

Law Office of Leah B. Moody, LLC

235 East Main Street
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RECEIVED

Phone: (803) 327-4192

JUN 22 2015
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S.C. SUPREME COURT

June 17, 2015

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

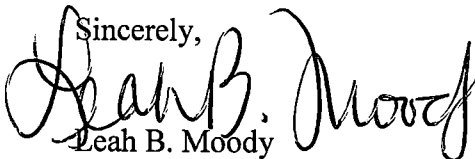
RE: Norman Stoudenmire v. State of South Carolina
Case No.: 2013-CP-42-2174

Dear Mr. Shearouse:

The Spartanburg County Court of Common Pleas appointed my office to represent Norman Stoudenmire in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,


Leah B. Moody

LBM/ts
Enclosure

cc Norman Stoudenmire
Suzanne White, Esquire
Sharon Graham, SCCID
Hope Blackley, Clerk of Court, Spartanburg County

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 22 2015

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Deadra Jefferson Presiding in Spartanburg County

C.A. No.: 2013-CP-42-2174

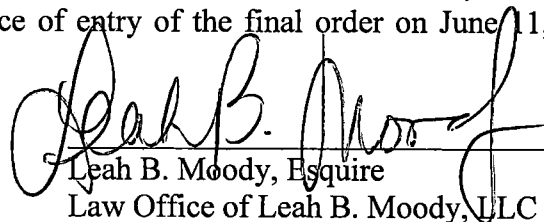
Norman Stoudenmire, ... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Norman Stoudenmire appeals the order of the Honorable Deadra Jefferson, dated June 4, 2015. Appellant received written notice of entry of the final order on June 11, 2015.



Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

Other Counsel of record:
Suzanne White, SC Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

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

JUN 22 2015

S.C. SUPREME COURT

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

Deandra Jefferson Presiding in Spartanburg County

C.A. No.: 2013-CP-42-2174

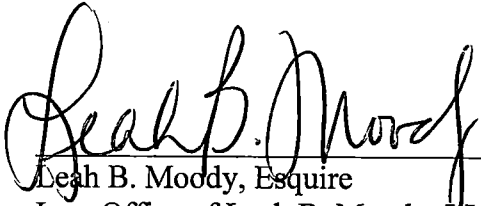
Norman Stoudenmire, ... Appellant,

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Suzanne White by depositing a copy of it in the United States Mail, postage prepaid, on June 17, 2015 addressed to its attorney of record, Suzanne White, Post Office Box 11549, Columbia, South Carolina, 29211-1549.


Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

June 17, 2015
cc Norman Stoudenmire
Sharon A. Graham

Law Office of Leah B. Moody, LLC

235 East Main Street
Post Office Box 1015
Rock Hill, South Carolina 29731
lbmatty@comporium.net

Phone: (803) 327-4192

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June 17, 2015

The Honorable Hope Blackley
Spartanburg County Clerk of Court
Post Office 3483
Spartanburg, South Carolina 29304

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JUN 22 2015

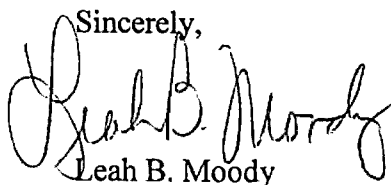
RE: Norman Stoudenmire v. State of South Carolina
C.A. No.: 2013-CP-42-2174

S.C. SUPREME COURT

Dear Ms. Blackley:

Please find enclosed the Notice of Appeal and the Proof of Service in the above-referenced matter.

Sincerely,



Leah B. Moody

LBM/ts

Enclosures

cc Norman Stoudenmire
Suzanne White, Assistant Attorney General
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

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June 17, 2015

Suzanne White, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

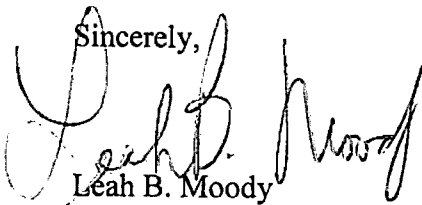
RE: Norman Stoudenmire v. State of South Carolina
C.A. No.: 2013-CP-42-2174

Dear Ms. White:

The Spartanburg County Court of Common Pleas appointed my office to represent Norman Stoudenmire in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,



Leah B. Moody

LBM/ts

Enclosures

cc Norman Stoudenmire
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Hope Blackley, Clerk of Court, Spartanburg County
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

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Post Office Box 1015
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lbmatty@comporium.net

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June 17, 2015

Ms. Sharon A. Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

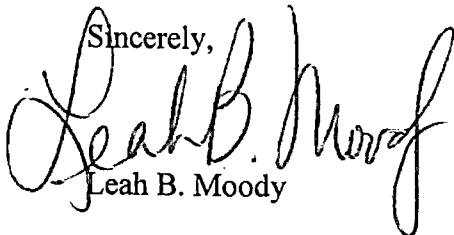
RE: Norman Stoudenmire v. State of South Carolina
Case No.: 20-13-CP-42-2174

Dear Ms. Graham:

The Spartanburg County Court of Common Pleas appointed my office to represent Norman Stoudenmire in his Post-Conviction Relief action. Please find enclosed the Notice of Appeal and Proof of Service in the above-referenced matter.

Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

LBM/ts
Enclosures

cc Norman Stoudenmire
Suzanne White, Esquire
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Hope Blackley, Clerk of Court, Spartanburg County

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Norman E. Stoudenmire, Jr., #182302,
The Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2013-CP-42-2174

ORDER OF DISMISSAL

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Appellate Counsel:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Leah B. Moody, Esquire
Suzanne H. White, Esquire
Robert B. Hall, Esquire
Robert M. Dudeck, Esquire
January 15, 2015
Pamela E. Green

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M. HOPE BLACKLEY

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed May 15, 2013. The Applicant also submitted a Memorandum of Law in Support of Post-Conviction Relief Action. The Respondent made its Return on or about March 18, 2014. An evidentiary hearing into the matter was convened on January 15, 2015, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Robert B. Hall, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the December 2008 term of the Spartanburg County Grand Jury for Murder¹ (2008-GS-42-7014). The Applicant was represented by Robert B. Hall, Esquire. On March 31, 2010, the Applicant proceeded to trial and was convicted of the charge of Murder by a jury. The Honorable J. Derham Cole sentenced the Applicant to life imprisonment.

Chief Appellate Defender Robert M. Dudeck of the South Carolina Commission on Indigent Defense filed a timely notice of appeal and brief on the Applicant's behalf. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Stoudenmire, Op. No. 2012-UP-628 (filed November 28, 2012), *available* at 2012 WL 10864180. The Applicant filed a *pro se* Petition for Rehearing, which was denied on February 22, 2013. The Remittitur was returned on April 3, 2013.

ALLEGATIONS

In his application and *pro se* memorandum, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - i. Counsel failed to conduct pre-trial investigation;

¹ "A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life or by a mandatory minimum term of imprisonment for thirty [(30)] years....For purposes of this section, "life imprisonment" means until death of the offender without the possibility of parole...No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years [(30)] pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty [(30)] years required by the is section." S.C. CODE ANN. §16-3-20 (2008). Murder is a violent most serious felony. S.C. CODE ANN. §17-24-45 (2008); S.C. CODE ANN. §16-1-60 (2008).

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- ii. Counsel failed to object to the prosecution's improper introduction of character evidence;
- iii. Counsel failed to request a mental evaluation or use mental history as mitigation;
- iv. Counsel failed to challenge issue that there was sufficient evidence at trial to establish a reasonable probability that the Applicant was incompetent at time of trial due to Post-Traumatic Stress Disorder;
- v. Counsel failed to investigate the third party guilt issues regarding the love triangle among Ben Nevins and Hillard Lee Walker and Victim;
- vi. Counsel failed to address juror that was sleeping during trial;
- vii. Counsel failed to properly perfect appeal;
- viii. Counsel failed to object to irrelevant and improper testimony;
- ix. Counsel failed to object to the improper introduction of evidence;
- x. Counsel failed to challenge voluntariness of confession;
- xi. Counsel failed to object to prosecution's closing argument;
- xii. Counsel's prior experience working as prosecutor and magistrate judge indicated conflict of interest;
- xiii. Counsel failed to challenge the void indictment;
- xiv. Counsel failed to object to shackling of The Applicant at sentencing;
- xv. Counsel failed to obtain DNA expert,
- xvi. Counsel failed to challenge and attack break in chain of custody and/or integrity of DNA kit;
- xvii. Counsel failed to challenge procedures and protocol while processing the crime scene, specifically law enforcement failed to bag victims hands to prevent forensic contamination;
- xviii. Failure to object and make contemporaneous objections;

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- xix. Failure to discharge professional duties;
 - xx. Failure to inform the Applicant that he had a right to address the jury in closing;
 - xxi. Failure to present facts that the State had no physical evidence other than alleged DNA "secondary transferred source";
 - xxii. Failure to present a defense;
 - xxiii. Counsel was ineffective for opening the door to damaging testimony;
 - xxiv. Counsel failed to object to Brady violations and failed to request and obtain police report,
2. Ineffective assistance of appellate counsel, in that;
- i. Failed to raise the issue of the trial judge abusing his discretion in various rulings,
 - ii. Failed to challenge the ruling after the attempt to use prior bad act at the suppression hearing,
 - iii. Closed case and refused to file a motion for rehearing and petition for writ of certiorari,
 - iv. Failed to challenge prohibition of trying and convicting mentally incompetent defendants,
 - v. Failed to challenge fact that The Applicant was convicted after trial counsel failed to make obvious meritorious objections to tainted evidence,
 - vi. Failed to challenge the prosecution's introduction of matters in closing that were not properly introduced as evidence during trial,
 - vii. Failed to challenge the voluntariness of the confession,
 - viii. Failed to challenge evidentiary sufficiency of the criminal conviction,
3. Prosecutorial misconduct, in that;
- i. Numerous Brady violations,
4. Violation of due process, in that;
- i. The Applicant was denied bond hearing for two years,
 - ii. Failed to obtain a rights waiver form for February 29, 2008,

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- iii. Officers failed to warn The Applicant of his 5th Amendment rights prior to interrogation,
- iv. Fraudulent indictment,
- 5. Abuse of discretion of trial judge, in that;
 - i. Failed to address The Applicant's known mental illness issues,
 - ii. Allowed admission of testimony of prior bad acts,
 - iii. Failed to instruct jury regarding voluntariness of confession,
 - iv. Allowed hearsay evidence to be used and improperly admitted other evidence,
- 6. Official misconduct, in that;
 - i. Officers failed to properly secure possible evidence and test possible evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

Summary of the Testimony

The Applicant testified that Counsel failed to address and failed to conduct pre-trial investigations into his mental health, even though Counsel was aware of the Applicant's mental issues. The Applicant testified that at the time of his arrest, he suffered from post-traumatic stress disorder (PTSD) and received disability payments. The Applicant testified that he started receiving a SSI check five (5) years prior to his trial, but that Counsel "did not try to find out anything" regarding his disabilities. The Applicant testified that he told Counsel he suffered from PTSD and that the officers who arrested him were aware that he suffered from PTSD as well.

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The Applicant informed the court that he and PCR counsel attempted to retrieve medical records from the United States Social Security Administration (SSA) to support the claim, but that even though the Applicant found his diagnosing physician and had his sister and PCR attorney call the SSA on his behalf, the SSA gave him "the run around" and told him that the records prior to ten (10) years before had all been destroyed. The Applicant testified that Counsel did not request a competency hearing prior to trial.

The Applicant testified that Counsel was ineffective for failing to investigate the love triangle among the victim and two (2) other men and, consequently, was ineffective for failing to present evidence of third party guilt. The Applicant explained that the victim was involved in a love triangle between her boyfriend (Lee Walker) and another man (Ben Nivens), and the Applicant believes that one of them committed the murder out of a jealous rage. The Applicant testified that there was a great deal of animosity between the two men. The Applicant further explained that he sought relevant crime stoppers reports in discovery, which would reveal possible instances of domestic violence among the victim and her prior roommate and former boyfriend, and which would show that someone was watching the victim and conveying threats to the victim prior to her death. However, the Applicant alleged that Counsel never raised the issue. The Applicant acknowledged that Counsel informed the Applicant that they probably could not get the evidence of prior domestic violence in the record, but alleged that Counsel was obligated to raise third party guilt as a complete defense and that Counsel was incompetent for not understanding the law and not raising the defense on his behalf. The Applicant admitted that he could produce no direct evidence pointing to Nevins' or Walker's guilt.

The Applicant testified that Counsel was ineffective for failing to retain an independent DNA expert to testify as to explain why the Applicant's DNA was found in the victim's home

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and underneath her fingernails. The Applicant testified that he often performed work for the victim in her home, including moving furniture, working on her computer, and fixing her vehicles and cable. Thus, the Applicant testified, a DNA expert could support his theory that the Applicant had prior contact with everything in the residence because he had the right to be at the victim's residence. The Applicant also alleged that a DNA expert could have testified that any DNA found at the residence could have been from a prior transferred source.

Further, the Applicant testified that an expert could be used to identify the trace hair found on the entrance door and the fingerprints found on the shadowbox. The Applicant testified that the fingerprints were not a match for the Applicant or victim, but Counsel performed no further investigation as to the identity of the fingerprints. The Applicant alleged that Counsel was deficient for failing to submit positive results identifying the fingerprints. The Applicant testified that Counsel never discussed the DNA results or obtaining an expert with the Applicant. However, the Applicant acknowledged that Counsel cross-examined pathologist Dr. Wren² and SLED expert Lindsay Thompson on the possibility of secondary transfer of DNA, "but nothing came of it." The Applicant further alleged that the Solicitor did not inform Counsel that the Applicant's DNA did not match the fingerprints found at the scene until the day before trial. However, the Applicant admitted that Counsel cross-examined Officer Talanges regarding the fingerprints at trial. The Applicant also stated that he did not know to ask his attorney about obtaining an independent DNA evaluation and expert because he was not familiar with the law that provides funding to indigent defendants to obtain DNA experts.

The Applicant also testified that law enforcement did not process the crime scene correctly. The Applicant testified that the victim's body was moved from the location in which she was found and the victim's shirt was removed from her body, but prior to law enforcement

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bagging her hands. The Applicant testified that an expert could have assisted in showing how law enforcement's failure to properly process the crime scene could have tainted the results and transferred DNA to the victim's fingernails. The Applicant further alleged that Counsel was ineffective for not challenging this issue and that if law enforcement had properly bagged the victim's hands prior to transporting her body, SLED may not have found any evidence at all.

The Applicant alleged that Counsel was ineffective for failing to challenge the chain of custody of the DNA kit and related evidence. The Applicant testified that one of the boxes that contained DNA evidence had a broken seal on one of the edges and thus the integrity of the DNA kit was compromised. The Applicant explained that when the DNA kit was turned over to investigators, the seals on the box were intact. However, thirty-one (31) hours later, after the box was booked for identification and placed in an evidence locker, when the evidence custodian Rosenberg went to retrieve the evidence, he discovered that the seal was broken. The Applicant further testified that at trial, the State presented no chain of custody forms relating to the thirty-one (31) hours that would prove evidence tampering. Although both he and Counsel were surprised by this revelation and spent half a day talking about the issue, the Applicant alleged that ultimately Counsel did not object to the improper chain of custody.

The Applicant testified that Counsel felt this error was not important and did not require expert testimony. The Applicant understood Counsel's explanation that no expert could be qualified to testify as to the improper chain of custody and that no expert had the right to testify as to that subject. The Applicant further alleged that Counsel provided and elicited no explanation for why the State could not produce the relative chain of custody forms and merely "swept [the issue] under the carpet." The Applicant finally testified that the trial court committed

² The Applicant directed the Court's attention to page 375, lines 2 through 11 of the trial transcript.

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an abuse of discretion by talking about the broken seal but not issuing the appropriate ruling.

The Applicant testified that Counsel failed to investigate or object to the Solicitor's improper implication during closing arguments regarding an "old scratch" found on the Applicant's neck at the time of his arrest. The Applicant summarized that the State's theory was that the victim defended herself by scratching the Applicant. Although the Applicant admitted that testimony regarding the scratch on his neck was elicited during trial, he alleged that Counsel was ineffective for failing to present photographic evidence of his neck. The Applicant also testified that Counsel failed to object to the State failing to turn over a report by Officer Cooper allegedly made during the Applicant's arrest and interrogation that purportedly reported the Applicant and the officer's conversation.

The Applicant alleged that Counsel was ineffective generally for failing to object, especially to improper character evidence.³ The Applicant testified that Counsel failed to object to testimony of Phyllis Pack that she had seen the Applicant with a gun one night while he was using crack cocaine. The Applicant also testified that Counsel failed to object to testimony of Phyllis Pack, Hillard Lee Walker, John Glenn, Angela Glenn, and Ben Nevins regarding the Applicant borrowing money, smoking crack cocaine, and being high. The Applicant explained that he "made good money" at the time—one thousand dollars (\$1,000.00) per week. The Applicant stated that the only item disturbed or missing from the victim's residence was a \$20 bill that served as a memento from the victim's boyfriend on the shadow box, but that the Applicant had no personal need for the victim's money and borrowing money was not relevant to the case. The Applicant further summarized that the State painted the picture that he was a "crack monster" and "crack addict" and that the State's theory of the case was that the Applicant's motive to murder the victim was to obtain money for crack. The Applicant explained

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that the State proved its theory by improperly showing that the Applicant regularly borrowed money to support his crack habit, borrowed money from his boss, and was trying to obtain money for crack the night of the victim's murder.

Additionally, the Applicant alleged that Counsel was ineffective for failing to object to the State's witnesses' prior inconsistent statements.

The Applicant also testified that he wanted Counsel to request jury instructions as to the voluntariness of the Applicant's statement and prior bad acts and that Counsel was ineffective for failing to seek definitions of "voluntary" and "voluntariness" as a result of his Jackson v. Denno hearing.

The Applicant testified that he met with Counsel only twice for less than one (1) hour at a time and spent approximately two (2) hours total meeting with Counsel, even though the Applicant was in jail for two (2) years. The Applicant testified that there was "no way" Counsel could have prepared sufficiently for trial. The Applicant testified that Counsel did not put the State to any adversarial testing and showed no loyalty to the Applicant. Furthermore, the Applicant testified that Counsel opened the door for damaging testimony. The Applicant alleged that Counsel improperly opened the door to character evidence and that Counsel failed to present a defense on the Applicant's behalf.

The Applicant testified that Counsel had a conflict of interest in his representation because Counsel had served ten (10) years at the Solicitor's office and fifteen (15) years as a magistrate judge and, consequently, Counsel should have never been appointed to represent him.

The Applicant testified that both his trial and appellate counsel, Robert Dudeck, Esq., were ineffective because appellate counsel was limited to arguing only the issues preserved on the

³ The Applicant directed the Court's attention to pages 213, 215, and 224 of the trial transcript.

record during the Applicant's trial. The Applicant asserted that the transcript reflects that the trial court did in fact make the appropriate rulings—especially that the court ruled against him on evidentiary issues stemming from his Jackson v. Denno hearing—and that Counsel preserved error for appellate review. The Applicant alleged that he had witnesses present for his Jackson v. Denno hearing, who testified *in camera* including the Applicant's attorney at the time he made his statement to law enforcement, Clyde Louis Pennington, Jr., and the Applicant's sister, Dena Suzanne Crump, and whose testimony aided the trial judge in ruling on the admissibility of the Applicant's statement. Thus, the Applicant argued, the issues stemming from his Jackson v. Denno hearing were preserved for review and should have been argued on appeal by his appellate counsel. The Applicant further testified that appellate counsel was ineffective for failing to move for a rehearing and instead conveying to the Applicant that his case was dismissed and that appellate counsel was no longer his attorney.

The Applicant alleged that he needed to testify on his behalf at trial. The Applicant testified that Counsel was ineffective for stopping him from testifying in order to preserve last argument. The Applicant admitted that Counsel advised him against testifying because of his prior record, which contained a Criminal Domestic Violence conviction, among others. The Applicant further opined that Counsel was ineffective for failing to instruct the Applicant that he had the right to address the jury in closing.

In support of his allegation that he is entitled to a new trial and a "fair chance to present his defense," the Applicant asserted his innocence and claimed that he was "railroaded" during his trial. The Applicant stated that while he was incarcerated, his mother passed away; that his father is on the verge of dying; that his children refuse to "have anything to do with" him as a result of his trial; and that he does not know his grandchildren.

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Counsel testified that he had been a practicing attorney since 1986 and summarized his extensive work history. Counsel testified that he worked with the Spartanburg and Cherokee County Solicitor's offices and then was a Spartanburg County magistrate judge before beginning work at the Seventh Circuit Public Defender's Office. Counsel acknowledged that he had previously worked in the Solicitor's office and as a magistrate judge, but testified his employment history did not affect his representation of the Applicant in any way. Counsel testified that he had worked for the Public Defender's Office continuously since 2008. Counsel testified that he has tried numerous murder cases and a wide variety of other serious and different type crimes. Counsel testified that most of his notes were lost when the Public Defender's Office updated its computer data system, but that he still retained some handwritten notes on the Applicant's case.

Counsel testified that he was assigned the Applicant's case in the summer of 2009 when another attorney in the Public Defender's Office had a conflict of interest with the Applicant's representation. Counsel explained that the Applicant's case appeared on the August 2009 docket but was not expected to be reached. Counsel further explained that the Applicant preferred his case be called in December or January because he had some ear, nose, and throat health problems and "hemorrhaging." Counsel testified that he met with the Applicant several times in December 2009 and that on December 31, 2009, he met with the Applicant for twenty minutes and the Applicant told him that they were not in a hurry at this point in the case. The Applicant's case was again continued from the January docket to the March docket. Counsel testified his notes reflected that he met with the Applicant at the jail on March 15, 2010 for almost three hours from 4:30 PM to 7:00 PM, in which Counsel discussed the State's theory of the case that the Applicant was a "crazed crack addict," potential witnesses, the victim's autopsy,

testimony about the knife, DNA testing of the knife, suppression of the Applicant's statement, the Applicant's property and booking, how long the Applicant had been in custody, and other issues. Counsel stated that the Applicant's booking and property card from his intake at the jail was a "big issue" for the Applicant, so Counsel spent fifteen (15) minutes or so checking on those things.

Counsel testified that the State's theory was that the Applicant was a drug crazed maniac, but Counsel pointed out during closing arguments that no one had actually testified that the Applicant showed any evidence of violence. Counsel testified that the Applicant provided him with a list of people who could potentially be defense witnesses, including: the Applicant's father, the Applicant's sister, Phyllis Pack, David Marguerite, John and Angela Glenn, Hillard Lee Walker, and Jenkins. Counsel tried to contact each witness and ascertain how successful he would be by adducing their testimony. However, Counsel deduced that the Applicant's sister Dena was the only potentially helpful witness. Counsel summarized that Dena was expected to testify, "I've smoked crack with him and he's not crazed." However, Counsel testified that at the time of trial, the Applicant's sister appeared to be changing her testimony to, "I don't know, I haven't done it [crack] in a while" and that she had not seen the Applicant in four (4) to five (5) years and thus did not know how the Applicant acted while high on crack.

One of the witnesses, David Marguerite, was in the intensive care unit at Spartanburg Regional Hospital, and the other witnesses did not have positive things to say about the Applicant. Counsel testified that he obtained permission from Marguerite's family and spoke with him for fifteen (15) minutes at the hospital. In fact, Counsel testified, Marguerite asked Counsel to move for a continuance so that Marguerite could get better and testify against the Applicant because "he [the Applicant] did it." Counsel stated that Phyllis Pack would have

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offered similar testimony against the Applicant. Counsel reached out to the Applicant's father, but the Applicant's father told Counsel that he was a Christian and as a result, could not lie on the stand and testify that his son was a good person. Counsel stated that it appeared all of the potential witnesses wanted to testify against the Applicant. Once Counsel revealed the results of his investigation, he testified that the Applicant was then "upset." Counsel opined that each of the proposed witnesses would support the State's case, not that of the defense.

Counsel testified that the Applicant's defense was that he was asleep at the time of the crime and "didn't do it," so "someone else must have done it" but there were no alibi witnesses, so the trial strategy was to focus on the holes in the State's case and deficits in law enforcement's investigation. Counsel testified that he did request a voluntary manslaughter instruction, which the trial judge denied based on insufficient evidence supporting the theory that the Applicant committed a lesser-included offense, but could not recall if he requested a charge on the voluntariness of the statement. However, Counsel stated that in denying the Applicant's Jackson v. Denno motion, the trial judge determined that the Applicant had waived his Miranda rights as well as his right to have his attorney present prior to volunteering his statement by never asserting his right.⁴

Counsel testified that he debated whether to suppress the Applicant's statement and move for a Jackson v. Denno hearing as a tactical matter and Counsel considered allowing the State to admit the statement. The report concerning the Applicant's statement was written to sound like the Applicant was held in custody for two (2) hours, when he was actually held for eight (8) hours. Counsel testified that he was able to examine law enforcement regarding the interview

⁴ The transcript and evidence presented at the Applicant's evidentiary hearing confirm that the charge conference was held in chambers. The criminal rules of procedure do not require the written submission of requests to charge or that requests be included in the record as court's exhibits. Counsel opined that neither the State nor the Applicant

and circumstances surrounding the alleged confession in great detail. Counsel stated that he was able to "impeach" witnesses with his detailed cross-examinations regarding the Applicant's statement. Thus, the circumstances surrounding the interrogation and confession supported the defense's theory that law enforcement improperly handled the Applicant's case. Counsel related that the Applicant said, "I feel responsible." Counsel focused his strategy on the fact that law enforcement did not videotape the interview, but videotaped all other proceedings. Counsel testified that ultimately he decided to make a suppression motion. Counsel testified that he needed the Applicant's former attorney, Clyde Louis Pennington, Jr., for the suppression hearing and that he spent hours in Laurens—from 5:00 PM to 8:30 PM—trying to track him down by using an address he had obtained from the Applicant's cousin. Counsel stated that Pennington was "less than cooperative."

Counsel further testified that the Applicant requested he reach out to the Applicant's sister about testifying, which he obliged even though Counsel was unsure as to when the last time the two had seen each other. Counsel stated that he spoke with the Applicant's sister regarding her testifying for the suppression hearing and regarding the Applicant himself testifying. Counsel testified that he explained to the Applicant his right to testify and that Counsel could not take a position on his behalf, either way. Counsel opined that the Applicant did not perform well in his cross-examination during the suppression hearing and therefore he did not feel that the Applicant would perform well on the stand at trial. Counsel further stated that he, the Applicant, and the Applicant's sister all agreed that the Applicant would not perform well on the stand. Counsel stated that the Applicant's only defense and testimony would have been "I smoked crack and was home alone asleep when this happened" and that the Applicant's

submitted written requests to charge and that even though Counsel could not recall whether he requested a charge regarding the Applicant's statement, he tried to check whether he had after the fact to no avail.

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statement was determined admissible. Counsel affirmed that it was the Applicant's decision not to testify, but that he agreed with his decision. Counsel finally stated that if the Applicant had wanted to testify, he would have put him on the stand.

Counsel testified that he discussed the DNA with the Applicant and Counsel had spoken with experts in preparation. Counsel stated that he reviewed the DNA issue a "great deal" and although the evidence "hurt" the Applicant's case, he was constrained to challenge it. Counsel testified that he did not feel it was necessary to call an expert witness because the State's witnesses supported the defense's theory that there was no way to determine at which time the Applicant's DNA had been placed somewhere, how long the Applicant's DNA had been there, or how the Applicant's DNA had gotten there. Counsel summarized that the DNA evidence consisted of scrapings from the victim's fingernails, who was a brick layer and had rough hands and nails, which fact supported the defense's theory of undermining the conclusive and inculpatory nature of the DNA. Counsel testified that he did not believe there was a need for additional expert analysis because the match to the Applicant was a 1:950 billion match. However, Counsel testified that he tried to focus on the question as to when the DNA had been left and the potential contamination of the victim's hands and scene because of mishandling of the crime scene. Counsel also testified that he was aware that law enforcement found a fingerprint on the shadow box, but testified that it was checked against the Applicant, Walker and Nivens and none was a fingerprint match. Counsel stated that he spent time the week before trial reviewing the DNA evidence and several hours at the jail reviewing the evidence with the Applicant.⁵

⁵ Counsel did not accurately recall that the Applicant's Buccal swab was admitted in evidence at trial (Tr. 331-36).

Counsel testified that he had spoken with the Applicant about his mental state and the Applicant told Counsel that he sometimes blocks things out. Counsel testified that the Applicant witnessed his young daughter's death years earlier and it was a traumatic experience. However, Counsel opined that he considered the Applicant's mental state to be a "normal human reaction" because the Applicant never mentioned his PTSD and Counsel understood that the Applicant enjoyed his work and his life. Counsel testified that there was never a question as to the Applicant's competency to stand trial. Counsel further testified that the Applicant understood the criminal justice system, the process, and his rights.

Counsel stated that he elicited testimony that the Applicant often performed work in the victim's house and that he moved furniture and things around in the victim's house in order to set up her computer. Counsel stated that the Applicant never denied being in the victim's residence. Counsel testified that no direct evidence pointed to the guilt of a third party. Instead, Counsel testified that there were rumors of the love triangle and allegations of prior violence but nothing concrete. Counsel elaborated that the Applicant's theory was that Nivens' son was jealous of his father's relationship with the victim and thus could be implicated as a suspect in her murder, which he argued to the jury. Counsel further testified that he completely developed and argued the theory of the other relationships. He further testified that he argued the fact that "the killer was on a digital camera" but that the State did not perform an investigation into other possible suspects. Counsel explained that law enforcement found rolls of film that the State did not develop, which supported the defense's argument of creating reasonable doubt as to the Applicant's guilt and possible third party guilt. However, Counsel testified that the fact that the fingerprint found on the shadow box excluded both Walker and Nivens undermined the defense's third party guilt defense.

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Counsel testified that he cross-examined the SLED witnesses regarding the chain of custody and evidence contamination issues regarding the broken seal on one side of the DNA box. However, Counsel explained that the structure of the box was such that you could not open the box without the other side also being open and that side's seal was intact. Counsel also argued that law enforcement's failure to properly bag the victim's hands until after they had moved the body several times supported the Applicant's secondary transfer argument. Counsel elaborated that the Applicant's argument was that the victim's hands picked up the Applicant's DNA while the body was moved because the Applicant had moved her bed earlier.

Counsel testified that he found no basis to object to the witness' testimony about the Applicant's crack use and that he was able to successfully cross-examine each witness as to potential bias. Counsel testified that he felt he disproved the State's "crazed crack addict" theory by eliciting testimony as to why the Applicant could have been angry. Counsel further testified that the State's theory was that the Applicant's demeanor at trial was different than the day of the incident, so Counsel tried to rebut that theory. Counsel testified that he was prepared to cross-examine each State witness offered to testify against the Applicant and hurt their character by impeaching and discrediting them as well as challenging how the State originally portrayed them on direct. Counsel stated there was testimony at trial regarding "normal behavior." Counsel also testified that another theory was that the victim fired the Applicant, thus establishing his motive to murder her. However, the testimony adduced at trial was that the victim did not fire the Applicant, but simply stated that he needed to call Pat. Pat then said "I don't need you anymore" to the Applicant and did not "stir" things up. Therefore, Counsel stated, that theory establishing motive was negated by the testimony at trial. Counsel stated that he never filed a motion *in*

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limine regarding the State seeking to admit character evidence, but that the State ultimately presented no evidence that the Applicant was violent or "wild."

Counsel testified that the State extended no guilty plea offers, even though Counsel asked to negotiate a plea agreement. Counsel testified that the Applicant never entertained the idea of a guilty plea because he maintained his innocence. Counsel finally stated that due to the local judges' sentencing philosophies it was likely if the Applicant plead guilty, he would "probably get life anyway," thus the Applicant had nothing to lose by going to trial.

Counsel testified that he saw nothing that he could legally object to during the Solicitor's closing arguments because one of the officers testified that they viewed a small red mark on the Applicant's neck at the time of his arrest, but there was no photo taken of the mark. Further, Counsel testified that the State did not produce a report from Officer Cooper because to his understanding a report was never made. Counsel further clarified that the officer entered the Applicant's interrogation room, said "this family needs closure" to the Applicant, then left.

Ineffective Assistance of Counsel

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

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

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Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. See id. at 117-18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. There is a strong presumption that counsel's

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conduct falls within the wide range of reasonable professional assistance and the “defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Id. This Court finds that the Applicant has failed to meet his burden of proof as to this claim.

Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778–79 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)). See Stokes, 308 S.C. at 548, 419 S.E.2d at 778–79 (finding counsel’s decision not to call witnesses reasonable where their testimony would have been of no value to the case and witnesses were not credible); Abney v. State, 408 S.C. 41, 51, 757 S.E.2d 544, 549 (Ct. App. 2014) (“While trial counsel should consult with his client, the final decision on strategy belongs to counsel.”); Moore v. State, 399 S.C. 641, 723 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551 (2004) (“Attorneys have a duty to consult with their clients regarding important decisions,’ including questions of overarching ‘defense strategy.’ . . . This does not require counsel to obtain the defendant’s consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights [to plead guilty, waive a jury, testify on his own behalf, or take an appeal] cannot be made for the defendant by surrogate”).

Regarding the Applicant’s claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant’s attorney

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demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687-88, 104 S. Ct. 2052, 2064-65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064-65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev'd on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)).

This Court further finds Counsel adequately conferred with the Applicant and provided thorough representation. This Court finds that Counsel's representation did not fall below an objective standard of reasonableness. This Court finds Counsel is a criminal practitioner who has experience in the trial of serious offenses. This Court finds Counsel provided credible testimony during the Applicant's evidentiary hearing. Counsel conferred with the Applicant and discussed the pending charges, his constitutional rights, range of penalty, the elements of the charges and what the State was required to prove, the Applicant's version of the facts, and the Applicant's defense at trial. The record also reflects that Counsel zealously advocated on his client's behalf.

Failure to Investigate Competency, Mental Health & Sanity

The Applicant alleges that Counsel was ineffective for failing to conduct a pre-trial investigation into his mental health and competency to stand trial, even though Counsel was aware of the Applicant's mental health issues, such as his PTSD, disability determination, and other mental health issues. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective in this regard.

Under M'Naughten, "[a]n accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime is relieved of responsibility for his acts."

Davenport v. State, 301 S.C. 39, 40, 389 S.E.2d 649, 649 (1990) (citing S.C. CODE ANN. § 17-24-10 (2014)); State v. Law, 270 S.C. 664, 244 S.E.2d 302 (1978); State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973)).

A defendant must be mentally competent to stand trial to assist Counsel in his defense. Drope v. Missouri, 420 U.S. 162 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

In every criminal case, it is presumed the defendant is sane. State v. Milian-Hernandez, 287 S.C. 183, 185, 336 S.E.2d 476, 477 (1985). "This presumption relieves the State of the burden of proving sanity in every case. However, when the defendant offers evidence of insanity, the presumption disappears and it is incumbent on the State to present evidence from which a jury could find the defendant sane. Any evidence of sanity is sufficient to present a jury issue when the defendant relies on the affirmative defense of insanity." Id. Insanity is an affirmative defense to a prosecution for a crime. Id. South Carolina has adopted the M'Naghten test to determine insanity. State v. Lewis, 328 S.C. 273, 277-78, 494 S.E.2d 115, 117 (1997). "A defendant is insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." Id. (citing S.C. CODE ANN. § 17-24-10(A) (2014)). South Carolina law provides:

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

(B) The defendant has the burden of proving the defense of insanity, by a

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preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

S.C. CODE ANN. § 17-24-10(A) (2014). “[T]he key to insanity is ‘the power of the defendant to distinguish right from wrong in the act itself-to recognize the act complained of is either morally or legally wrong’.” State v. Wilson, 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992) (quoting State v. McIntosh, 39 S.C. 97, 17 S.E. 446 (1893)).

This Court finds the allegation that Counsel was ineffective for failing to have the Applicant mentally evaluated to determine his competency to stand trial prior is wholly without merit. In determining whether counsel is ineffective for failing to request a competency hearing, under the second prong of the Strickland standard, an applicant must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992) (The Applicant claiming that trial counsel was ineffective in failing to pursue this defense “must produce some evidence of insanity or showing that with the exercise of due diligence, an insanity defense could have been developed.”). The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980). “In a PCR action, the petitioner bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea.” Jeter, 308 S.C. at 222-23, 417 S.E.2d at 596 (citing Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984)). Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id.

In order to show an Applicant was prejudiced by Counsel’s failure to pursue the defense of insanity, “the petitioner must produce some evidence of insanity or a showing that with the

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exercise of due diligence, an insanity defense could have been developed.” Id. (citing State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982), Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984)).

This Court finds the Applicant has failed to meet his burden of showing that he was incompetent at the time of his trial or that his mental health issues could support an insanity defense. The only testimony the Applicant provided in support of his contention that he was either incompetent and or insane was that he suffered from PTSD and had been classified as disabled. The Applicant also failed to articulate an argument supporting an insanity defense. The record is devoid of any evidence that the Applicant was either incompetent or insane at the time of his trial or at the time of the offense. Rather, this Court finds credible Counsel’s testimony that he had no indication or reason to question the Applicant’s competence.⁶ Further, this Court finds credible Counsel’s testimony that the Applicant maintained his innocence and that his ultimate defense was that he did not, in fact, commit the crime. Accordingly, this Court finds that the Applicant has failed to meet his burden of proof in this regard.

Failure to Investigate and Argue Third Party Guilt

The Applicant alleges that Counsel was ineffective for failing to investigate and argue a third party guilt defense on his behalf. The Applicant specifically alleges that Counsel failed to admit an alleged crime stoppers report that detailed instances of criminal domestic violence among the purported love triangle and that Counsel was ineffective for failing to request a third party guilt defense jury charge.

This Court finds the Applicant’s contention that Counsel did not conduct an adequate pre-trial investigation or prepare enough for trial is without merit. “[C]riminal defense attorneys have

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a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), *overruled on other grounds*, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). “Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.” Porter v. State, 368 S.C. 378, 385–86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Wiggins v. Smith, 539 U.S. 510, 521–22, 123 S. Ct. 2527, 2535 (2003).

The admissibility of evidence of third party guilt is governed by the rule set forth in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); State v. Burgess, 391 S.C. 15, 22–23, 703 S.E.2d 512, 516 (Ct. App. 2010); State v. Cope, 385 S.C. 274, 292–93, 684 S.E.2d 177, 186–87 (Ct. App. 2009).

The Gregory rule holds:

[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

⁶ Although Counsel erroneously stated that the Applicant did not divulge his PTSD, this Court notes that the record reflects that all parties knew that the Applicant suffered from PTSD and the fact was never purposefully hidden as a result of Counsel’s ineffective assistance (Tr. 53:12–25).

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Gregory, 198 S.C. at 104–05, 16 S.E.2d at 534–35.

This Court finds that the Applicant failed to meet his burden of proof of establishing that there was any remaining evidence that Counsel could have presented to support a defense of third party guilt. This Court finds credible Counsel's testimony that no direct evidence supported the Applicant's theory, particularly based upon the fact that neither the DNA nor fingerprint found at the crime scene matched either man involved in the love triangle. This Court finds credible Counsel's testimony that he effectively developed and argued the Applicant's theory at trial. This Court finds most compelling the trial transcript, which reveals that Counsel effectively elicited evidence supporting the Applicant's theory during his cross examination of Ben Nevins (Tr. 152:3–164:5, 165:8–166:5); and Lee Walker (237:13–145:17).

The Applicant argues Counsel was ineffective for not introducing an alleged crime stoppers report that details acts of criminal domestic violence among the love triangle. The Applicant failed to present any purportedly beneficial testimony or evidence supporting his theory at the PCR hearing. Our Courts have repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant's mere speculation as to what a witness' testimony would have been by itself cannot satisfy the Applicant's burden of showing prejudice. Id. (citing Glover, 318 S.C. at 498–99, 458 S.E.2d at 540). Further, this Court finds credible Counsel's testimony that he told the Applicant that the report would not be admissible at trial based on the South Carolina Rules of Evidence. See Rules 401, 402, 403,

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SCRE. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this allegation.

Failure to Obtain DNA Expert and Challenge DNA Evidence

The Applicant alleges Counsel was ineffective for failing to retain an independent DNA expert to testify as to explain why the Applicant's DNA was found in the victim's home and underneath her fingernails. The Applicant generally alleges that Counsel was ineffective in challenging the State's DNA evidence. The Applicant specifically alleges that Counsel failed to adequately challenge the chain of custody and law enforcement's failure to properly process the crime scene. This Court finds that the Applicant has failed to meet his burden in this regard.

"[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-06 (2007) (citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957)). "Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." Id. (citing Benton, 232 S.C. at 33-34, 100 S.E.2d at 537). "Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive. Id. (citing State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)). However, "[t]estimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility. . . . Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id.

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"A complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is taken from the [source] to the final custodian by whom it is analyzed." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001) (citing State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992); Raino v. Goodyear Tire & Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (1992); State v. Kahan, 268 S.C. 240, 233 S.E.2d 293 (1977)). "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." Id. (citing State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990)). Additionally, the value of the specimen is a credibility determination for the jury, not an impediment to admissibility:

In applying this rule, our Supreme Court has found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the specimen was not established at least as far as practicable. . . . On the other hand, where the identity of persons handling the specimen is established, the Supreme Court has found that evidence regarding its care goes only to the weight of the specimen as credible evidence. . . . In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility.

State v. Horton, 359 S.C. 555, 567-68, 598 S.E.2d 279, 286 (Ct. App. 2004) (citing Carter, 344 S.C. at 424, 544 S.E.2d at 837).

This Court finds that the State established the chain of custody and processing of the crime scene in accordance with the above standards at trial and that various failures regarding the DNA testing, chain, crime scene processing, and obtaining proof of the Applicant's scratch on his neck were in fact presented to the jury (Tr. 308:10-313:25). This Court finds credible Counsel's testimony that he effectively elicited information supporting the Applicant's theory of the case at trial.

Further, this Court finds that Counsel's strategic trial decision not to present the testimony of an independent DNA expert is valid. Cf. Dempsey v. State, 363 S.C. 365, 370, 610

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S.E.2d 812 (2005) (citing McLaughlin v. State, 352 S.C. 476, 483–84, 575 S.E.2d 844–45 (2003)) (finding defense counsel’s decision not to call an expert witness to rebut the State’s expert witness was legitimate strategic decision and any resulting prejudice to the Applicant would be merely speculative). See Roseboro, 317 S.C. at 294, 454 S.E.2d at 313; Underwood, 309 S.C. at 562, 425 S.E.2d at 22 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 778–79. Our courts are understandably wary of second-guessing defense counsel’s trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel’s choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel’s performance should not be found ineffective. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 779. This Court finds credible Counsel’s testimony that he interviewed potential DNA experts prior to trial, none of whose testimony would have been beneficial. This Court further finds credible Counsel’s testimony that he was able to elicit favorable testimony and all the requisite testimony supporting the Applicant’s case from the State’s scientists.

Moreover, the Applicant has failed to provide this Court with any actual evidence tending to prove his assertions that a DNA expert would offer beneficial or exculpatory testimony on his behalf at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458

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S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). Ultimately, the Applicant has failed to produce the putative witnesses and present their purportedly beneficial testimony at the PCR hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant failed to produce any evidence or testimony to support his claim.

Finally, this Court notes that even if the Applicant had proved Counsel was ineffective for failing to produce an independent DNA expert or even if the Applicant had been successful on appeal, it is unlikely that he would have been granted a new trial. "In order to obtain leave from this Court to move for a new trial based on after-discovered evidence, an appellant must make a *prima facie* showing that a new trial is warranted." State v. Ford, 301 S.C. 485, 491, 392 S.E.2d 781, 784 (1990) (citing State v. Butler, 261 S.C. 355, 200 S.E.2d 70 (1973); State v. Jennings, 40 S.C. 553, 18 S.E. 932 (1894)). "The requirements for a new trial are: (1) the evidence is such as will probably change the result if a new trial is granted, (2) the evidence has been discovered since the trial, (3) the evidence could not have been discovered prior to trial by the exercise of due diligence, (4) the evidence is material to the issue, and (5) the evidence is not merely cumulative or impeaching." Id. (citing Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983); State v. Allen, 276 S.C. 412, 279 S.E.2d 365 (1981)).

Just because the Applicant exercised his rights pursuant to the Access to Justice Post Conviction DNA Testing Act, see S.C. CODE ANN. § 17-28-10 (2014), does not mean that the Applicant has also satisfied the requirements of the Act, has met his burden of proving the DNA evidence was actually exculpatory and supports his theory of the case, and has established the requisite prejudice supporting the grant of a new trial. See S.C. CODE ANN. § 17-28-100 (2014)

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("If the results of the DNA test are exculpatory, the applicant may use the exculpatory results of the DNA test as grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure. If the results of the DNA test are inconclusive, the court may allow for additional DNA testing or may dismiss the application."). Cf. Bagwell v. State, 410 S.C. 259, 268, 763 S.E.2d 630, 635 (Ct. App. 2014), *reh'g denied* (Oct. 21, 2014), *cert. denied* (Feb. 27, 2015) ("Although the DNA test results indicating Bagwell's blood was not found on the pieces of glass do not exonerate Bagwell or preclude the possibility of his guilt, we believe the jury more likely than not would have reached a different verdict had this evidence been presented at trial."); Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 792, 178 L.Ed.2d 624 (2011) (recognizing Strickland prejudice "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case' "). The Applicant has failed to show that he has suffered prejudice as a result of Counsel's alleged failures.

Finally, the Applicant asserts that the trial judge committed error based on an improper and incomplete ruling regarding the admissibility of the State's scientific evidence against the Applicant. This Court finds that any allegation of trial court error raises direct appeal issues that are procedurally barred by S.C. CODE ANN. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, this Court summarily dismisses those claims.

Failure to Object to the Solicitor's Closing Argument & Brady Violations

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The Applicant testified that Counsel failed to object to the improper implication made by the Solicitor during closing arguments regarding a scratch found on the Applicant's neck at the time of his arrest.

"A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 432-42, 115 S.Ct. 1555, 1565-69, 131 L.Ed.2d 490, 505-10 (1995); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963); State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. Id. (citing United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985)). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 388-89, 434 S.E.2d 266, 267-68 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id.

The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624-25 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 188, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868,

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40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996).

This Court finds that the Applicant has failed to meet his burden of proof as to this issue. The record reflects that testimony had been previously presented regarding a mark on the Applicant's neck and the Solicitor was allowed to reference evidence or reasonable inferences drawn from the evidence (Tr. 313:11-25). Therefore, there was no legal basis for Counsel to object.

As it relates to the alleged Brady violation, this Court finds that this allegation lacks merit. This Court finds Counsel's testimony to be most credible in that there was no report to turn over.

Failure to Object to Improper Character Evidence

The Applicant alleges Counsel was ineffective for failing to object to the admission of improper character evidence regarding the Applicant's drug use, anger, violence, firearm use, and borrowing money. The Applicant specifically asserts that Counsel was ineffective for failing to highlight the State's witnesses prior inconsistent statements.

Further, "[i]n a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue." Mitchell v. State, 298 S.C. 186, 188-89, 379 S.E.2d 123, 125 (1989) (citing State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983); State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966)). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). "It is well settled that when the defendant in a criminal prosecution becomes a witness in his own behalf, he places his reputation for truth and veracity in issue and

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may be cross-examined about any of his past transactions tending to affect his credibility, but his general character is not put in issue and may not be assailed by cross-examination or otherwise.” Taylor v. State, 258 S.C. 369, 375-76, 188 S.E.2d 850, 853 (1972) (citing State v. Knox, 98 S.C. 114, 82 S.E. 278 (1914); State v. Bolin, 177 S.C. 57, 180 S.E. 809 (1935); State v. Corn, 215 S.C. 166, 54 S.E.2d 559 (1949)). “Evidence is relevant if it ‘ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 835 (2001) (citing Rule 401, SCRE). Evidence of prior bad acts by the defendant is admissible to prove motive, intent, identity, lack of accident or mistake, or common scheme or plan. Rule 404(b), SCRE. A logical connection between the prior bad act and the crime is required. State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999); State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923).

This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The State’s theory was that the Applicant was high on crack cocaine and when the victim refused to loan him money, he became angry and killed her. Therefore, evidence and testimony regarding the Applicant’s crack cocaine abuse and previous times borrowing money were relevant and admissible to prove motive. This Court finds no basis for Counsel to object to inconsistent witness testimony. This Court finds credible Counsel’s testimony that he effectively impeached the State’s witnesses. This Court further finds that Counsel was effectively able to use cross-examination to address and combat harmful testimony.

Further, this Court finds that the testimony would be considered *res gestae* and not improper character evidence. The testimony in question would not have been excluded as an impermissible reference to a prior bad act, but would have been admissible as part of the *res*

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gestae of the crime. See Rule 404(b), SCORE; State v. Blackburn, 271 S.C. 324, 327–28, 247 S.E.2d 334, 336–37 (1978) (“In order to qualify as a part of the *res gestae*, a statement must be substantially contemporaneous with the litigated transaction and be the spontaneous utterance of the mind while under the active, immediate influence of the event.”); State v. Dennis, 321 S.C. 413, 417–18, 468 S.E.2d 674, 676–77 (1996) (citing State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995)) (same); State v. King, 334 S.C. 504, 512–13, 514 S.E.2d 578, 582–83 (1999) (citing State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996)) (“The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred.”); see also, State v. Gagum, 328 S.C. 560, 563 & n.2, 492 S.E.2d 822, 823 & n.2 (1997) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Bolden, 303 S.C. 41, 43, 398 S.E.2d 494, 495, n.1 (1990)) (“While there are times when evidence may be admissible under *Lyle* and Rule 404(b) and the *res gestae* exception, the *res gestae* exception is properly viewed as independent of *Lyle*—that is, some evidence that would be inadmissible under *Lyle* and Rule 404(b) would be admissible as part of the *res gestae*.”).

Additionally, “[d]efense counsel may decide as a strategic matter not to object because his objection would highlight the erroneous evidence, argument, or charge.” State v. Torrence, 305 S.C. 45, 65, 406 S.E.2d 315, 326 (1991). See Fernandez v. State, 306 S.C. 264, 267, 411 S.E.2d 426, 428 (1991) (counsel’s failure to object to admission of syringe into evidence not ineffective assistance of counsel where counsel impeached State witness and bolstered the applicant’s case by showing that the syringe was not consistent with the State’s case against the applicant.). See Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes, 308 S.C. 546, 419 S.E.2d 778 (1992)) (finding valid strategy not to request curative instruction

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"because they tend to bring into focus precisely the item the objector has kept out"). Accordingly, this Court finds that Counsel executed a valid strategy and was not ineffective. See Roseboro, 317 S.C. at 294, 454 S.E.2d at 313; Underwood, 309 S.C. at 562, 425 S.E.2d at 22 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 778-79. Therefore, this Court finds the Applicant has failed to meet his burden of proof.

Failure to Prepare and Properly Investigate

This Court finds that the Applicant's allegations that Counsel did not conduct an adequate pre-trial investigation or prepare enough for trial are without merit. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), *overruled on other grounds*, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 528-29, 123 S. Ct. 2527, 2535 (2003). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 355-56, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had

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

The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared or had additional time prior to the case being called to trial. This Court finds the allegation that Counsel was unprepared, did not investigate, and did not sufficiently meet with the Applicant prior to trial lacks merit. This Court finds Counsel's testimony on this issue to be credible and it is clear from the record and from Counsel's testimony that he met with the Applicant appropriately and fully investigated possible defenses for trial. This Court notes that Counsel has years of experience representing clients on similar charges. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation or lack of investigation. Accordingly, this allegation is without merit.

Conflict of Interest

The Applicant alleges Counsel should have been replaced due to a conflict of interest. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Lomax v. State, 379

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S.C. 93, 101, 665 S.E.2d 164, 168 (2008) (Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001)). The test used to determine when a conflict of interest results in a violation of sixth amendment rights is:

In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance . . .

[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. . . . But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Duncan v. State, 281 S.C. 435, 437-38, 315 S.E.2d 809, 810-11 (1984) (citing Cuyler v. Sullivan, 446 U.S. 335, 348-350, 100 S. Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980)). An actual conflict of interest occurs "when a defense attorney places himself in a situation inherently conducive to divided loyalties. . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists." Id. (citations omitted) "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Id. (citing State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005)). "Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction." Id. (citing Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998)). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

South Carolina jurisprudence contemplates a criminal defendant is prejudiced where his attorney has an actual or concurrent conflict of interest concerning multiple representations of adverse parties or parties to the same criminal episode. See Lomax, 379 S.C. at 101, 665 S.E.2d at 168; Duncan, 281 S.C. at 438, 315 S.E.2d at 811. Here, the Applicant stated that Counsel

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should have been removed because his conflict of interest was his prior service as a magistrate judge and a solicitor. This Court finds that the Applicant's allegation of a conflict of interest lacks merit. There was no credible evidence presented to support the claim. See Padgett v. State, 324 S.C. 22, 27, 484 S.E.2d 101, 103 (1997) (the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction).

Failure to Present the Applicant's Testimony

The Applicant alleges Counsel was ineffective for failing to allow him to testify on his behalf. This Court finds Counsel's testimony credible that he and the Applicant extensively discussed his right to testify, that he discussed his right to testify with the Applicant's sister, that the Applicant came to his own decision not to testify freely, intelligently, voluntarily and of his own will, and that based on the Applicant's poor performance on cross-examination during his pre-trial hearing, all parties agreed with the Applicant's decision not to testify. Moreover, the record reflects that Counsel and the Applicant again took time to discuss the Applicant's right to testify at the end of the State's case, the State published the Applicant's prior criminal record for purposes of impeachment, and trial court fully advised the Applicant of his right to testify, which he waived, thereby curing any error on behalf of counsel (Tr. 405:10-412:20).

Failure to Challenge the Confession

The Applicant claims Counsel was ineffective for failing to obtain a jury charge on the voluntariness of his statement. The record reveals that the trial court's general charge to the jury regarding their role as fact finder, the Defendant's presumption of innocence, considering the weight and value of witness testimony and evidence, and the defendant's right not to testify, was proper and the trial court properly instructed the jury that in order to find the Applicant guilty the

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burden remains on the State to prove each element of the offense beyond a reasonable doubt (Tr. 439:13-447:22).

The Court further finds credible Counsel's testimony that he debated whether to suppress the Applicant's statement and move for a Jackson v. Denno hearing as a tactical matter and considered allowing the State to admit the statement. The Court finds credible Counsel's testimony that he was able to effectively examine law enforcement regarding the circumstances surrounding the interview and the alleged confession in great detail. The Court finds credible Counsel's testimony that he was able to effectively "impeach" witnesses with his detailed cross-examinations regarding the Applicant's statement. The Court finds credible Counsel's assessment that the circumstances surrounding the interrogation and confession supported the defense's theory and strategy that law enforcement improperly handled the Applicant's case. Counsel related that the Applicant said, "I feel responsible." The Court finds that the Applicant's statement is less than inculpatory and subject to many different interpretations falling short of an admission of guilt. The Court further finds valid Counsel's strategy to use the statement to focus on the fact that law enforcement did not videotape the interview, but videotaped all other proceedings.

This Court finds Counsel's testimony credible that the voluntariness of the Applicant's confession was a non-issue at trial based on the trial court's ruling on the Applicant's Jackson v. Denno motion. Counsel made a motion to suppress the Applicant's statement to police and a full pre-trial hearing was held, at which the Applicant testified. Counsel then renewed his objection during trial at the time of the officer's testimony regarding the statement. The voluntariness of the Applicant's confession was addressed on direct appeal and affirmed by the South Carolina Court of Appeals. Specifically, the Court of Appeals held:

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As to Stoudenmire's argument that the officers intentionally kept his attorney from him during the interrogation, we find that Stoudenmire was read his Miranda rights and never invoked his right to silence or his right to counsel. He never stopped talking during his interrogation and there was no indication that his interrogators knew that Stoudenmire's attorney was in the building. . . . Accordingly, we find that the trial court did not err in holding that Stoudenmire's statements were freely and voluntarily given.

State v. Stoudenmire, No. 2012-UP-628 (S.C. Ct. App. filed Nov. 28, 2012), *available at* 2012 WL 10864180.⁷

Further, as referenced above, the Applicant's statement was determined admissible, was read into the record and published for the jury, and was not a true confession (Tr. 288:15–289:19). Thereafter, Counsel effectively cross-examined the officer who published the Applicant's statement (Tr. 290:15–305:13).

It is not clear from the record whether Counsel requested an instruction, whether an instruction was requested and denied or whether the lack of giving the charge was a simple omission on the part of the trial Court. While it is prudent to give an instruction on the voluntariness of the Applicant's statement the omission of the instruction is subject to a harmless error analysis. When considering whether an error with respect to a jury instruction was harmless the reviewing Court must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014). The relevant inquiry is not what the verdict would have been had the jury been given the correct instruction, but whether the erroneous charge contributed to the verdict rendered. State v.

⁷ While the Court of Appeals held that the Applicant's argument that "physical contact by the officers during his interrogation prevented his statements from being freely and voluntarily given" was not properly preserved for appellate review "as it was not argued in his motion to suppress his statement," Counsel testified that the main basis for challenging the Applicant's statement was the fact that he was held for eight (8) hours, did not have the benefit of an attorney's advice, and other issues. See State v. Stoudenmire, No. 2012-UP-628 (S.C. Ct. App. filed Nov. 28, 2012), *available at* 2012 WL 10864180. Neither Counsel nor the Applicant testified as to any physical contact. Thus, the Applicant has not met his burden of proof as to this issue. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)).

Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014). Whether or not an instruction error was harmless is a fact-intensive inquiry. Id. Further, precedent is clear that the failure to give an instruction is subject to "harmless error" analysis. Id. Therefore, this Court finds the Applicant's allegation is without merit.

In determining this issue on post-conviction relief the Court finds if Counsel failed to request the instruction, failed to preserve the issue for appellate review or the instruction was simply not given due to an omission on the part of the Court such error was harmless beyond a reasonable doubt. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014). Considering Counsel's strategy as articulated in the summary of testimony above and the breadth of the record in this case establishing the Applicant's guilt it is clear beyond a reasonable doubt that any error in not giving the charge did not contribute to the verdict rendered in this case.

Ineffective Assistance of Appellate Counsel

The Applicant alleges Appellate Counsel was ineffective for failing to argue preserved error and failing to file a petition for rehearing on his behalf. This Court finds the Applicant has failed to meet his burden of proof. The Applicant articulated no specific grounds of Appellate Counsel's error. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (Citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)).

A defendant is constitutionally entitled to 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 non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose

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among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

This Court finds that there was no evidence or testimony presented to show that appellate counsel did not raise the preserved issues that counsel felt had merit. Further, the South Carolina Supreme Court has held that appellate counsel has no duty 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).

Due Process Violations

This Court finds that the allegations of due process violations raised by The Applicant are direct appeal issues that are procedurally barred by S.C. CODE ANN. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

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The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, this Court summarily dismisses those claims.

Prejudice

"In order to prevail on a claim of ineffective assistance of counsel, petitioner must demonstrate that but for counsel's ineffectiveness, there is a reasonable probability the result of the trial would have been different." Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998).

The overwhelming evidence of the Applicant's guilt presented by the State at trial negates any claim that Counsel's performance could have reasonably affected the outcome of the Applicant's trial See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding no reasonable probability the result of trial would have been different had counsel's performance not been deficient where there is overwhelming evidence of guilt).

This Court finds that the Applicant has failed to meet his burden of proof. Based on the testimony provided at the evidentiary hearing and a review of the record, this Court cannot discern any error in Counsel's performance that would undermine this Court's confidence in the jury's verdict. This Court finds that a reasonable jury could find the Applicant guilty of the

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charged offense. Therefore, this Court finds that the Applicant has failed to establish prejudice supporting vacating his convictions.

All Other Allegations

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

CONCLUSION

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

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by Counsel's representation. See id. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

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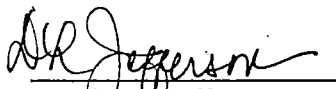
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 454, 409 S.E.2d 395, 396 (1991), and the Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. The Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4th day of June, 2015.

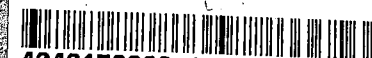

Deadra L. Jefferson
Presiding Judge
Seventh Judicial Circuit

Charleston, South Carolina
At Chambers

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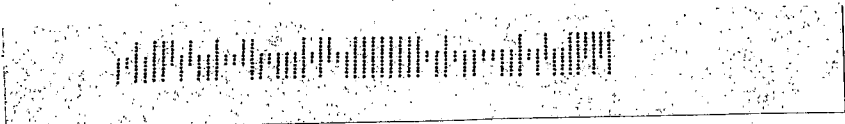
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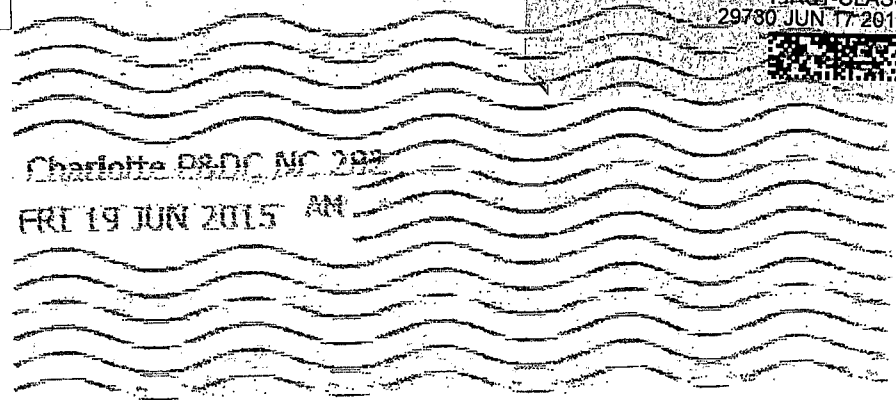


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TO: _____

The Honorable Daniel Shearouse
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