ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 16 2017
S.C. SUPREME COURT

June 16, 2017

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

Re: Gregory Vincent Smith v. State of South Carolina
2015-CP-28-0002

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. A copy of the order which is to be challenged on appeal.
4. A letter ordering the PCR transcript from the court reporter

Sincerely,

Jessica E. Kinard
Assistant Attorney General

JEK/fvh
Enclosures

cc: Kristy Grafton Goldberg, Esquire
The Honorable Janet C. Hasty, Clerk of Court of Kershaw County
The Honorable Daniel E. Johnson, Fifth Circuit Solicitor
SCCID, Division of Appellate Defense
Vincent J. Barton, Esquire
Trisha Allen, Victims Services

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 16 2017

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable Jocelyn Newman, Circuit Court Judge

Case No. 2015-CP-28-0002

GREGORY VINCENT SMITH, #353524,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Jocelyn Newman's order dated April 21, 2017 and filed April 24, 2017 granting post-conviction relief to the Respondent. Judge Newman denied the State's Motion for Reconsideration in an order dated May 17, 2017 and filed May 18, 2017. The State received notice of entry of the orders on May 22, 2017. A copy of the orders on appeal is attached to this notice.

Jessica E. Kinard
Assistant Attorney General
South Carolina Bar No. 77889
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

June 16, 2017

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

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Respondent,

v.

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Petitioner.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 16, 2017, to Kristy Grafton Goldberg, Esquire, his attorney of record, to the address below.

Kristy Grafton Goldberg, Esquire
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 303
Columbia, SC 29201

Jessica E. Kinard
Assistant Attorney General

SWORN to before me this 16th day of June, 2017.

Notary Public for South Carolina.
My Commission Expires: _____

FELICIA V. HAY NOTARY PUBLIC Exp. April 21, 2019 SOUTH CAROLINA

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015-CP-28-0002

Gregory Smith (SCDC# 353524) — PLAINTIFF(S)

State of South Carolina — DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

ORDER INFORMATION

Respondent's Motion to Alter or Amend Judgment is DENIED.

This order ☑ ends ☐ does not end the case.

Additional Information for the Clerk : _____

FILED
IN THE COURT OF COMMON PLEAS
17 MAY 18 AM 9:10
KERSHAW COUNTY, S.C.

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge Jocelyn Newman **Judge Code** 2757 **Date** May 17, 2017

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

ATTEST True, Correct & Certified Copy of Original on File in this Court
Janet C. Hasty
Clerk of Court Kershaw County

SCRCP Form 4C (10/2011)

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015- CP-28-0002

GREGORY V. SMITH (SCDC #353524)

PLAINTIFF(S)

STATE OF SOUTH CAROLINA

DEFENDANT(S)

Submitted by: NEWMAN, J.	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

FILED FOR RECORD
2017 APR 24 PM 12:05
KERSHAW COUNTY, S.C.

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

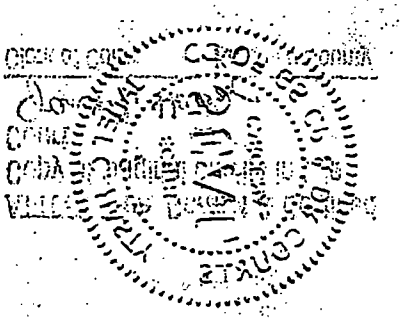
If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2757
Judge Code

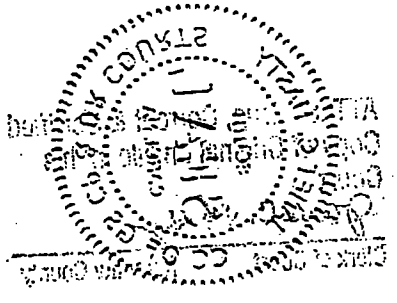
ATTEST True, Correct & Certified Copy of Original on File in this Court
April 21, 2017
Date
Janet C. Hardy
Clerk of Court - Kershaw County



STATE OF SOUTH CAROLINA COUNTY OF KERSHAW Gregory V. Smith (SCDC #353524), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2015-CP-28-0002 **ORDER** **GRANTING POST-CONVICTION RELIEF**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 2, 2015 and amended August 22, 2016. Respondent made its return on or about March 3, 2016. An evidentiary hearing was held on September 1, 2016, at the Richland County Courthouse. Applicant was present and represented by Kristy Goldberg, Esq. Assistant Attorney General Jessica Kinard represented Respondent.

Witnesses who testified at the hearing included Applicant; Ronald Moak, Esquire; Brett Perry, Esquire; Dr. Janice Ross; and Applicant's trial counsel, Cornelius Riley, Esquire. The Court had before it Applicant's Record on Appeal including the original trial transcript and an attached exhibit consisting of a SLED investigation report, the Kershaw County Clerk of Court records, the South Carolina Department of Corrections records, the PCR applications, the Return, and the following Applicant exhibits: (1) statements of Samantha Steeprock, (2) statements of Morris Nixon, (3) an audio recording of Gregory Smith's statement to law enforcement; and (4) photographs of a gun and a holster.



PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. Applicant was indicted at the January 2012 term of the Kershaw County Grand Jury for murder (2012-GS-28-0076), manufacturing marijuana (2012-GS-28-0075) and manufacturing methamphetamine (2012-GS-28-0074). Applicant was represented by Cornelius Riley, Esq. at trial. This case was called to trial on October 22, 2012. On the first day of trial the Honorable G. Thomas Cooper granted he defense motion to sever the manufacturing marijuana charge. That offense was later Nolle Prossed by the State on May 21, 2013. On October 25, 2012, a jury convicted Applicant on the remaining murder and manufacturing methamphetamine charges, and Judge Cooper sentenced Applicant to thirty years in prison for murder and a consecutive five years for manufacturing methamphetamine.

A notice of appeal was filed and perfected by Benjamin Tripp, Esq., of the Office of Appellate Defense pursuant to Anders. Applicant also filed a *pro se* brief and a supplemental record on appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences by unpublished opinion. State v. Gregory Smith, 2014-UP-459 (S.C. Ct. App. filed December 17, 2014). The Remittitur was issued on January 5, 2015.

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).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel due to multiple deficiencies by trial counsel which are laid out in the Amended Application and discussed in detail in the upcoming paragraphs. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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; see Strickland, 466

U.S. at 688, 692, 104 S. Ct. at 2065, 2067 ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."); see also Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) ("PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.").

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

This Court will now address each allegation of ineffective assistance of counsel as follows:

A. Ineffective assistance of counsel for failure to adequately challenge the admissibility of Applicant's statement provided to law enforcement.

Prior to trial in front of the jury the parties participated in a Jackson v. Denno[1] hearing in order to obtain a court ruling regarding the admissibility of Applicant's statements to law enforcement. At the conclusion of testimony presented by the State, Applicant's trial counsel argued that "Mr. Smith's will was somewhat overborne because it took considerable explanation for him to reach the point where he was willing to sign the Miranda rights" and that "it doesn't appear to me that he is a man who is in full possession of his mental faculties." Tr. 131-132. Trial counsel went on to argue that "it's not a totally intelligently, voluntarily, and willingly uttered confession." Tr. 132. Counsel did not make any further statements or argument to suppress the statement.

Applicant argues that counsel failed to argue the fact that, rather than providing legal advice to Applicant during the interrogation, attorney William Tetterton ("Tetterton") only gave Applicant implied promises of leniency. See Ex. 2 to PCR hearing. Testimony during the evidentiary hearing revealed that Tetterton was not hired by Applicant but appeared at the Sheriff's Department at the request of someone with the State to assist Applicant in giving his statement. Applicant has provided this Court with the audio recording of the interrogation, which shows that Applicant clearly relied on the statements made by Tetterton. Applicant specifically asked what he could say to help himself and his lawyer informed him that cooperating would help him. This is not necessarily a legally accurate statement. Regarding whether or not he understood his rights including his right to counsel, Applicant repeatedly questioned whether or not Tetterton would continue to be his lawyer and help him with this matter and questioned why

[1] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

he should trust him. Applicant was repeatedly assured that Tetterton would remain his lawyer and therefore Applicant should follow his advice. Applicant did not seem to fully understand how and when his statement would be used against him. Specifically, Applicant asked if his statement could be used against him and law enforcement advised him that it depends on what he says. Tetterton did not provide any legal advice in this regard.

Applicant argues that trial counsel should have argued that the implied assurances of leniency from Tetterton affected the intelligent and voluntary nature of the waiver of rights. Statements of leniency from an individual like Tetterton, who presents as an experienced authority figure who should be trusted, are often powerful – potentially more powerful than offers of leniency by the State.

Trial counsel was ineffective for not presenting these arguments to the Court and thus not preserving such arguments for appeal. Failure of counsel to present any substantive argument to suppress the statement essentially waived Applicant's rights to challenge the statement on appeal and therefore prejudiced Applicant.

B. Ineffective assistance of counsel for failure to object when a witness offered as an expert in "methamphetamine and meth labs and the effects of meth on the human body" was asked to testify in the Denno hearing regarding the witness' perception of the Defendant's statement on video and whether or not Applicant appeared to be under the influence of anything or was able to understand and knowingly and voluntarily waive Miranda.

During the Denno hearing, the State called witness Ashley Harris to testify. Harris was a former SLED employee and current Spartanburg County Sherriff's Office employee who was qualified as an expert in "methamphetamine and meth labs and the effects of meth on the human body" without any objection from trial counsel. Tr. 76-77, 84.

Even though this witness had not interacted with Applicant at any time and had no

personal experience with him, the State used this testimony to bolster their argument that his judgment was not impaired by recent or chronic use of methamphetamine and his statement was voluntary. The State even asked the witness to review Applicant's interrogation and asked if Applicant appeared to be under the influence and whether or not exposure to these chemicals could cause someone to make false statements or misunderstand Miranda. Tr. 85-90. The State ultimately asked the witness whether or not she believed the "confession" on video was affected by the manufacture or use of methamphetamine." Tr. 90.

Applicant argues that this entire line of questioning is improper and should have been objected to, as this witness did not have the proper qualifications to testify regarding anyone's state of mind or ability to enter into a voluntary waiver of legal rights.

C. Ineffective assistance of counsel for failure to advise client that he was able to testify regarding the admissibility of the statement and still retain his 5th Amendment right to remain silent regarding the allegations.

During the evidentiary hearing, Applicant testified that trial counsel never informed him that he could testify in the Denno hearing about the circumstances surrounding his statement and still retain his Fifth Amendment right to remain silent as to his guilt or innocence. In contrast, Applicant testified that trial counsel informed him that he could not "take the statement back." Applicant testified that if he had known he could testify during the pre-trial hearing he would have testified and explained why he gave the statement to law enforcement.

Specifically, Applicant testified that he would have informed the court as follows: On the day of his arrest he was in custody for approximately twenty-three hours before he was transported to the Sheriff's Department. Applicant had told the police that he would not give them a statement without a lawyer present, but he never asked for a lawyer and wasn't planning

on giving a statement. At the Sheriff's Department he met with Tetterton in a back room. Applicant did not call or hire Tetterton and had never met him before. Tetterton introduced himself as a former Assistant Solicitor and said that he was there to represent Applicant. Tetterton told Applicant that he was looking at forty years on his pending drug charges, but that if Applicant explained that he didn't mean to shoot the victim, Tetterton could get him a fifteen-year plea bargain.

Applicant testified that he was Mirandized twice and that he, in theory, understood that he had a right to counsel, but that he did not understand where Tetterton came from or why he was involved. Applicant testified that he was under duress and overwhelmed based on the statements Tetterton made including the threat of forty years in prison and the promise of a fifteen-year sentence. He had never been in real trouble before and was not in good physical or mental shape as he was an active drug addict. He testified that he specifically relied on Tetterton's promise of a fifteen-year offer and his promise to represent Applicant on these charges.

Applicant testified that within thirty days he realized that the entire situation had "gone down the wrong way" and that he did not want a fifteen-year plea offer. Once it was clear that Applicant was inclined to pursue his innocence through a trial, Tetterton asked to be relieved from his case and abandoned him.

This Court finds that Applicant should have been advised of his right to testify during the pre-trial hearing. The Court also finds that Applicant's testimony regarding his reliance on promises of leniency would have been relevant to the trial court's analysis in weighing the voluntary nature of the waiver of his right to testify. This is clear given the fact that, in

determining that the statement was voluntary, the trial judge said "I have no evidence to the contrary" and further said the statement appeared to be obtained "without duress, without coercion, without undue influence, without reward, without promise or home of reward, without promise of leniency." Tr. 134. The Court was not able to properly weigh the testimony of Applicant in making this determination because it was not offered, and counsel was ineffective for not offering it. Because the Court was unable to fully exercise discretion in analyzing all of the available information regarding statement, Applicant was prejudiced because it is unclear whether or not the statement should have been deemed admissible before the jury. The jury was allowed to consider the statement as evidence and, as a result, this Court believes that the trial cannot be relied on as having produced a just result. Applicant's conviction should be remanded for new trial. See Strickland, 466 U.S. 668.

D. Ineffective assistance of counsel for failure to object when the Assistant Solicitor impermissibly informed the jury of alleged statements by the Defendant which were not ruled admissible during the *Denno* hearing and not admitted into evidence during the trial.

a. "Second Story"

During his opening statement to the jury, Assistant Solicitor Brett Perry told the jurors about statements allegedly made by Applicant which had been determined to be admissible by the Court during the Denno hearing. The Assistant Solicitor continued on to say the following:

> After he finds out, hey, the husband is dead, officers have to be checked out for these fumes, guess what? Suddenly he has a new story. That's right. I didn't do it anymore. No, no, no, no, I didn't do it. Her husband did it. He shot her. He killed her. I didn't do it. That confession I gave, don't worry about that. That confession wasn't real. That wasn't me talking, that was the meth fumes talking.

Tr. 173. The transcript reflects that this alleged "second story" was not addressed during the

Denno hearing at all. During the PCR evidentiary hearing, the Assistant Solicitor was asked about the evidence underlying this "new story" he mentioned. He testified that he believed that witness Samantha Steeprock ("Steeprock") testified that Applicant shared this "new story" with her. A review of the transcript shows that Steeprock mentioned during her re-direct examination that Applicant only "said he was going to say that Goat Man did it." Tr. 232. A review of the prior statements given to law enforcement by Steeprock does not reveal any information about this "new story." See, Ex. 1 to PCR hearing. No additional details regarding a "second story" are offered by any witness during the trial and no witness testifies that Applicant actually provided a statement to anyone regarding "meth fumes."

Applicant argues that trial counsel should have objected when the Assistant Solicitor made this remark in his opening statement as there does not appear to be an evidentiary basis for it. In the alternative, Applicant argues that trial counsel should have objected and requested a mistrial at the close of the State's case when no evidence was offered in trial to back up this claim by the Assistant Solicitor. This court agrees. Quite simply, the State cannot attribute words to a defendant that were never said by him. The audio recording entered into evidence shows that at the time he gave the initial statement to law enforcement, Applicant was aware of all of these facts, that the husband died, and that everyone went to the hospital for fumes. See Ex. 3 to PCR hearing. The Assistant Solicitor's comments are not reasonably inferred from the facts presented and they directly attribute quotes to the defendant that have no evidentiary basis. Attributing statements to a defendant which were never said is clearly prejudicial and, therefore, would justify post-conviction relief in this matter.

b. "Jail for the rest of my life."

As stated above, the Assistant Solicitor told the jurors in his opening statement about statements allegedly made by Applicant which had been determined admissible by the Court during the Denno hearing. Specifically, one statement offered during the Denno hearing was that Applicant had told law enforcement, "I'll tell you everything you want to know, I just want some water," and then commented that the water wasn't "F'ing cold enough." Tr. 115. However, during his opening statement to the jury the Assistant Solicitor informed the jurors that Applicant said, "I'm getting ready to go to jail for the rest of my life and you're worried about a cold bottle of water." Tr. 167.

When testimony regarding Applicant's statements was presented before the jury, two separate officers testified identically to the evidence presented in the Denno hearing. Tr. 336, 538-539. A review of the transcript shows that no witness ever testified in any stage of trial that Applicant said anything about "getting ready to go to jail for the rest of" his life.

Applicant argues that trial counsel should have objected when the Assistant Solicitor made this remark in his opening statement as there does not appear to be an evidentiary basis for it, and in the alternative, trial counsel should have objected and requested a mistrial at the close of the State's case when no evidence was ever offered in trial to back up this claim by the Assistant Solicitor. Again, this court agrees because the State cannot attribute words to a defendant that were never said by him. In this case, where the statement involves "going to jail for the rest of" his life, the effect is clearly prejudicial and, therefore, justifies post-conviction relief.

E. Ineffective assistance of counsel for failure to object when the prosecutor elicited prejudicial, irrelevant and highly inflammatory statements from witness Samantha Steeprock.

a. Prior threats

During the direct examination of witness Samantha Steeprock, the Assistant Solicitor elicited testimony to provide the jury with background information regarding the history and relationship between Applicant and Steeprock, including how long they knew each other, how well they knew each other, and other details including the fact that Applicant had lived with Steeprock and her mother for a period of time in the past. See Tr. 180-183. The Assistant Solicitor then asked the witness, "[D]id he ever make any comments to you about your mom having thrown him out?" Tr. 183. Steeprock responded, "Yeah, he said he was going to kill my mom. He said if it wasn't for me, that he would shoot her, but I didn't think nothing of it" because she didn't believe he would do it. Tr. 183. The Assistant Solicitor then brings up this matter again later in his direct examination. Tr. 190.

Applicant argues that trial counsel was unreasonable and ineffective in failing to object. This Court agrees. During the evidentiary hearing, trial counsel testified that he believes he should have objected to the testimony and he did not have a strategic reason for failing to object. The testimony offered at trial was clearly irrelevant to the case because it involved an alleged threat against a person unrelated to this case at an unspecific time in the past. As to the charges at issue in trial, this testimony did not make the existence of any fact more or less probable than it would be without the evidence. Rule 401, SCRE. To the extent that the State can argue that it was probative in some way, the potential prejudicial effect highly outweighs any possible probative value as it easily creates unfair prejudice, confuses the issues and misleads the jury.

Rule 403, SCRE.

This Court is not convinced that this testimony could or should have been deemed admissible to explain why Steeprock provided multiple statements to law enforcement changing her story. Steeprock testified that she did not believe that the threat was real and said she "didn't think nothing of it." Tr. 183. Given this testimony, the probative value of the information as it relates to Steeprock's credibility is far outweighed by the potential prejudicial affect it likely had on the jurors.

The State later emphasized this testimony in their closing argument as follows:

> He apparently had moved to the Tyler's after living some period at Samantha Steeprock's house and he had been kicked out of there for making meth at Samantha Steeprock's mother's house and made a threat to kill the mother, okay. Is that consistent with getting put out of the Tyler property and killing Nicole Tyler? You know, he already threatened to kill one family for putting him out. He did it this time. Again, that's malice aforethought. This is a murder. This is not voluntary manslaughter. This is not involuntary manslaughter.

Tr. 653-654.

Applicant argues – and this Court agrees – that this irrelevant, prejudicial and inadmissible testimony about a past event was improperly used by the State as evidence of malice. More specifically, even assuming the testimony could have been found admissible an objection should have been raised when this testimony was used as evidence of malice. A Murder conviction requires evidence of malice aforethought. While our courts have held that "there is no requirement that it must exist for any appreciable length of time before the commission of the act," it still must be *aforethought* or "thought of in advance; deliberate;

premeditated." See State v. Wilds, 355 S.C. 269, 276, 584 S.E.2d 138, 142 (Ct. App. 2003); see also Black's Law Dictionary 61(7th ed. 1999).

The fact that the State was allowed to use testimony of prior unrelated threats made regarding a different person in advancing their argument that requisite malice existed in this instance convinces the Court that it is likely "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

b. Gore.com

During the direct examination of witness Samantha Steeprock, the Assistant Solicitor also elicited, through leading questions, testimony regarding conversations Steeprock had with Applicant when she visited him at the jail. Referring to Applicant, the Assistant Solicitor asked Steeprock, "[D]id he ever ask you to do anything for him," and "did he ask you about any pictures?" Tr. 203. Steeprock testified, "He told me if I would post pictures of the scene on gore.com" and explained that she was referring to pictures of the victim's deceased body. Tr. 204. Trial counsel did not object at any time. Instead, trial counsel brought up this testimony again during his cross-examination and had the witness elaborate that Applicant "asked me – to post the pictures of Nicole's dead body on gore.com. I have never saw the pictures." Tr. 227. It appears the only purpose trial counsel had in eliciting this information a second time was to explain to the jury that Steeprock never actually had possession of the photographs. Tr. 228.

This Court agrees with Applicant that this testimony was neither relevant to nor probative of any issue this case and should not have been mentioned at all by any party. It does not have any tendency to make the existence of any fact of consequence more or less probable than it

would be without this evidence. See Rule 401, SCRE. Further, the nature of the testimony regarding gore.com is highly prejudicial as it has an extreme likelihood to create unfair prejudice, confusion of the issues, and mislead the jury. Id.

The State argues in closing that this evidence shows that Applicant was "proud" of what he did. Tr. 634. To the extent that the State can argue that the evidence is admissible to show Applicant's lack of remorse, the testimony would have still been constitutionally impermissible on due process grounds. See, e.g., State v. Perry, 359 S.C. 646, 598 S.E.2d 723 (Ct. App. 2004) (citing State v. Reid, 324 S.C. 74, 78, 476 S.E.2d 695, 696 (1996), *overruled on other grounds by State v. Watson,* 349 S.C. 372, 563 S.E.2d 336 (2002)). No objection to this was made by trial counsel at any time.

This Court is convinced that this testimony was inadmissible on several grounds. The alleged request by Applicant regarding the photographs does not contain within itself a confession or admission of any kind. The only potentially relevant information that this evidence could provide to the jury would be inadmissible information, and yet no objection was made and no strategic reason has been offered to explain why defense counsel failed to object. The Court finds that this testimony was unconstitutional and highly prejudicial, and trial counsel was ineffective for failing to object. Accordingly, this Court grants Applicant's request for post-conviction relief on this ground.

F. Ineffective assistance of counsel for failure to object to leading questions by the prosecutor.

A review of the trial transcript shows that the direct examination of Samantha Steeprock was conducted by the Assistant Solicitor repeatedly asking leading questions of the witness. Tr. 199 - 205, 231-233. Trial counsel failed to object at any time during the testimony. Eventually,

the Court stepped in.

> The Court: You're continually leading this witness. I know that there's been no objection, but it's – I feel compelled to caution you about leading your witness. Ask the witness a question.
>
> Mr. Perry: Yes, Your Honor.
> The Court: But not one that always requires a yes or no answer.
>
> Mr. Perry: Yes, sir.
>
> The Court: You're putting words in the witness's mouth.

Tr. 233.

Applicant argues that trial counsel's failure to object to such repeated, objectionable conduct by the Assistant Solicitor shows a clear failure by trial counsel to effectively assist Applicant in his defense. This Court agrees.

G. Ineffective assistance of counsel for opening the door into allegations that Applicant and Steeprock were involved in bringing contraband into the jail.

Prior to trial it was alleged that Samantha Steeprock was attempting to mail Applicant envelopes and stamps laced with methamphetamine while he was housed at the jail. Tr. 763. In fact, Steeprock was charged with the crime of furnishing contraband to an inmate – specifically to Applicant. Tr. 767.

During the direct examination of Steeprock, the State appropriately never mentioned this allegation or pending charge. However, on cross examination trial counsel mentioned that Steeprock was charged with "bringing contraband into the jail" and that charge was still pending. Tr. 216. This statement opened the door and allowed the State to question Steeprock about the contraband charge and elicit testimony that Applicant asked her to mail methamphetamine to him at the jail. Tr. 231-232. It should be noted that Steeprock never admitted to actually

bringing or sending methamphetamine to the jail - she only testified that Applicant asked her to send it. Tr. 232.

Applicant argues that all of this testimony should have been inadmissible as both irrelevant and overly prejudicial under Rules 402 and 403, SCRE. During the evidentiary hearing, trial counsel testified that he mentioned the subject because he thought it would assist his case to disparage Steeprock's character, however he thought any resulting harm disparaging Applicant's character would only result in "minor damage." The Court finds this unreasonable. The evidence presented during the trial was that Applicant requested Steeprock send him illegal drugs. There was no evidence offered that she actually sent him illegal drugs. Therefore, the only character that this information would disparage would be the character of Applicant on trial. It did not disparage Steeprock's character at all and was only prejudicial to Applicant. Further, any attempt by Applicant to obtain drugs while in jail would be irrelevant to the charges before the jury. This Court agrees that counsel was ineffective for opening the door allowing this information to be presented and that deficient performance prejudiced Applicant's case.

H. Ineffective assistance of counsel for failure to object to impermissible victim impact testimony.

During the Assistant Solicitor's re-direct examination of Samantha Steeprock, he asked her about the nature of the victim's relationship with her husband and asked how Steeprock felt about the deaths of the victim and her husband. Tr. 233-235. Applicant argues that the State had no reason to offer this testimony other than to arouse the passions of the jury through impermissible victim impact testimony. While trial counsel correctly objected to the introduction of a photograph of the victim with her husband, he did not object to the line of questioning that preceded the introduction of the photograph. Tr. 235. This Court agrees that

counsel should have objected to this line of questioning on the grounds that it was irrelevant and not probative to the case before the jury and overly prejudicial.

I. Ineffective assistance of counsel for failure to adequately cross examine forensic pathologist, Dr. Janice Ross, and witness Samantha Steeprock.

During trial the State called Dr. Janice Ross with Newberry Pathology Associates as a witness regarding the autopsy of the victim, Deborah Tyler. Tr. 340. Dr. Ross was deemed qualified as an expert in pathology without objection. Tr. 342. Dr. Ross testified that a gunshot wound entered the victim at the inner corner of the decedent's left eye and traveled back and down lacerating her brainstem. Tr. 344. The official cause of death was laceration of the brainstem. Tr. 346. Trial counsel did not ask a single question on cross examination. Tr. 347.

Dr. Ross also testified on behalf of Applicant in this post-conviction relief matter. Upon questioning Dr. Ross explained that the injury in this case would have caused the decedent to become unconscious almost immediately as the laceration of the brainstem would have resulted in a cessation of nerve functioning. As a result, the decedent would immediately become limp. Dr. Ross also explained that it would not be medically possible for the victim to reach up and wipe or touch her face after being shot. None of this testimony was elicited during the jury trial because neither the Assistant Solicitor nor trial counsel asked how the laceration of the brainstem would effected the decedent or how quickly the effect would have taken place.

During the evidentiary hearing, both the Assistant Solicitor and trial counsel testified that Steeprock was the only eyewitness to the incident and she testified accordingly during the jury trial. Counsel for Applicant introduced Exhibit 1 which contained all three statements provided by Steeprock prior to trial and included within the discovery documents provided to Applicant's

counsel. See Ex. 1 to PCR hearing. It is notable that in her first two statements Steeprock did not admit seeing the shooting take place. During cross-examination counsel for Applicant referred trial counsel to the third and final statement by Steeprock within Exhibit 1, dated July 19, 2012. Specifically, he was directed to the following lines:

> Greg jumped off the couch with the gun and shot Nicole in the face. Steeprock does not recall hearing the gun go off and didn't know if the bullet hit Nicole or went over her head. She said that she saw Nicole grab or wipe her face as she ran out the door.

The record reflects that trial counsel never asked Steeprock to confirm or deny this statement or to provide further details during her cross-examination. This statement by Steeprock was not mentioned at all by any party during trial. Trial counsel also failed to ask Dr. Ross about the medical possibility of the decedent grabbing or wiping her face after being shot. During the evidentiary hearing, trial counsel testified that he never considered asking Dr. Ross about this issue and that his strategy was only to get the doctor off the stand as quickly as possible.

This Court finds trial counsel was unreasonable in failing to present and argue this potential issue at trial. Steeprock was a very important witness as she was the only alleged eyewitness to the shooting. She originally denied witnessing the shooting in two separate statements and only changed her statement after the State charged her with a contraband charge and with accessory after the fact to murder – charges which were pending at the time of her testimony at trial and later dismissed. Given these circumstances, trial counsel did attempt to challenge the credibility of Steeprock's testimony during trial but failed to use this detail in her

third statement to challenge her credibility. Applicant argues this is was significant failure by counsel.

In the PCR hearing the State did not present any reasonable strategic reason why trial counsel would have failed to cross examine Steeprock on the facts she provided in her third statement. Likewise, the State did not present any reasonable strategic reason why he would have failed to question Dr. Ross regarding the medical possibility of the decedent's ability to "grab or wipe her face" as explained in Steeprock's statement. If trial counsel had been able to use this information to show that Steeprock's account of events was inaccurate or even fabricated it is likely that the jury could have reached a different conclusion. This Court believes that Applicant has shown 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." See Strickland, 466 U.S. 668; see also Butler, 286 S.C. at 442, 334 S.E.2d at 814. As a result, this Court finds that Applicant should be granted post-conviction relief on this ground.

J. Ineffective assistance of counsel for failure to object to admissibility of handwritten notes.

During trial the State offered the testimony of Brian Elliott, a deputy with Kershaw County, who responded to the scene and took multiple photographs of the house where the meth lab was and the house where the victim lived. Tr. 359-361. Several photographs were introduced into evidence through this witness relevant to the drug charge and the murder charge.

Applicant has alleged concerns related to exhibits 57 and 58 offered into evidence by the State through this witness without objection from trial counsel. These exhibits are photographs of a handwritten note that was found inside the victim's bedroom on top of her dresser. Tr. 368. Deputy Elliott read the substance of the note to the jury. Tr. 368-369. The State then elicited

Deputy Elliott to testify as to his opinion that victim appeared to be "venting" her complaints. Tr. 369.

The exhibits were offered without objection from trial counsel. During the PCR evidentiary hearing, trial counsel was asked why he didn't object to the admissibility of these exhibits. He responded that he believed that they were relevant because they were found in the victim's room and, therefore, he did not have a valid objection to make. A review of the transcript shows that no foundational testimony was offered by the State at any time to prove the origin of the note, the author of the note, or the meaning of the note.

Applicant argues that every single item found at an incident location is not relevant *per se* and admissible at trial simply because of its proximity to a crime scene. Evidence is only relevant if it has any tendency to make a fact more or less probable than it would be without the evidence. Rule 401, SCRE. This note, found in the victim's bedroom and not at the actual crime scene, does not automatically prove any fact relevant to the murder based on the location where it was found. At first glance, the exhibits appear to have no relevance and no purpose in this trial and that alone makes them objectionable.

However, it appears that the State offered the exhibits into evidence for the purpose of providing a potential motive by Applicant. This Court finds such use of these documents is problematic given the lack of foundation provided to show where or who the note came from. It is especially concerning that during the State's opening statement the Assistant Solicitor said the following:

> In fact, she had gone to the trouble to actually make a list of all her complaints, all her grievances with Mr. Smith. It was found whenever law enforcement, you know, when through the property whenever they were there checking things out after this happened.

> She had quit a list of things that she was unhappy with Mr. Smith about.
>
> The fact that he was eating all the food, not paying rent, you know, difficult to deal with. She was upset with him. A lot of reasons why she was upset with him.

Tr. 162. The statements made by the Assistant Solicitor were not supported by the evidence offered at trial. No evidence was offered that the note was written by the victim. No evidence was offered that the note was written about Applicant. No evidence was offered regarding when the note was written. Because trial counsel was placed on notice regarding the State's intentions regarding how this evidence would be offered and characterized, he should have objected to the exhibits when they were offered into evidence as irrelevant to the charges since they lacked a sufficient foundation. Without objection, the photographs of the note were able to be viewed by the jury with no other explanation other than the one provided by the State.

This Court finds it unreasonable for trial counsel to fail to object under these circumstances. It is likely that the jury considered this evidence as proof of motive by Applicant based on the representations made by the State. Without a proper foundation, this evidence became more prejudicial than it was probative and its consideration by the jury calls into question whether or not the trial produced a just result. Accordingly, Applicant is entitled to post-conviction relief.

K. Ineffective assistance of counsel for failure to object to incorrect factual references in trial testimony.

During trial, several allegations were made that the weapon used in the crime was located in a "holstered belt" allegedly made by Applicant with "his initials on it." Tr. 164, 171, 551. Investigator Phillips also testified that Applicant admitted making the belt in his video statement.

Tr. 551. Phillips also testified that the holster was collected into evidence when it was found. Tr. 550. The State presented this information as an additional piece of evidence to incriminate Applicant.

Review of the trial transcript shows that photographs of the holster, exhibits 74-78 introduced for identification purposes, were discussed in front of the jury but were never entered into evidence and, therefore, never viewed by the jury. Tr. 427. The holster itself was not admitted into evidence during the jury trial. Trial counsel testified at the evidentiary hearing that he believed the holster had been misplaced by the State prior to trial.

This Court has been provided with a copy of the photograph exhibits offered during the jury trial and cannot discern any initials visible on the gun holster. A review of the audio statement provided by Applicant upon his arrest does not reflect any statements regarding the holster. Because the photographs and holster weren't actually offered into evidence, the jury had no reason to question the statements made by the State that Applicant's initials were on the holster, especially when these statements were not challenged by trial counsel in any way. Trial counsel never objected to these statements.

Applicant contends that these statements should have been challenged because no evidence was offered to prove this incriminating fact. This Court agrees that it would be unfair to allow the State to comment on "facts" which are not supported by any evidence, particularly when the actual evidence is available and is being withheld from the jury's inspection.

L. Ineffective assistance of counsel for failure to adequately cross examine Investigator Phillips regarding paperwork seized from Applicant during the pendency of his charges and the underlying search warrant.

In the preceding paragraphs this Order addressed the fact that trial counsel was

ineffective for introducing irrelevant and prejudicial allegations that Applicant had asked Steeprock to bring contraband into the jail. Applicant has further argued that, given the fact that trial counsel made these errors, he should have used the information effectively to Applicant's advantage.

During the cross-examination of Investigator Phillips, trial counsel questioned Phillips about confiscating all of Applicant's legal and personal papers prior to trial. Phillips admitted that he executed a search warrant on Applicant's jail cell "which included legal papers" and "personal notes, and letters from and to Samantha Steeprock." Tr. 567. Phillips testified that he took the items, separated the documents purportedly received from Applicant's attorney, and placed all documents in two separate material bags. Tr. 569-570. Phillips testified that he only reviewed the personal documents, letters, and pictures that he obtained. Tr. 571-572.

At first glance it appears that none of this testimony aided the jury in their decision making regarding the charges at issue in trial. None of this information had any "tendency to make the existence of any fact that is of consequence to the determination for the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. However, Applicant argues additional information could have been used to make this information relevant and helpful to his defense.

Attached to the transcript is a SLED investigative file regarding the seizure of Applicant's paperwork from his cell. These documents could have and should have been obtained and addressed during Applicant's jury trial to assist in his defense. An incident report dated August 15, 2011 at 12:00 states that a confidential informant informed Phillips that Applicant was having Steeprock mail him stamps and envelopes laced with methamphetamine at

the jail. Tr. 763. As a result, Phillips spoke to the jail administrator who had a "field urine drug test completed on Smith" which had "a result of positive for meth." Id. The incident report states that Phillips then executed a search warrant on Smith's cell." However, the urinalysis report shows that the test was collected on August 15, 2011 at 12:00 and the results were completed at 13:02 hours with negative results for all substances. Tr. 1087.

Notwithstanding these results, it appears that Investigator Phillips obtained a search warrant from a Magistrate by stating under oath that "a random drug test was conducted on August 15, 2011 and was positive for amphetamines." Tr. 757. The search warrant then authorized Phillips to obtain "all appears and effects belonging to inmate Greg Smith to include pictures, letters, envelopes and memos" despite the fact that the allegation had only been that envelopes and stamps had been laced with methamphetamine. Tr. 756. Further, the Return to the search warrant states that the search warrant was executed on August 15, 2011 at 12:00 pm – the same time the urine sample was being collected from Applicant by a nurse. Tr. 762.

Applicant argues that trial counsel could have used the above referenced documentation (all of which was accessible as public records or Applicant's own medical file) to show that Investigator Phillips made false statements in an affidavit to the Court regarding Applicant. It could easily be inferred that Phillips used this deceptive tactic in order to place additional pressure on witness Steeprock to give a statement, or in an attempt to obtain and review Applicant's private materials including his notes made in preparation for trial. More generally, the jury could simply have been convinced that Phillips was biased, overreaching and not credible in his testimony or his judgment involved in this case. This argument could have been extended to cast doubt on Phillips' reliability and trustworthiness regarding his interactions with

Morris Nixon, Steeprock, and Applicant himself in obtaining statements. This could have affected whether or not the jury believed each of the resulting statements, especially given the fact that Morris Nixon first contacted law enforcement the day after Applicant's documents were taken from him by Phillips.

At first glance, the contraband issue appears to be irrelevant to the charges at issue in Applicant's jury trial. However, once testimony of the search warrant and contraband allegation was presented to the jury (by trial counsel), trial counsel should have been prepared to use this chain of events to substantially attack the credibility of law enforcement in a way that could have cast doubt on almost all of the substantive evidence offered against Applicant at trial. Trial counsel failed to do this and failed to offer a strategic reason as to why he failed to do this. At the time of the PCR evidentiary hearing trial counsel was unsure that he had previously seen all of this documentation prior to trial, but he did not testify that he had been denied access to any of the documentation. This Court finds that trial counsel acted unreasonably given these events and that Applicant was prejudiced as a result. Accordingly, Applicant is entitled to post-conviction relief.

M. Ineffective assistance of counsel for failure to challenge the Kershaw County Solicitor's Office's involvement in prosecuting this case prior to trial after his legal materials had been confiscated as evidence.

Applicant failed to offer any testimonial evidence that the Solicitor's office had reviewed Applicant's legal materials prior to trial. Accordingly, post-conviction relief is denied as to this allegation.

N. Ineffective assistance of counsel for failing to be adequately prepared to effectively cross examine Morris Nixon and correct misleading statements made by the prosecutor regarding Nixon's pending charges.

During trial, the State called a "jailhouse snitch" witness, Morris Nixon, to testify

regarding incriminating statements Applicant allegedly made while housed at the detention center. It appears that Nixon was also being prosecuted by the Assistant Solicitor at the same time. Testimony and exhibits offered by Applicant in the evidentiary hearing show that Nixon wrote a letter on August 16, 2011[2] detailing his conversations with Applicant. See Ex. 2 to PCR hearing. On October 5, 2011, he wrote an official statement for law enforcement. Id. The Assistant Solicitor testified that one week later, the State consented to a personal recognizance bond for Nixon on October 12, 2011.

During trial, Nixon testified that he had a second degree burglary and an "assault charge" pending. Tr. 402. The Assistant Solicitor failed to correct this statement and point out that Nixon actually had three counts of Second Degree Burglary, one count of First Degree Burglary and possession of burglary tools pending. Trial counsel had to elicit this testimony on cross-examination. Tr. 404. Instead, the Assistant Solicitor emphasized that "the" burglary occurred after Nixon gave his statement to law enforcement. Tr. 403, 416. Neither attorney ever clarified for the jury that Nixon's pending "assault charge" was actually an Assault and Battery First Degree, which was pending at the time of his statement to law enforcement. Trial counsel questioned Nixon as to whether or not the Assistant Solicitor offered him any leniency or whether he was trying to get out of jail on bond, but he never specifically elicited testimony that the Assistant Solicitor had consented to a personal recognizance bond and let Nixon out of jail soon after providing his statement. Tr. 405, 410, 414-415.

During the evidentiary hearing trial counsel testified that he did not bring up the Assault and Battery First Degree charge or the fact that the State consented to a personal recognizance

[2] Interestingly, August 16, 2011 was one day after the police searched Applicant's cell at the jail and confiscated all of his legal materials and discovery documents.

bond soon after Nixon's statement to law enforcement because he did not know these facts. It is without question that this information is available to the public in the Clerk of Court's office. These facts would have significantly aided trial counsel's argument that Nixon made false statements to law enforcement in an attempt to help himself and get out of jail. Trial counsel's failure to investigate and adequately prepare to cross examine Nixon allowed the State to mislead the jury as to Nixon's status regarding criminal charges and infer that Nixon had no bias or reason to lie. Tr. 646. Applicant was prejudiced due to the fact that this witness was not properly cross examined.

O. Ineffective assistance of counsel for failing to object when the judge instructed the jury that they would have to decide between the charges offered for three possible convictions without telling them that they could find the defendant not guilty.

Prior to closing arguments the Court provided the jury with some preliminary instructions to assist them when listening to the arguments. Notably, the Court said the following:

> Now, in South Carolina, for some reason, we don't call – we have the same thing, but we don't call it the same thing. In South Carolina, we call it obviously murder and then voluntary manslaughter. You might want to write this down. You're going to hear about it and then you're going to have to try to decide among these three different charges which one you think best suits the facts in this case.

Tr. 618. Applicant argues that this language suggests to the jury that they should pick one of three substantive options – Murder, Voluntary Manslaughter, or Involuntary Manslaughter. Further, Applicant argues that the verdict form emphasized this point; as it appears the jury was given the option of "guilty" or "not guilty" for each charge but was not given an overall option of "not guilty" of any charge. Tr. 696.

Applicant argues that it is likely that the jury may have incorrectly understood that their

job was to choose which crime Applicant was guilty of, rather than to choose whether he was guilty of anything at all. While the court does mention the option of acquittal, Applicant contends that it could have been easily construed that the court was talking about the juror's analysis on each charge. Applicant further argues that the court failed to state anything specifically informing the jury that they may find him completely "not guilty."

This Court is not persuaded by Applicant's argument on this issue. Additionally, while the Court recognizes the difficulty of making such a showing, it appears that Applicant has failed to demonstrate that any prejudice resulted from the trial court's instructions to the jury. Therefore, post-conviction relief is denied as to this argument.

P. The cumulative effect of trial counsel's errors are significant enough to undermine the reliability of the results at trial.

Applicant has raised a number of issues in his Amended PCR Application which were addressed during the evidentiary hearing. Each of deficiencies alleged, on their own, resulted in Applicant being denied effective assistance of counsel. Nonetheless, as recently addressed by the South Carolina Court of Appeals, it appears that a court in a Post-Conviction Relief matter may be able to consider the cumulative effect of counsel's errors in determining deficient performance. Walker v. State, 397 S.C. 226, 243 (2012) citing Lorenzon v. State, 376 S.C. 521, 535 (2008.)

In Walker, the applicant alleged that trial counsel failed to interview alibi witnesses and failed to cross examine the victim or call witnesses to testify about conflicting evidence as to the time of the rape incident. The applicant alleged that these errors were deficient and the cumulative effect of trial counsel's errors resulted in prejudice. The Court of Appeals held that Walker failed to demonstrate that trial counsel was deficient on either ground such that it did not

independently warrant relief under Strickland. The Court further noted, that "even if South Carolina did allow PCR based upon the cumulative prejudicial effect of two or more instances of deficient performance, Walker would still have to demonstrate 'a reasonable probability that, but for [the cumulation of] counsel's unprofessional errors, the result of the proceeding would have been different.'" Walker at 243 (citing Edwards v. State, 392 S.C. 449, 459 (2011)).

The applicant in Walker failed to prove the deficiencies in counsel's performance. In contrast, in the instant case, trial counsel's deficiency has been proven on several independent grounds. Therefore, to the extent that it is unclear whether each independent deficiency is sufficiently substantial to have caused prejudice, the errors in counsel's performance were so interrelated that the cumulative effect of prejudice was such that, but for the series of errors, the result of the proceedings would have been different.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has established constitutional violations and deprivations both before and during his trial. The Court further finds that trial counsel was deficient in his representation of Applicant and that Applicant was prejudiced by trial counsel's deficiencies. Therefore, this PCR application must be granted and Applicant's charges remanded to General Sessions Court.

This Court advises Respondent that a notice of intent to appeal must be filed within thirty (30) days from the receipt of this Order in order to secure appropriate appellate review.

IT IS THEREFORE ORDERED:

1. That the Amended Application for Post-Conviction Relief is GRANTED, Applicant's conviction is VACATED, and this matter is REMANDED to the Court of General Sessions; and

2. That Applicant be remanded to the custody of Kershaw County.

AND IT IS SO ORDERED this 21st day of April 2017.

Jocelyn Newman
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.