional pending charges. He stated that he was further unaware that his attorneys would ask him to show his "gold tooth" to the jury at trial.

Prior to trial, Attorney Harvey made a motion to be relieved which was denied but led to second attorney, Attorney Myers, being appointed to his case to assist Harvey. Applicant stated Attorney Harvey remained the primary attorney on the case. Applicant reviewed certain areas of his case and discussed specific issues with Attorney Myers. He was not told how his attorneys would split up his case at trial.

Applicant testified to the extent of plea negotiations in the case. He did not want to plead guilty and only entertained the matter because his mother had pressured him on the matter. He recalled that Attorney Harvey tried to negotiate a plea offer on a non-violent offense with the solicitor. When he learned that the solicitor would not consider an offer for non-violent offense, he insisted on proceeding to trial.

Applicant testified Attorney Harvey filed a post-trial motion for reconsideration of Applicant's sentence. Yet, he stated he never expressed a desire for the post-trial motion to his

attorney. He ultimately requested Attorney Harvey withdraw the motion. He claimed he was misled in this endeavor.

Last, Applicant reasoned that his attorneys fought hard for him but speculated that they could have done more. Applicant did not recall if he told Attorney Harvey that he desired a defense strategy centered on the appellate court's reversing his conviction; although he conceded that he was asking this Court to do just that. Furthermore, Applicant stated Attorney Harvey also represented on a subsequent trial after his conviction on this case. Attorney Harvey's subsequent representation led to an acquittal.

Applicant testified that he was dismayed appellate counsel filed an Anders brief on his behalf. He stated that he believed his case contained two meritorious issues that would have warranted his reversal. First, he alleged appellate counsel should have briefed a Denno argument regarding voluntariness of his statement to police. It was Applicant's opinion that the statement was rendered involuntary by his mental state at the time of the interview because he was purported intoxicated. Second, he alleged appellate counsel should have briefed an actual innocence argument supported by the SLED AFIS report.

Testimony of Stanley Myers, Esq.,

Attorney Myers testified to the circumstances surrounding his appointment to Applicant's case. Attorney Myers recalled that Attorney Harvey moved to be relieved from the representation in 2006. He recalled that Judge McMahon was not inclined to grant Attorney Harvey's motion because the solicitor was adamant on a proximate trial date. As a result, Judge McMahon phoned him and inquired if Attorney Myers would accept an appointment as a second chair attorney in Applicant's case to alleviate Applicant's subjective concerns. Attorney Myers accepted the appointment and opined that Attorney Harvey held an esteemed reputation as an excellent

attorney. Attorney Myers soon met with Attorney Harvey and Applicant and learned that Attorney Harvey had also represented Applicant on past criminal charges. In addition he sent correspondence to Applicant that memorialized their consultations. See **Respondent's Exhibit 7-8.**[1] Attorney Myers also learned that the solicitor intended to call another armed robbery case against Applicant to trial after the disposition of this case. Based on Attorney Myers initial involvement in Applicant's case, he developed the opinion that Attorney Harvey was exceptionally knowledgeable on the case. As a result, he told Attorney Harvey that he would direct his involvement in the case in any matter that Attorney Harvey saw fit. Ultimately, he opined that he was appointed to assist Attorney Harvey in communicating to Applicant. He recalled his efforts to assist Attorney Harvey in the presentation of Applicant's case.

Attorney Myers testified that Attorney Harvey handled the pre-trial motions. He noted that his chief responsibility was to cross-examine the victim clerk. He identified the solicitor's letter that explained how and when the prosecuting office learned of victim's 2004 identification of Applicant. See **Applicant's Exhibit 10.** He was uncertain if the matter was in fact a last minute notice. Yet, Attorney Myers testified he and Attorney Harvey discussed the matter and possible suppression strategy with Applicant prior to trial.

Attorney Myers testified his trial strategy was fashioned in a matter to prevent opening the door to Applicant's pending armed robbery charges; it was the defense team's chief concern at trial. Attorney Myers testified that Applicant was thoroughly aware of this matter. Thus, Attorney Myers noted that he refrained from questioning the victim on her 2004 out-of-court identification of Applicant as the assailant. The fear of opening the door to the pending charges

[1] In **Respondent's Exhibit 7**, Attorney Myers explains the defense strategy concerning the finger print evidence. He explained the reason why the SLED electronic fingerprint report came back as inconclusive match. The Introduction of the report would not support a credible argument that Lexington County expert latent print examiner falsely identified Applicant as the source of the prints on the chip bag.

was further heighted regarding testimony concerning the escape vehicle. Thus, the defense team stipulated to allowing limited identification testimony concerning the assailant's vehicle. Attorney Myers asserted Applicant was fully cognizant of the chosen trial strategies and tactics. He was adamant that every aspect of the case was discussed with Applicant, with the exception of proposed jury instructions.

Attorney Myers testified that he prepared and executed his cross-examination of the victim in a matter designed to elicit testimony on the defense theory of mistaken identity. Thus, Attorney Myers moved the victim's statement into evidence during his cross-examination. See **Applicant's Exhibit 8.** A booking report that contained Applicant's personal information as to his height, weight, etc. was utilized to directly contrast the victim's description of Applicant. Within the ambit the same trial strategy, Applicant was presented as an exhibit of sorts to show his gold tooth. Attorney Myers stated that his representation of Applicant did not extend to the post-trial motion or to Applicant's subsequent trial. In retrospect, Attorney Myers described Attorney Harvey's performance as "outstanding" He did not equivocate in his evaluation of Attorney Harvey.

Agent Abilen

Agent Abilen testified to her experience and qualification. She reviewed the request to run the latent prints recovered from the chip bag through the SLED database. Agent Abilen explained that AFIS is one of many databases that retains prints; yet, it is the only database utilized by SLED. She testified that typically the prints are electronically scanned into the AFIS system. She reviewed the November 15, 2004 report and SLED file on this case and noted that only one submitted print from the chip bag was suitable for examination. She stated that they recovered a print but it did not match prints within the AFIS database. She noted that SLED

agents did not conduct a visual inspection of the recovered print in this case. It was her opinion that inclusive finding in AFIS would not diminish a positive hit within a local county database.

Johnathan Harvey, Esq.,

Attorney Harvey testified that he has practiced law since 1981. He testified to the circumstances that surrounded getting retained on Applicant's cases. Attorney Harvey met with Applicant and his mother where she explained Applicant had numerous pending charges. Attorney Harvey extensively communicated with Applicant regarding the representation. Additionally, he extensively utilized correspondence to further communicate with Applicant. Attorney Harvey testified to the circumstances surrounding his motion to be relieved from Applicant's case. He stated he had disagreements with Applicant concerning "where the case was headed." Harvey explained that "they did not see eye-to-eye." The problem was alleviated subsequent to his unsuccessful motion to be relied from Applicant's case. Attorney Harvey filed for discovery and independently evaluated the State's evidence against Applicant. He testified that he met with Applicant multiple times where he explained all of the State's evidence to Applicant's satisfaction. Attorney Harvey noted he wrote a letter to Applicant on October 6, 2006 that memorialized their September 29, 2006 conference where the State's latent print identification evidence and Applicant's statement to police were discussed. Several of Attorney Harvey's letters to Applicant concerning his assessment of State's evidence and Applicant's expectations were moved into evidence. See **Respondent's Exh. 13**; **Respondent's Exh. 14**[2]; **Applicant's Exh. 7.** Attorney Harvey was also adamant he reviewed and discussed the convenience store's surveillance tap with Applicant.

Attorney Harvey testified to his course of conduct in his investigation and evaluation of the State's latent print report and evidence that identified Applicant's prints on the chip bag.

[2] Here, Harvey advised Applicant that trying his case to win the appeal is an inauspicious strategy.

Attorney Harvey sought out an independent examination from Don Girndt. Girndt met with LCSD's expert latent prints examiner, Duane Johnson, a former examiner with the FBI, and reviewed all of the evidence referenced in his Johnson's findings. See **Respondent's Ex. 9-12.** Girndt informed Attorney Harvey that the State no longer had possession of the chip bag in evidence. In an in-camera hearing at trial, Attorney Harvey utilized Girndt's investigation in framing his chain-of-custody suppression argument. Attorney Harvey reasoned that it was unnecessary to produce testimony from Girndt, or Girndt's report in the alternative, to preserve his chain-of-custody argument for appeal. Attorney Harvey further noted that Girndt's findings corroborated Johnson's harmful findings. Attorney Harvey reasoned that he did not want to introduce an adverse report that had the potential to bolster the credibility of key State evidence. Attorney Harvey stated that he preserved his objection to the missing chip bag at the appropriate time.

Attorney Harvey decided to not utilize the SLED latent print report in his case because the evidence was potentially more harmful than beneficial. He stated that the absence of Applicant's prints in the AIFS database was not dispositive on the presence or absence of Applicant's prints in the LCSD database. In contrast, Attorney Harvey worried that he risked opening the door to solicitor presenting rebuttal evidence on the origins of Applicant's prints being cataloged into the LCSD database.

Attorney Harvey testified that Applicant did not authorize him to negotiate for a favorable plea agreement until the eve of trial. At this juncture of the representation, Attorney Harvey discussed a comprehensive plea offer regarding all of Applicant's pending charges with the solicitor. The solicitor was open to pleading Applicant down to the lesser-included offense of strong armed robbery. However, because the solicitor was only willing to plead Applicant

"straight-up," Applicant instructed Attorney Harvey to withdraw from the plea negotiations and proceed to trial. Although Attorney Harvey was adamant he explained the difference between an offense classified as violent compared to a non-violent classification, he opined that the particular advice here did not factor in Applicant's decision to proceed to trial.

Attorney Harvey testified that he moved to suppress the victim clerk's out-of-court identification of Applicant based upon the solicitor's recent discovery and disclosure of the identification procedure. He testified to the circumstances surrounding the identification procedure. Detective Sims did not authorize the photo line-up nor did he know what took place purportedly between an unknown officer and the victim. He recalled being prepared to argue the motion at the start of the trial. Attorney Harvey noted he apprised Applicant of his legal motions and on other salient evidentiary issues at the October 16th consultation prior to trial. The defense team made the decision to not elicit testimony regarding the particular known facts about the victim's out-of-court identification of Applicant in the presence of the jury because of the continued concern regarding opening the door to Applicant's six pending armed robbery charges. Furthermore, Attorney Harvey reasoned that this line of questioning would have been cumulative to testimony elicited elsewhere to establish the defense's theory on the victim's mistaken identity.

Attorney Harvey made the decision to not present Applicant at the Denno hearing based upon his opinion of Applicant's ~~unquestionable~~ questionable credibility. He stated that calling the Applicant as a witness could have been problematic; even in an in camera hearing. Attorney Harvey stated that he reviewed the record of Applicant's verbal statements to police at length with him prior to trial.

Attorney Harvey testified that he would have made the decision to present Applicant's aunt as a defense witness instead of Applicant's girlfriend and mother solely based upon his credibility assessments of potential defense witnesses. He was adamant that the sequestration complications that occurred at trial would not have impacted his decision here.

Attorney Harvey reasoned that comments made by the solicitor in the State's closing argument regarding Applicant's statements to police did not merit an objection. He noted that he made the appropriate admissibility objection when the statements were introduced during the State's case-in-chief. Attorney Harvey explained his general practice in tempering making objections during a solicitor's closing argument unless a particular comment is egregious. He adopts the rationale that an objection accentuates the impact of the questionable comment made during a closing argument.

Attorney Harvey recalled the circumstances surrounding filing and then subsequently withdrawing his post-trial motion for a reconsideration of Applicant's sentence. He made the unilateral decision to file the motion in order to garner additional time to prepare the Applicant's next trial. When Applicant communicated that he did not desire a reconsideration of his sentence, Attorney Harvey immediately withdrew the motion and filed the notice of appeal. Attorney Harvey testified to his prior appellate practice and experience. He believed he adequately preserved his objections to the admissibility of the State's evidence and testimony from its witnesses.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must

prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, Applicant's appellate records, the transcripts and documents from the prior proceedings, and legal arguments of the attorneys. Pursuant to S.C.

Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

This Court notes finds Attorney Harvey and Attorney Myers' testimonies to be substantially more credible than Applicant's at times illogical and suspect testimony. Further this Court finds Applicant has received the benefit of exemplary representation, noting that this finding extends to PCR counsel's exhaustive efforts to present every conceivable allegation that this forum supports. However, this Court finds Attorney Harvey and Attorney Myers' performance and record keeping in this matter left very little room to speculatively challenge their sound representation, let alone their constitutional efficacy. As a result, Applicant falls well short in meeting his burden on his numerous allegations of ineffective assistance of counsel to necessitate relief.

A.

Applicant failed to meet his burden to prove his attorneys were ineffective for failing to investigate his case. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). This Court is firmly convinced that Attorney Harvey's efforts to independently evaluate the State's evidence and conduct additional investigation was not just sufficient, his representation here was exemplary. Both attorneys provided compelling testimony on the matter. Thus, this Court finds the allegation, couched in general terms, is without merit. The facial basis of the vast majority of Applicant's PCR allegations were not derived from a lack of preparation and investigation, but instead strategic choices employed by the defense team to not take certain actions that included the presentation of defense witnesses

and scope of cross-examination. This Court's review of the strategic choices employed by the defense team are discussed at a latter point in this order. Therefore, this allegation is denied and dismissed.

This Court also finds Applicant has failed to meet his burden to prove his attorneys were ineffective for allegedly waiting until the eve of trial to inspect the evidence. This Court finds Attorney Harvey's testimony on the matter credible and finds his decision sound in consulting Girndt to also evaluate the particular strength of the State's case. Furthermore, Girndt relayed his investigation of the State's evidence in a timely matter to allow the attorneys to make any necessary adjustments in preparation for trial. The record shows Attorney Harvey executed a well-reasoned and ~~through~~ thorough suppression defense of the chip bag based on spoliation. The record shows he submitted memoranda in support of his argument. Regardless, Applicant attempt to show prejudice here was entirely speculative and unconvincing. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result."). Therefore, this allegation is denied and dismissed.

B.

This Court readily denies Applicant's allegation that his attorneys were ineffective for failing to adequately communicate developments in his case to him. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland, 466 U.S. at 688. This Court finds Attorney Harvey's testimony that he reviewed all relevant evidence and aspects of the case to be convincing. In particular, Attorney Harvey testified that on

September 29, 2006, he met with Applicant and discussed the victim's statement and latent prints with him. Prior to trial, Attorney Harvey also apprised Applicant of the substance of suppression motions. Attorney Myers also testified Applicant was well aware of defense team's trial strategy and related constraints. This Court finds Attorney Myers' testimony also convincing here. In contrast, this Court finds Applicant's testimony to be facially suspicious. Even Applicant's personal log of consultations showed his attorneys went above and beyond to communicate with him. In addition, ample irrefutable correspondence was presented at the PCR hearing. Therefore, these allegations are readily denied and dismissed.

Applicant's allegation that his attorneys were ineffective for failing to adequately advise Applicant concerning the terms and consequences in pursuing a possible plea. "To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel." Missouri v. Frye, 132 S. Ct. 1399, 1402-03, 182 L. Ed. 2d 379 (2012). Notably Applicant still protests his innocence in light of the convincing evidence of his guilt here. He has wholly failed to make a credible showing that his lack of knowledge concerning the sentencing consequences of the indicted offense to the possible lesser-included offenses impacted his decision to proceed trial. This Court finds Attorney Harvey's testimony on the matter convincing. Therefore, this allegation is readily denied and dismissed.

C

Applicant's allegation that Harvey was ineffective for failing to present Applicant as a witness at the Denno hearing is without also merit. "[T]he prosecution must prove ... by a preponderance of the evidence that the confession was voluntary." State v. Smith, 268 S.C. 349,

354, 234 S.E.2d 19, 21 (1977). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008). Based on this Court's observation of Applicant at the PCR hearing, this Court finds counsel's decision to present Applicant at pre-trial hearing to be sound, if not advisable. Applicant has presented no credible testimony or evidence to disrupt the Trial Judge's finding that his statements were "given freely and voluntarily." (Trial Tr. p.59).

Furthermore, this Court finds Attorney Harvey and Myers' collective performance was effective in light of sound strategy. "[A]s with other assertions of trial strategy, we consider the particular circumstances of the case." Ingle v. State, 348 S.C. 467, 475, 560 S.E.2d 401, 405 (2002).. The record shows Harvey deftly utilized the Denno hearing to mount a bifurcated Rule 403, SCRE and Rule 401, SCRE, attack on the admissibility of Applicant's oral statements to police. The Record shows that Applicant gave two short and inconsistent statements to police. In his second oral statement, Applicant claimed he had no memory of his actions during because he was using cocaine. Applicant failed to show how his testimony would have been beneficial here. Therefore, this allegation is denied and dismissed.

Last, Applicant failed to meet his burden to prove appellate counsel was ineffective for not submitting a merits brief for this issue on appeal. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). This Court finds that ample evidence that shows that the trial judge did not abuse his

discretion in finding Applicant's statement was voluntarily rendered.[3] The Record shows Applicant was informed of and ~~this~~ thus waived his right to self-incrimination; the record also shows the absence of coercion. Applicant has presented no credible evidence that call into question his competency during the police interviews. In addition the length and circumstances surrounding the police interview and the subsequent interrogation were unremarkable. Therefore, this allegation as to ineffective assistance of appellate counsel is denied and dismissed.

D.

Applicant failed to meet his burden to prove Attorney Harvey was ineffective for making an purported failing to preserve his objection to the admissibility of the latent print. "In order to preserve an evidentiary issue for review on appeal, a contemporaneous objection must be made when the testimony is offered." State v. Johnson. 363 S.C. 53, 609 S.E.2d 520 (2005). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." Id., at 58-59, 609 S.E.2d at 523. Attorney Harvey made pre-trial motion to suppress latent print evidence based upon spoliation, followed by an objection to the admissibility of the latent prints based on chain of custody; the Record also shows that Attorney Harvey made his chain-of-custody objection when latent print exhibits were marked for identification. (Trial Tr. pp.230-33). He further detailed the basis of his argument in a subsequent in-camera hearing. (Trial Tr. pp.311-17). At the close of the in-camera hearing, the trial judge immediately ruled that the exhibits were in evidence subject to previous objections. (Trial Tr. pp.318). Therefore the issue was properly preserved for appellate review. See Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d

[3] This Court notes that although appellate counsel did not testify at the PCR hearing, there is a strong presumption effective assistance of counsel. See Burt v. Titlow, 134 S. Ct. 10, 17, 187 L. Ed. 2d 348 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.").

517, 520 (1993) ("[P]ost-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

In addition, Applicant failed to meet his burden to prove Attorney Harvey was ineffective for failing to preserve his motion to suppress the latent prints based on spoliation of evidence. The trial judge pluralized "objections" when he ruled the latent prints were admissible subject to the previous objections. Regardless, Applicant also failed to prove the issue would have been meritorious on appeal. See Arizona v. Youngblood, 488 U.S. 51 (1988). "To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001). Here, the record shows an absence of bad faith in the decision to not preserve the chip bag once the latent prints were retrieved from it. No new credible evidence was presented at the PCR hearing on the matter. Next, Applicant failed to show how the chip bag would have had exculpatory value prior to its abandonment or destruction. At trial, Det. Hickman testified to his general procedure in "making a lift off a bag of potato chips." (Trial Tr. p.238). He explained the substantial unlikelihood that the print would remain on the plastic bag once the latent print is retrieved. Furthermore, Det. Hickman testified he didn't collect the chip bag because "it's a food item. I don't like to collect food items and turn them in." (Trial Tr. p.238). Therefore, this allegation is denied and dismissed.

Similarly, Applicant failed to meet his burden to prove Attorney Harvey was ineffective for not presenting an expert to strengthen his spoliation argument. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was

prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."). Regardless, Attorney Harvey's decision to not present Girndt as defense witness at trial constituted valid trial strategy. This Court agrees that Girndt testimony would have yielded Applicant's case no benefit while bolstering State expert's findings. This Court finds its entirely speculative on how Girndt's testimony could have augment Applicant's pre-trial suppression argument.

Last, Applicant failed to meet his burden to prove Harvey was ineffective for not subpoenaing a SLED witness to testify concerning it inconclusive finding regarding the print. Again, Attorney Harvey's decision here constituted valid trial strategy based on a reasonable assessment of the benefits and detriments at play. Simply, because AFIS was not an all-inclusive database, the testimony offered from the Agent at the PCR hearing would not have been beneficial to Applicant's case. This Court agrees that an inclusive match within the AFIS database would not diminish a positive hit within a local county print database. See State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct.App.1999). Therefore, this allegation is denied and dismissed.

E.

Applicant failed to prove Attorney Harvey was ineffective for failing to make a "notice" argument to the solicitor's disclosure of victim's original out-of-court identification of Applicant. "A Brady violation would have occurred only had the evidence been favorable to the defense, the State possessed and withheld it, and it was material to a [defendant]'s guilt or punishment. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Geer, 391 S.C. 179,

192, 705 S.E.2d 441, 448 (Ct. App. 2010). "No due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial." United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 532 (4th Cir.1985). This Court finds Attorney Myers' testimony credible and assessments here to be convincing that the defense team had ample time to make necessary pre-trial adjustments. In response to the solicitor's disclosure, Attorney Harvey preserved his client's rights when he filed a motion in objection to the impropriety of the out-of-out court identification as the merits for his suppression arguments. Attorney Harvey apprised Applicant of the late developed prior to trial; he testified that he was prepared to address the argument at the start of trial. This Court finds Attorney Harvey's assessment here convincing. Importantly, this Court takes into account the wealth of criminal litigation experience shared by Attorney Harvey and Myers in disposing of this allegation. Furthermore, the only possible remedy here would have been a continuance. The Record shows Attorney Harvey apprised the trial judge during the pre-trial motions that Applicant was anxious for a speedy disposition of his case. Therefore, this allegation is denied and dismissed.

Concerning the post-trial motion, Attorney Harvey testified Applicant instructed the post-trial motion for reconsideration of Applicant's sentence be withdrawn because he desired no further delay in proceeding to next trial. Considering Applicant was acquitted at his subsequent trial and avoided an LWOP sentence, he has very little to complain about here. Therefore, this allegation is denied and dismissed.

Applicant also alleges that appellate counsel was ineffective for failing to brief an issue concerning the admissibility of the victim clerk's out-of-court identification of Applicant. "A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken

identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "Generally, the decision to admit eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct.App.1993). The following factors are to be considered in evaluating the totality of the circumstances as to whether an identification is admissible:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. at 199. This Court finds Applicant failed to show the merits of the substantive issue. The record shows that the Trial Judge did not abuse his discretion in finding the victim clerk's identification was reliable based upon the totality of circumstances. The victim clerk had clear and sufficiently lengthy confrontation with Applicant during of the commission of the armed robbery. Furthermore, the victim clerk testified that no one else was present during the offense. The victim clerk provided thorough details regarding Applicant's conduct in executing the armed robbery. Therefore, Applicant has failed to persuade of the merits of this argument.

F.

Applicant raises several distinct allegations that all attack the defense team's strategic decision to limit bad character evidence from Applicant's six other pending armed robbery charges. Despite the Trial Judge's comment that evidence other armed robberies was facially admissible to prove identity here, Attorney Harvey's diligent trial preparations yielded a favorable discretionary stipulation agreement with the solicitor. (Trial Tr. p.214). See State v.

Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("The fact that the same weapon was used in both the barbershop and cab driver murders goes to show appellant's identity as the barbershop killer."). As a result, evidence and testimony of how the investigation of other crimes linked Applicant to this offense was not presented to the jury. The solicitor was willing and capable of presenting clear and convincing evidence of the prior armed robberies. (Trial Tr. pp.207-17). The Record shows that Applicant was implicated in string of armed robberies of convenience store and fast food eateries in the greater Columbia area where the assailant wore a distinctive hat and traveled in the same vehicle. Several different law enforcement agencies investigated the crimes. This Court notes that the stipulation was a product of Attorney Harvey's exceptional performance. Thus, this Court finds Applicant's allegation that Attorney Harvey was deficient for not objecting to testimony that the vehicle used by the assailant in the armed robbery was registered to Applicant's mother because of the valid strategic decision made by the attorneys. See Lamarca v. Sec'y, Dep't of Corr., 568 F.3d 929, 937 (11th Cir. 2009) ("[S]trategic decision to limit his cross-examination of Tonya Flynn "to avoid opening the door to potentially incriminating information that would not otherwise have been admissible," recognized such decisions are "virtually unchallengeable.").

Similarly, Applicant alleges Attorney Myers performance in cross-examining the victim clerk was deficit. He asserts Attorney Myers should have cross-examined examination on circumstances surrounding her November 4, 2004 out-of-court identification procedure. Attorney Myers testified he fashioned his cross-examination of the victim in manner to prevent opening the door to Applicant's prior bad acts. This Court agrees with his assessment. An attempt to impeach the credibility of the victim and the police regarding the November 4, 2004 identification procedure would have the door to the introduction of rehabilitative evidence that

the showed the circumstances of numerous investigations against Applicant. See State v. Beam, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct. App. 1999). Therefore, this allegation is denied and dismissed.

G.

This Court finds that Applicant presents several allegations of ineffective assistance of counsel that call into question the defense team's presentation of its theory of the case that are all wholly unproven and suspect. First, the Record shows Attorney Myers' performance in utilizing the victim's statement to police in the context of Attorney Harvey's performance in utilizing the booking report to establish inaccuracies in the victim's physical description of the Applicant constituted the proficient execution of the sound trial tactics. Furthermore, Applicant cannot make a prejudice showing in this instance. See United States v. Fugit, 703 F.3d 248, 260 (4th Cir. 2012) ("The Supreme Court has specified, furthermore, that such an individual 'must convince the court' that such a decision 'would have been rational under the circumstances.' Padilla, 130 S.Ct. at 1485. The challenger's subjective preferences, therefore, are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts."). Therefore, these allegations are denied and dismissed.

Last, Applicant failed to meet his burden to prove Harvey was ineffective for failing to call Applicant's mother or girlfriend to testify at trial. This allegation is readily denied and dismissed where it entirely rests upon mere speculation. See Dempsey, 363 S.C. at 369, 610 S.E.2d at 814. Therefore, this allegation is denied and dismissed.

H.

Applicant's allegation that Attorney Harvey was ineffective for failing to comment on the evidentiary weight of the surveillance tape of the armed robbery during his closing argument is

without merit because its cumulative where he had successfully elicited the defense theory during the course of trial. Furthermore, Applicant failed to show how Attorney Harvey's closing argument was lacking and ~~aggrees~~ agrees with Attorney Harvey's assessment that an attorney does not have to relitigate every fact of the case in a closing argument in order to be persuasive. Attorney Harvey presented Brown as the last trial witness to establish the defense theory that surveillance tape lacked substantive value as identification evidence. Therefore, this allegation is denied and dismissed. This Court is also unpersuaded that Applicant's similar allegation that Attorney Harvey was deficient for failing to comment on the missing chip bag. Regardless, the jury was properly instructed on the import of evidence and testimony compared to to argument. Therefore, this allegation is denied and dismissed.

I.

Applicant failed to meet his burden to prove that Attorney Harvey was ineffective for not objecting to purportedly improper comment made by the solicitor during the State's closing argument. A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816 (1990). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). Applicant asserts that the solicitor's comments regarding Applicant's statement was impermissible. (Trial Tr. p.418). Attorney Harvey disagreed and testified that comment constituted a permissible inference on the evidence presented. This Court agrees with Attorney Harvey's assessment. Therefore, this allegation is denied and dismissed.

J.

This Court summarily dismisses Applicant's claim as to actual innocence. See Al-shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (Focus in direct appeal is on propriety of trial court's rulings; in PCR it is ineffective assistance of counsel.).

G.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. 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 intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice

has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 24th day of November, 2014.

EDGAR W. DICKSON
Presiding Judge
Eleventh Judicial Circuit

Orangeburg, South Carolina