LAW OFFICE OF
TRICIA A. BLANCHETTE

RECEIVED
JUL 26 2017
S.C. SUPREME COURT

July 26, 2017
VIA HAND DELIVERY

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

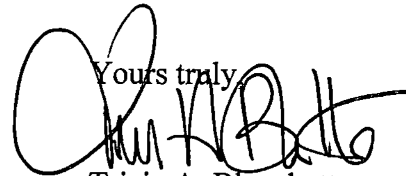
RE: Willie Bell, Jr. v. State; 2009-CP-38-1261

Dear Sir:

For filing, attached please find a Notice of Appeal, Certificate of Service and copies of the Orders from the underlying PCR Application. I have been retained to represent Mr. Bell on this appeal. I had previously written the court reporter to request a copy of the evidentiary hearing, and I have sent a second request via letter, which is attached.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: Orangeburg County Clerk of Court (without Orders)
Ruston W. Neely, Office of the Attorney General
Willie Bell, Jr.

PO Box 2147 • Leesville, SC 29070
803.908.3266 • blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 26 2017
S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

Case No.: 2009-CP-38-1261

Willie Bell, Jr., #254817, Petitioner,

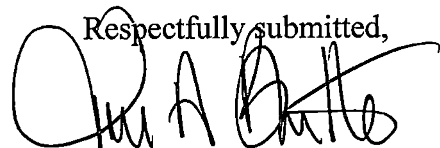
vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

Willie Bell, Jr., Petitioner, appeals the Order of Dismissal issued by the Honorable Maite Murphy on August 31, 2015. Petitioner also appeals the Order Denying Motion to Alter or Amend the Order of Dismissal, issued by the Honorable Maite Murphy on April 20, 2017, which was filed on May 2, 2017. Petitioner, through counsel, received notice of the entry of the Order via email on July 7, 2017 and mail on July 14, 2017.

Respectfully submitted,



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July 26, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
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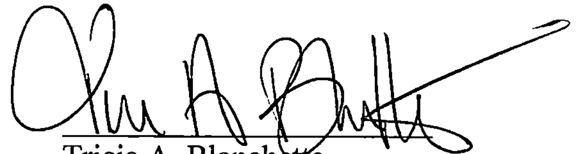
CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that a copy of the Notice of Appeal, and accompanying Orders, were hand delivered to Ruston W. Neely, Assistant Attorney General, this 26th day of July 2017 at the following address:

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



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July 26, 2017

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG WILLIE BELL, JR., #254817 Plaintiff, vs. STATE OF SOUTH CAROLINA Defendant.	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT CASE NO.: 2008-CP-38-1261 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

RECEIVED
JUL 26 2017
S.C. SUPREME COURT

Plaintiff's Attorney:	Defendant's Attorney:
Tricia A. Blanchette, Bar No. 74904	J. Clayton Mitchell, Bar No. 101443
Address:	Address:
PO Box 12725, Columbia SC 29211	PO Box 11549, Columbia SC 29211
Phone: _____Fax _____	Phone: _____ Fax_____
E-mail: _____Other: _____	E-mail: _____Other: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /☒ Defendant 6/26/2015 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $__________
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other:	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Willie Bell, Jr., #254817, Applicant, v. State of South Carolina, Respondent.	2009-CP-38-1261 **ORDER OF DISMISSAL**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 29, 2009. Respondent made its Return on February 2, 2010, requesting an evidentiary hearing be convened. Andrew J. Brown, Esquire was appointed to represent Applicant and was relieved as he was an Assistant Public Defender and had some contact with Applicant during the office's representation. The Honorable Robert E. Hood was then appointed to represent Applicant. He was relieved as he was elected as a Circuit Court Judge for the Fifth Judicial Circuit. Glenn Walters, Sr., Esquire, was then appointed and subsequently relieved by Order filed July 12, 2013. Jonathan D. Waller, Esquire was then appointed by the Orangeburg County Clerk of Court. Finally, Tricia A. Blanchette, Esquire, was retained and substituted as counsel on October 15, 2013. A hearing was held on October 31, 2013, at the Dorchester County Courthouse. Applicant waived his appearance due to medical issues. The Court heard a motion for discovery of the complete South Carolina Law Enforcement Division (SLED) file and the Orangeburg County Public Defender's File. This Court entered an Order granting discovery on October 15, 2013. A full evidentiary hearing was held on May 20, 2015. Applicant was represented by Counsel Blanchette. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel R. Douglas Mellard, Esquire, Margaret Hinds, Esquire, Sean Fogle of the Orangeburg County Coroner's Office, Dr. John David Wren of Carolinas Pathology Group, Pete Skidmore, and Applicant's aunts Annie Wallen and Jannie Simmons. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, amended application, the Return, and the trial plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted at the April 2006 term of the Orangeburg County Grand Jury for Murder (2006-GS-38-0751). He was represented by Peggy Hinds, Esquire, and Doug Mellard, Esquire. Applicant proceeded to a jury trial before the Honorable James C. Williams, Jr. Applicant was found guilty, and on March 15, 2007, Applicant was sentenced to fifty (50) years' imprisonment.

A notice of appeal was filed and an appeal perfected by Robert M. Dudek, then Deputy Chief Appellate Defender for Capital Appeals of the South Carolina Commission on Indigent Defense of the Division of Appellate Defense. Applicant's conviction and sentence were affirmed. State v. Bell, Op. No. 2009-UP-325 (S.C. Ct. App. filed June 15, 2009). The remittitur was sent on July 1, 2009.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in failing to raise inconsistencies in the purported original pathology report. In the alternative, prosecutorial misconduct or Brady violation if a pathology report not listing a 2cm defect in the lungs was not turned over to the defense.

2. Ineffective assistance of trial counsel in:
    a. failing to consult with and utilize a forensic pathologist,
    b. failing to properly prepare with Applicant for trial,
    c. failing to utilize Jannie Simmons and Ann Wallen as witnesses at the Jackson v. Denno hearing,
    d. failing to utilize Applicant as a witness at trial,
    e. failing to call witnesses on Applicant's behalf,
    f. failing to effectively utilize witnesses called by the defense,
    g. failing to object to the State's questions and comments regarding "stabbing" and failing to refute the alleged evidence regarding "stabbing,"
    h. failing to effectively cross-examine
        i. State's witnesses on and argue to the jury about the alleged inconsistencies in the reports regarding the fire scene and matters regarding the testing for accelerants,
        ii. failing to cross-examine Frank Colter,
        iii. failure to effectively cross-examine the State's witnesses regarding the DNA findings,
        iv. failing to effectively cross-examine Kareem Taylor,
    i. failing to make a pre-trial motion to exclude the testimony of Victoria Baskin and failing to object to the State's comments regarding Baskins in closing arguments,
    j. failing to raise third party guilty defense,
3. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, specifically:
    a. Denial of motion to relieve counsel,
    b. Jackson v. Denno hearing,
    c. Denial of objection to pictures,
    d. Denial of motion for a mistrial,
    e. Denial of objection to coroner's testimony.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Sean Fogle's Testimony

Fogle testified he is employed by the Orangeburg County coroner's office. He testified he complied with a subpoena served by Applicant's counsel which required the production of the victim's file which included the report of the autopsy and other documents. Fogle explained that he did not work on the victim's case and had no knowledge as to the victim's cause of death. He did not have any personal knowledge relating to the case and only complied turned over records from the office.

Dr. John Davis Wren's Testimony

Dr. Wren testified he is employed by the Carolinas Pathology Group. He is also the medical director of the lab for Spartanburg Hospital where he handles all forensic pathology cases in Spartanburg County. He explained his extensive background in forensic pathology and was qualified by the Court as an expert in anatomical, clinical and forensic pathology. He testified he has conducted around 5,000 autopsies in his career and has testified as an expert numerous times.

Dr. Wren testified he reviewed the case file provided by Applicant's counsel which included the complete South Carolina Law Enforcement Division's (SLED) file, photographs from the public defender's file, coroner's file, the transcript, and the autopsy reports. Dr. Wren testified that there appeared to be three different versions of the autopsy report issued by the Drs. Joel S. Sexton and Janice E. Ross: Applicant's Exhibits 2, 7, and 8.

As an initial point, Dr. Wren testified he testifies at the trial level of cases where he performed the autopsy himself. He admitted he does not normally testify on other physician's autopsies in collateral proceedings. Dr. Wren testified the victim's body was extremely burned, especially on the right side of the body. He testified that this likely affected the pathologists' findings. He explained that the victim was an older black female. He testified the reports issued by the pathologists were not as detailed as he would expect. He testified there is a lack of substantive findings with each organ. He pointed out that there was a discrepancy in the various reports issued by the pathologists. In Applicant's Exhibit 2 there was no mention of a "2 cm defect with slight hemorrhage around it in the soft tissue," as there was in Applicant's Exhibit 7. Dr. Wren took issue with the procedure of the autopsy and in how the pathologists issued what he testified could have been a draft with no notation or explanation as to why a change was

made. He testified that it was his normal protocol to initial a change to a report to show why a change was made. He testified he does not send non-final drafts to the coroner's office. Dr. Wren did acknowledge that an amended report (Applicant's Exhibit 8) was issued and dated on April 14, 2006, which included reference to a "nonfatal stab wound of the left back" listed under the heading "Final Necropsy Diagnosis." Dr. Wren also acknowledged that the amended report also lists defects to the right chest wall and to the "left chest cavity consistent with a stab wound without injury to underlying organs." Dr. Wren testified the 2cm incision should have been measured more closely.

Dr. Wren further testified that he did not believe it to be normal protocol for an amended report to be issued without a reexamination of the body. Dr. Wren testified, in his experience, there would be photographs of the body on the examining table. He acknowledged that there may have been photographs taken during the autopsy but none were included in the materials he reviewed in preparation for his report and testimony. Dr. Wren noted that he is familiar with Dr. Sexton, who conducted the autopsy in conjunction with Dr. Ross, and believes that he is a very knowledgeable and well reputable pathologist.

Dr. Wren also took issue with the pathologists' determination of the cause of death. He explained that he would *not* have considered whether the investigators concluded that the victim's house was burned through arson in determining the victim's cause of death. Dr. Wren then testified that he does in fact get background information from investigators to give some direction in what to rule in or rule out as a cause of death. He testified the reports do not give an indication of the victim's overall health and he speculates that he believed the victim would have had some medical problems because of her age.

Dr. Wren testified he believed the victim died within 90-120 minutes of her last meal. His report stated and he speculates that the victim's meal was probably consumed between 5:30 and 7:30 pm. Dr. Wren found it odd that the fire set to the victim's house was likely lit around 6:00 am. He acknowledged that the victim could have been killed within his estimated time frame and that the fire set early the next morning.

Dr. Wren testified he could not determine what type of trauma the victim died from as he believed there was not enough information from the autopsy and the materials to come to a definite conclusion. He acknowledged the victim could have died from trauma to the skull but could not be certain as the skull was severely burned. He testified he did not believe the victim died from a stab wound.

Pete Skidmore's Testimony

Pete Skidmore testified that he is a private investigator licensed in both North and South Carolina. He testified he attempted to locate Walt Lee Myer (or Walker Myers) to testify at the hearing. Skidmore testified he was unable to locate this witness in two years of searching and believes he is on the run from law enforcement.

Counsel Margaret Hinds's Testimony

Counsel Hinds testified she is the Deputy Public Defender at the Orangeburg office and has been practicing law for eighteen (18) years. She sat second chair in Applicant's trial. Counsel Hinds testified she reviewed her filed and case materials before the hearing. She also reviewed the coroner's file that she received from Counsel Blanchette. The coroner's file included Applicant's Exhibit 2. Counsel Hinds testified she did not have this autopsy report before trial and that it was not included in the discovery materials received from the solicitor's office. She testified that she would have wanted this report and would have used the report that did not list

the 2cm defect on cross examination of Dr. Ross who testified at trial. Counsel Hinds testified that she and Counsel Mellard took issue with Dr. Ross's findings and attempted to challenge them throughout the trial. She testified she highlighted those inconsistencies during opening, on Dr. Ross's cross examination, and in closing. Counsel Hinds testified there were also inconsistencies in Dr. Ross's findings and the coroner's findings. The coroner testified that he believed the victim was killed due to blunt force trauma to the head. Trial Tr. p. 250, lines 11-21. She explained that the inconsistencies muddied the water. She testified that there were also inconsistencies in the pathologists' reports. On cross examination Dr. Ross admitted that she and Dr. Sexton did not reexamine the body before issuing the amended report. Trial Tr. P. 482, lines 11-17. Counsel Hinds testified they attempted to show the jury that the pathologists were basing their findings on the cause of death on the arson investigation and therefore Dr. Ross could not credibly testify as to the cause of death to a degree of medical certainty. She also testified that it was not odd to receive an autopsy report without photographs of the examination and that she routinely receives similar autopsy reports in other cases. Counsel Hinds testified she did not look into retaining an expert in forensic pathology, but may have if this she had this report. She testified that at trial the State argued the victim was stabbed and that this report may have been helpful to counter that theory. She testified that it would not have occurred to any attorney to subpoena the coroner's entire file. She noted that she relies on the solicitor to turn over any report.

Counsel Hinds explained that the focus of the case was that there no "smoking gun" and the evidence was for the most part circumstantial. She noted that in her opinion the State could not prove when and how the victim died. She acknowledged that the circumstantial evidence did

strongly implicated Applicant. She testified that from all accounts, Applicant and the victim were very close.

Counsel Hinds testified that she did not look into testifying Applicant's clothes which were found in Augusta, Georgia for accelerants. She noted that the clothes were tested for DNA evidence by the State. Counsel Hinds testified they hired Dr. Ronald Ostrowski to consult on the case. She testified that she handled the cross examination of the State's DNA expert, Agent Adrienne Riley. Counsel Hinds testified that she recalled not all items tested implicated Applicant. She recalled that the victim was not a positive match as the source of the DNA on Applicant's tennis shoes, but could not be excluded. Trial Tr. p. 520, lines 5-21. Counsel Hinds testified that after consulting with Dr. Ostrowski, she and Counsel Mellard chose not to call him as a witness. Defense counsel also decided to keep the State's expert's testimony as short as possible. She explained that the blood found on Applicant's pants was a *direct* match to the victim's DNA and did not want the witness to be able to repeat that conclusion.

Counsel Hinds testified that the probability of randomly selecting a person whose DNA was a direct match was based on the notion of those individuals being unrelated. Trial Tr. p. 518, lines 10-22 ("The probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this item is approximately one in four hundred trillion."). Counsel Hinds testified she believed the State's expert knew the victim was Applicant's grandmother and that they were related.

As to the issues of ineffective assistance of appellate counsel, Counsel Hinds testified she believed the pre-trial motion to relieve counsel, Jackson v. Denno hearing ruling, ruling that the photographs of the victim's body were admissible and the motion for a mistrial were likely preserved as issues of appellate review.

Annie Wallen's Testimony

Ms. Annie Wallen testified she is Applicant's aunt and the victim's daughter. She testified at trial and spoke to Applicant's trial attorneys "for a little bit." She testified she was not properly prepared to testify. Wallen testified that Applicant did not use the front door to the victim's house and that everyone used the back door to enter and leave.

Wallen testified she viewed the victim's car after it was found and that it did not smell of accelerant. She also testified cash was found next to the victim's body. She testified she did not have any personal knowledge that Applicant had a drug problem and never had any suspicions that he was doing drugs regularly.

Jannie Simmons's Testimony

Ms. Jannie Simmons testified that she is Applicant's aunt but grew up with him like a sister. She explained Applicant's relationship with the victim as a mother son relationship as the victim raised Applicant since he was a baby. She explained that Applicant basically lived with the victim and slept in the trailer behind the victim's house. She testified at trial and met with Applicant's trial attorneys the day before the trial began. She did not recall how much they prepared her for her testimony.

Simmons had told the victim to put her foot down with Applicant as he would take the car owned by Simmons and her husband but used by the victim. Simmons testified that she threated to call the police if Applicant took the car again. She stated she did not know Applicant had a drug problem and did not have any suspicions of this.

Simmons testified she spoke with Investigator Rodriguez when Applicant was in custody. She recalled during her trial testimony that she was asked about those discussions, but the trial

court sustained an objection from the solicitor. Trial Tr. p. 570, lines 12-17. She testified that Investigator Rodriguez urged her to convince Applicant to give a statement.

Simmons testified she also went to examine the victim's vehicle after it was recovered and that she did not see any blood or smell accelerant in the car. She noted that there were only two sets of keys to the car and that the victim had one and she had the other.

Applicant's Testimony

Applicant testified the relief he seeks in this action is a new trial. He testified he moved to relieve his trial attorneys before the trial began and such motion was denied. Trial Tr. p. 11-36. He stated he did not believe Counsel Mellard or Counsel Hinds properly prepared him for his trial. He noted he brought this to the trial court's attention after the jury returned a guilty verdict. Trial Tr. p. 653-54.

Applicant testified that he should have testified at trial to clear things up. He alleged that his attorneys advised him not to testify and that they asked Jannie Simmons to help convince him not to testify. He acknowledged that the trial court advised Applicant of his rights and examined him on his decision. Trial Tr. 530-536. He testified he trusted Counsel Hinds's advice that he not testify. He stated that he would have testified to give context to the setup of the victim's house and that no one used the front door at the victim house and that he slept in a trailer behind the house. He also claimed he would have testified the victim's thumb was bleeding earlier and that is how her blood came to be on his sweat pants. Applicant then testified to his version of events the night the victim the killed. He claims the victim called for him and James Gilmore and then gave him $50. He then took the victim's car key and left in the car around 9:00pm to meet Walter Myers. He claimed they then bought drugs and did those drugs. He stated that he had no reason to set a fire. Myers was listed on the defense's witness list, but he was not called to testify

at trial. He claims he would have testified similarly to his testimony during the Jackson v. Denno hearing emphasizing that he did not stab his grandmother.

Applicant testified that his attorneys should have objected to the solicitor saying the word stabbing as there were no reports saying there was a stab wound. He did concede that Lieutenant Craig Collier, of SLED, testified at the Jackson v. Denno hearing that when asked if he was responsible for the death of his grandmother, he made the statement that he did not stab the victim. Trial Tr. p. 44, line 10 – p. 45, line 3.

Applicant testified he wanted his sister to be asked about whether he took the victim's car numerous times. He testified he would have wanted an expert pathologist to testify in his defense since he was not charged with murder until the 2cm incision was found by the pathologist after receiving a call from investigators. He testified he wanted his attorneys to put up a defense to the fire. He also believed his attorneys should have objected or refuted the solicitor's closing argument. He believed his attorneys should have looked into testing his clothing or the victim's car for accelerants. He testified that the victim's blood could not have been found on his shoes because he bought the shoes after the victim was killed.

Applicant also believes he would have testified to counter witness Victoria Baskins's testimony that Applicant threatened to kill her and stated he would do it like he killed his mother. Trial Tr. p. 307, lines 2-19. He would have testified that he never said that. He also believed his attorneys should have more effectively cross examined witness Kareem Taylor and let the jury know that he was paralyzed and that Applicant could have just taken Taylor's money instead of selling him the victim's car.

Applicant also testified that he wanted his trial attorneys to question Frank Colter on whether he had a television or not because Applicant would have testified that he was watching

People's Court. Applicant testified that he stole Frank Colter's shoes which had the DNA on them and left a pair of boots.

Applicant believes his attorneys should have developed a third party guilty defense and presented it to the jury. He also believes his attorneys should have properly brought out the issue revolving around a set of key found in the victim's bedroom.

Applicant acknowledged that the defense, as argued by his attorneys at trial, was that he did not have a motive and that the State lacked a motive. He noted that his aunt testified that he had not reason to harm the victim. Applicant acknowledged he was a user of drugs but that he did not do crack cocaine every day. He admitted that he did not attend the victim's funeral even though he had lived with her his entire life. He denied being on the run, acknowledged that he went to Augusta, Georgia, but noted he returned to Orangeburg. He admitted to selling the victim's car to Kareem Taylor in exchange for drugs.

Counsel R. Douglas Mellard's Testimony

Counsel Mellard testified he was lead counsel in Applicant's trial. Counsel Hinds became involved as the case got closer to trial. He recalled his advice to Applicant regarding whether he should testify or not and the ramifications of the decision. Counsel Mellard testified he received responses from his Rule 5, SCRCrimP, and Brady[1] requests piecemeal as the documents came in. He noted his office has a "pretty good" relationship with the solicitor's office. They follow an open file policy where Solicitor Pascoe usually shows defense counsel his trial notebook. As a matter of practice, if documents or materials were not received, Counsel Mellard testified he would bring that to the Solicitor's attention and if need be to the court's attention.

Counsel Mellard testified that Applicant's Exhibit 2 was not included in what he and Counsel Hinds received from the solicitor. He recalled that he did not have the entire coroner's

[1] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

file. He noted that in Applicant's Exhibit 8, the amended autopsy report, the pathologists concluded was that the cause of death was homicide. He testified he spoke to Dr. Ross regarding her procedure before trial. He stated it was his intention to focus the jury's attention on the brevity of time she spent with the body and that she never re-examined the body to follow up with what the investigators were conveying to her. In his opinion, Dr. Ross examined the victim's body in the context of the surrounding events and then making her determination off of that. He noted Dr. Ross was questioned on the cause of death determination only coming after investigators concluded the fire was the product of arson. Trial Tr. p. 484, lines 1-23. He could not say whether having this report would have changed anything but believed that it would have helped on cross examination of Dr. Ross. He would have spoken to Dr. Ross about the reports and why there are different versions of them. He testified he would have expected Applicant's Exhibit 2 to be turned over to the defense.

Counsel Mellard testified that Dr. Ostrowski was hired to consult on the DNA aspect of the case where he was able to review the report and explain the testing process. He emphasized that Dr. Ostrowski worked with Counsel Hinds to frame questions on cross examination of the State's DNA expert and to make them look like they understood the process very well. He noted that he could not change the results of the testing. He did not recall whether Dr. Ostrowski knew if Applicant and the victim were related.

Counsel Mellard stated that he had concerns with Applicant taking the stand in his defense. He noted that he was interrupted the trial multiple times with outbursts and screamed various denials during testimony. He recalled that at one point there were undercover agents surrounding the table who were there for court room security.

He testified the motion to relieve counsel motion was, in his opinion, preserved for appellate review. The trial court went through each of Applicant's concerns which Counsel Hinds responded to and explained. Trial Tr. p. 11-36.

Counsel Mellard testified Applicant's aunts were called to testify to reinforce their argument that Applicant did not have a motive to kill the victim.

He recalled there was no cross examination of Kareem Taylor because he gave a statement where Applicant asked him if he had ever killed someone and Applicant then said, "don't because you won't sleep well at night." He testified he did not want this to come out and thought that the solicitor would have gotten this testimony out on redirect.

Counsel Mellard recalled that Walker Myers was on the witness list. He did not recall whether he was subpoenaed and present at the trial. Counsel Mellard did not believe his testimony would be favorable as the investigator's interview notes showed that Myers believed Applicant did kill the victim. He also told the investigator that Applicant acted aggressively while on drugs which would have supported the State's theory of the case.

Counsel Mellard testified he spoke to Applicant about who may have killed the victim, but he did not provide any concrete leads or evidence to support a third party guilt defense.

As to the photographs of the victim's body, Counsel Mellard believed those pictures to be gruesome for an average person but were not the worst he had seen in his practice.

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced 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.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, ~~the guilty plea transcript~~, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented. As a matter of general

impression, this Court finds Applicant's testimony and assertions to be not credible. This credibility finding has been applied to the Court's findings and conclusions set forth below.

Overwhelming Evidence of Guilt

This Court finds Applicant can show no prejudice in regards to any of the alleged allegations of ineffectiveness because there is clear overwhelming evidence of guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). "There must be a substantial likelihood of a different result." Harrington v. Richter, 562 U.S. 86, 90, 131 S. Ct. 770, 779 (2011). This Court also finds that a harmless error analysis would apply to the determination of whether Applicant could meet his burden in proving appellate counsel was ineffective.

In support of its finding, this Court notes that the testimony showed that Applicant had lived with the victim his entire life but after she was found murdered, Applicant had fled and not returned. "Flight from prosecution is admissible as evidence of guilt." State v. Walker, 366 S.C. 643, 654, 623 S.E.2d 122, 127 (Ct. App. 2005); see also State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005). "In South Carolina, we recognize that evidence of flight [is] proper [and] [w]e also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight." Id.; *citing* State v. Byers, 277 S.C. 176, 177 – 178, 284 S.E.2d

360, 361 (1981). Applicant did not attend the victim's visitation or funeral. Trial Tr. p. 217, lines 6 – p. 218, line 13. He also did not make any contact with any family members after the incident. Id. Applicant took the victim's car the night the victim was killed and the car was finally recovered in Augusta, Georgia six days later. Trial Tr. p. 336-37; p. 446, lines 1-4. Jannie Simmons, Applicant's aunt, told Applicant that if he took the car that the victim drove, but which was owned by her and her husband, that she would have him arrested. Trial Tr. p. 570. Lovester James testified that Applicant picked him up the morning of the fire and actually gave him a ride to a nearby store. Trial Tr. p. 260-61. Bertha Jackson, the store clerk, testified she saw the victim's car drop James off. Trial Tr. p. 289-90. She reported this to the police. Trial Tr. p. 291. Kareem Taylor testified that Applicant sold the victim's car for around $180 worth of crack cocaine. Trial Tr. p. 390, lines 4-13. James Gilmore, a high school friend of Applicant's, testified that Applicant had a crack problem and was angry and moody when he was on crack. Trial Tr. p. 273.

Lieutenant Craig Collier testified to the circumstances of Applicant's arrest. Lt. Collier received a tip that Applicant was driving in the area. Trial Tr. p. 446-447. Applicant spotted the officers and fled at a high rate of speed Id; "Flight or evasion of arrest is an issue for the jury to consider." Walker at 655, 623 S.E.2d at 128. Applicant was arrested only after he wrecked the vehicle into a telephone pole. Id.

Leonard A. Weir of the SLED arson unit was qualified as an expert in the field of accelerant detection by a canine. Trial Tr. p. 410. He testified that the accelerant detection canine is trained to alert to all accelerants and that his canine, Trixie, alerted ten (10) times in the victim's bedroom. Weir testified at trial of accelerant led from the victim's bedroom, down the hall and to the front door of the house. Trial Tr. 420, lines 7-9. In his opinion, the fire was set

intentionally and originated on the victim's bed and area around the bed. Trial Tr. p. 418, lines 2-20.

The prosecution also presented DNA evidence which strongly implicated Applicant in the murder. SLED Agent Adrienne Riley testified as an expert regarding the DNA analysis done on Applicant's clothing. Trial Tr. p. 510. She testified the blood found on Applicant's sweat pants was a direct scientific match to the victim. Trial Tr. p. 517-19. There was also blood found on Applicant's left tennis shoe which Agent Riley determined the victim could not be excluded as a match. Trial Tr. 520.

While in custody, Lt. Collier testified Applicant gave a brief oral statement that he did not stab the victim. Trial Tr. p. 452. Lt. Collier testified that when confronted about his statement, Applicant explained that he heard about the victim's stabbing on the television. Id. Lt. Collier significantly noted that the investigation had not yet revealed that the victim had been stabbed and knew Applicant was not being truthful. Trial Tr. p. 452, line 15 – p. 453, line 15. He testified he then called and confirmed with Dr. Ross that the victim was stabbed. Trial Tr. p. 453, lines 13-17. Dr. Janice Ross, pathologist, testified in her opinion the victim died as a result of blunt force trauma of undetermined origin. Trial Tr. p. 476. She testified the manner of death was homicide. Trial Tr. p. 478. She testified that no soot was found in the victim's airways and that she had no doubts the fire had nothing to do with her death. Id. She also testified there was a stab wound to the victim's back wall of the left chest and that there was bruising around that area so the victim would have to have been alive when she was stabbed. Trial Tr. p. 475. George E. Bonnete, a deputy coroner, believed the victim died from blunt force trauma to the head as parts of the victim's skull were missing. Trial Tr. p. 249-50.

While housed at the Orangeburg County Correction Facility, Applicant told Victoria Baskin, at the time a medical officer, that if she did not comply with his requests to give him medications, then he would kill her like his killed his mother. Trial Tr. p. 307.

This Court also notes the jury was out for approximately 2 hours 25 minutes. See Dugas v. Coplan, 428 F.3d 317, 335 n.28 (1st Cir. 2005) (The court has looked not only to the strength of inculpatory evidence, but also the brevity of the jury's deliberations). Based on the foregoing, this Court finds there is clear evidence of overwhelming guilt. As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of trial counsel could have reasonably changed the outcome of trial.

Ineffective assistance of trial counsel in failing to raise inconsistencies in the purported original pathology report. In the alternative, prosecutorial misconduct or Brady violation if the pathology report not listing a 2cm defect in the lungs was not turned over to the defense.

This Court notes that the parties agreed to stipulate that the solicitor had no knowledge of and was not in possession of the pathology report at issue, Applicant's Exhibit 2. This Court addresses the allegations of whether a Brady/Rule 5 violation has occurred first. Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). 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). 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. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985).

The parties have stipulated that the solicitor did not possess or have knowledge of the report at issue. The Court finds the stipulation dispositive of the allegation. Therefore, Applicant concedes the report was not suppressed by the prosecution. Additionally, Applicant failed to show that the report was material to his guilt. The pathologists issued an amended autopsy report that concludes the cause of death was a homicide as both initial autopsy reports indicated that the pathologist's determination were pending the investigation. This Court finds this allegation must be denied and dismissed with prejudice. Applicant failed to meet his burden in proving prosecutorial misconduct or that a Brady violation occurred.

This Court will now analyze whether counsel was ineffective in failing to procure these documents and in failing to raise the inconsistencies. This Court finds Applicant failed to meet his burden in proving counsel was ineffective in any regard. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Counsel Hinds's credible testimony on the matter is persuasive in that she did not believe it would have occurred to any attorney to subpoena the coroner's entire file. This Court agrees. This Court finds it is within the prevailing professional norms for defense counsel to receive the autopsy reports with no photographs, no supporting materials, and none of the pathologists' work product, as Counsel Hinds testified. This Court finds Applicant failed to meet his burden in proving counsel was deficient in failing to procure this document from either the pathologists or the coroner's office.

It was trial counsel's strategy to call into questions the pathologist's findings by questioning how she determined the cause of death. Counsel Hinds argued in closing arguments that the State could not prove how she died, citing that the coroner believed it was from blunt

force trauma to the skull. Trial Tr. p. 586, line 1 – p. 587, line 10. Counsel Hinds argued that the pathologists were basing their findings on the investigators' conclusion that the fire was intentionally set and ultimately concluded the cause of death was from trauma of undetermined origin. Trial Tr. p. 594, line 5 – p. 595, line 8. It was argued that these varying theories were not enough to convict Applicant. Counsel Hinds also stated in opening:

> This was not labeled a homicide until the pathologist did an amended report a while later. And in that amended report, which did say at that point, homicide. You're going to hear testimony that the reason for that change was because of the arson investigation. In other words, once it was determined that the fire was probably set, it was the pathologist's opinion, that therefore, it was a homicide. So, in other words, if there had been no arson there would be no murder. That's kind of like the tail wagging the dog. The pathologist is going to testify to you that Ms. Bell died of undetermined trauma, undetermined trauma. It's a fancy way of saying they don't know how she died. Certainly, they don't know why.

Trial Tr. p. 171, lines 9-22. This demonstrates that trial counsel effectively highlighted the inconsistencies in the State's theory of how the victim died.

Counsel Mellard also highlighted the inconsistencies during his cross examination of Dr. Ross. Dr. Ross testified that she only examined the victim's body one time and the report was amended without an additional examination of the body. Trial Tr. p. 482, lines 11-13; Trial Tr. p. 484, lines 10-12. Counsel Mellard even elicited testimony from Dr. Ross that her "conclusion was based in part on the fact that the police had decided that arson was involved." Trial Tr. p. 484, lines 17-20.

Counsel Hinds argued these inconsistencies in closing as well. She argued the coroner felt that the victim must have been killed by blunt force trauma, but highlighted that that's not what the experts confirmed. Trial Tr. p. 586-87. She noted that he was not an expert and was merely speculating. Id. Counsel Hinds argued in closing:

> When pressed, the pathologist did say, could have been blunt force trauma, but she didn't say it was, she said it could have been. As a matter of fact, there was,

there's been speculation, there was one puncture wound, was she stabbed to death? Nobody knows. Was she hit – the coroner seems to think she was hit over the head. Everybody's got a theory, nobody can tell you for sure. You heard the pathologist testify that the reason that the amended report was changed from "pending investigation" to the homicide label was because of the determination that the fire was an arson related fire. That was the only reasons, ladies and gentleman. They didn't – she didn't re-examine the today, they didn't do another physical examination, it was strictly because of the arson determination. All she can do is guess. Even an educated guess is just a guess. According to the pathologist, if there had not been an arson determination there would have been no murder, which is interesting. As we're in this courtroom today, Willie Bell is being tried for murder, he is not being tried for arson. At the end of her testimony she states that there was no mistake on the March tenth report, it was a trauma of undetermined original, she didn't know.

Trial Tr. p. 594-95.

An attempt by Counsel Mellard to question Dr. Ross regarding the report at issue would be cumulative to the many inconsistencies presented. Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (no prejudice from not eliciting cumulative information.). The trial strategy was to challenge the cause of death and that was done on multiple grounds. Also, this Court finds Applicant failed to present any evidence to corroborate the report at issue. It leaves the Court to speculate as to the nature and circumstances of the report. Additionally, this Court finds it would not have changed the result of the trial. Applicant has also failed to prove prejudice as there exists overwhelming evidence of guilt. This allegation is denied and dismissed.

Ineffective assistance of trial counsel in failing to consult with and utilize a forensic pathologist.

Applicant alleges trial counsel should have consulted a forensic pathologist to further challenge the pathologists' cause of death finding. Applicant argues that by presenting an expert forensic pathologist Applicant could have more thoroughly challenged the pathologists' findings and ultimately the victim's cause of death. This Court disagrees and finds this allegation meritless.

Counsel's failure to procure expert witnesses does not render their representation deficient when counsel vigorously cross-examines the State's witnesses and attached the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). See also Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991). Counsel Mellard and Counsel Hinds both thoroughly attacked the pathologist's cause of death finding consistently throughout the trial. As stated *supra*, counsel argued that the pathologists' conclusion was flawed in opening statements, on cross examination of Dr. Ross and of Deputy Coroner Bonnette, and notably in closing arguments. This Court finds Counsel was not deficient in any regard as trial counsel thoroughly challenged the cause of death conclusions made by the State's witnesses.

This Court finds Applicant has also failed to show prejudice as Dr. Wren was unable to conclude that the pathologists' findings were not correct. See Harrington v. Richter, 562 U.S. 86, 112, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011) (It was also reasonable to find Richter had not established prejudice given that he offered no evidence directly challenging other conclusions reached by the prosecution's experts.). Dr. Wren testified that although he took issue with the procedure and practices of the pathologists, he was unable to conclude how the victim died and concluded that it could have been from trauma. Dr. Wren's criticism of the autopsy reports was primarily based on issues he had with his perception of the procedures used in coming to the conclusion that the victim died as a result of trauma of underdetermined origin. Dr. Wren's testimony was inconclusive as he was unable to make a determination of the cause of ~~his~~ MM death. It provided the Court with nothing more than theoretical possibilities that included what the examining pathologists determined to be the cause of death. This Court finds Applicant has failed to prove any prejudice in not presenting an expert witness in forensic pathology as Applicant failed to present any testimony from Dr. Wren that would likely have changed the

result of the trial. Applicant has also failed to prove prejudice as there exists overwhelming evidence of guilt.

Ineffective assistance of trial counsel in failing to prepare Applicant for trial and in failing to utilize Applicant as a witness

Under the United States and South Carolina Constitutions, a criminal defendant has a right to remain silent and to not testify during his trial. U.S. Const. amend. V; S.C. Const. art. I, § 12. It is clear that a defendant in a criminal trial has a constitutional right to testify on his own behalf. Rock v. Arkansas, 483 U.S. 44, 51, 107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987). Further, it is the defendant who retains the ultimate authority to decide whether or not to testify. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). To waive the right, all the defendant needs to know is that a right to testify exists. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991).

This Court finds this allegation is clearly refuted by a reading of the colloquy between Applicant and the trial judge. Trial Tr. p. 532-36. The record reveals that the defendant actually received competent advice from counsel and strategically decided not to testify. Id. It is clear Applicant was aware of his right to testify. Id. This Court finds persuasive the testimony of counsel that Applicant was advised of his right to testify. This Court finds Applicant's testimony on the issue not credible. The testimony presented at the PCR hearing shows that both Counsel Hinds and Counsel Mellard advised Applicant that he should not testify but that the decision to do so was his own. Applicant acknowledged this at the hearing and stated that he trusted Counsel Hinds's advice on the issue. This Court also notes that the trial court gave Applicant overnight to make his decision. Id. This Court readily denies and dismisses this allegation with prejudice.

Ineffective assistance of trial counsel in failing to utilize Jannie Simmons and Ann Wallen as witnesses at the Jackson v. Denno hearing

Applicant has failed to meet his burden of proving counsel was ineffective in failing to call Jannie Simmons and Ann Wallen during the Jackson v. Denno hearing. Applicant argues these witnesses would have testified that they spoke to Investigator Rodriguez and that they were asked to convince Applicant to speak with the investigators. This argument was made by Counsel Mellard. He argued in support of his suppression motion that Rodriguez coerced Applicant and his family into cooperating. Trial Tr. p. 86, lines 7-17. Applicant attempted to solicit testimony from these witnesses at the PCR hearing regarding what Rodriguez said to them. This Court ruled the testimony was inadmissible hearsay. Counsel Hinds similarly tried to elicit these conversations through Simmons on direct examination, but the trial court ruled the conversations were inadmissible hearsay. Rodriguez testified at the Jackson v. Denno hearing and trial counsel had the opportunity to elicit what they argued amounted to coercion. Further, Simmons and Wallen could not add anything of substance to the Jackson v. Denno hearing because what they would testify to is inadmissible hearsay.

This Court further finds Applicant cannot show prejudice as he has not shown that Simmons and Wallen's inadmissible testimony would have changed the court's ruling, much less the result of the trial, as the arguments Applicant believes should have been made were in fact made. Additionally, this Court notes its previous finding that Applicant can show no prejudice as there was clear overwhelming evidence of guilt.

Ineffective assistance of counsel in failing to effectively cross examine witnesses

Applicant alleges Counsel was ineffective in failing to effectively cross examine the State's witnesses regarding the alleged inconsistencies in the reports regarding the fire scene and matters regarding the testing for accelerants, State's DNA expert, Frank Colter, and Kareem Taylor. The manner and extent of cross-examination should not be second-guessed. See Sallie v.

North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Marzullo not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness); United States v. Nersesian, 824 F.2d 1294, 3121 (2d Cir. 1987) ("decisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature" and will not support an ineffective assistance claim). This Court will address each in turn.

State's witnesses regarding alleged inconsistencies in the reports regarding the fire scene and matters regarding the testing for accelerants

Applicant argues trial counsel was ineffective in failing to effectively cross examine the State's witnesses regarding inconsistencies in the testing of accelerants. This Court finds Applicant failed to present to the Court what those alleged inconsistencies are and therefore dismisses this claim as no evidence was presented in support of this allegation. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (Prejudice cannot be based on "pure conjecture.").

State's DNA Expert

Applicant further alleges that trial counsel did not effectively cross examine the State's DNA expert, SLED Agent Adrienne Riley. Agent Riley testified that she tested various pieces of Applicant's clothing for the victim's DNA. She concluded to a degree of medical certainty that the blood found on Applicant's sweat pants was a direct match to the victim. Trial Tr. p. 519, lines 1-5. She testified she did not find any DNA on the collar of Applicant's shirt. Trial Tr. p. 516. She testified there was blood found on Applicant's shoes where the victim could not be excluded as a match. Trial Tr. p. 520. At this point of the trial Applicant made multiple outbursts which prompted the trial court to chastise Applicant and instructed him to be quiet. Trial Tr. p. 521.

This Court finds Applicant has failed to meet his burden in proving counsel was ineffective in failing to effectively cross examine Agent Riley. Counsel Hinds credibly testified at the hearing that it was her strategy to keep Agent Riley's testimony brief in order to not allow her to repeat her conclusions. Sallie v. N.C., 587 F.2d 636, 640 (4th Cir. 1978) ("Marzullo was not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness."). Upon a comprehensive examination of the record, this Court finds Counsel Hinds conducted an efficient and effective cross examination of Agent Riley. Counsel Hinds attempted to show that DNA testing is very intricate and is never certain one hundred percent certain. See generally Trial Tr. p. 523-29.

Regardless, Applicant has failed to present the testimony or evidence that a more effective cross examination would have procured and has therefore failed to prove prejudice. See Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) ("[T]he Confrontation Clause guarantees an opportunity for effective cross examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish"); see also Simpson v. Moore, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case." (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998))).

Frank Colter and Kareem Taylor

Applicant asserts trial counsel was ineffective in failing to effectively cross examine witnesses Frank Colter and in failing to cross examine Kareem Taylor. This Court finds these allegations without merit.

Frank Colter testified that Applicant came to his house on March 10, 2006, and stayed the night hiding from the windows when cars would go by. Trial Tr. p. 370-71. He testified that

Applicant returned that Monday with a man in a wheelchair who turned out to be Kareem Taylor. Trial Tr. p. 371-72. This Court finds Applicant has failed to meet his burden in proving deficiency in failing to effectively cross examine Colter. This Court notes the evidentiary impact of Colter's testimony was minimal.

This Court finds Applicant has failed to present any evidence of how he was allegedly prejudiced by Counsel Mellard's cross examination of Colter. Counsel Mellard made a timely and proper argument in support of his objection to Colter's identification of Applicant. Trial Tr. p. 382. Additionally, this Court notes its previous finding that Applicant can show no prejudice as there was clear overwhelming evidence of guilt.

Applicant further alleges trial counsel was ineffective in failing to cross examine Kareem Taylor. This Court finds persuasive Counsel Mellard's testimony that they chose not to cross examine Taylor because he gave a statement where Applicant asked him if he had ever killed someone and Applicant responded, "don't because you won't sleep well at night." He credibly testified as to this issue that he did not want this to come out on redirect examination. This Court denies and dismisses this allegation.

Ineffective assistance of trial counsel in failing to object to the solicitor's use of the word "stabbing" and in failing to refute the alleged evidence regarding "stabbing"

Applicant alleges counsel was ineffective in failing to object to the solicitor's use of the word "stabbing" and in failing to refute the alleged evidence regarding "stabbing." This Court finds these allegations without merit. Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. See State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) ("The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such."). The solicitor presented arguments to the jury in closing and mentioned the word "stabbing." This Court finds

the use of the word "stab" or "stabbing" in the solicitor's questions and comments are clearly proper as there is evidence from not only the pathologist, but from Applicant himself that a stabbing occurred. Applicant stated to investigators that he did not stab the victim. Trial Tr. p. 452. This allegation is unquestionably meritless. Applicant has failed to present any reason or argument as to why using the word "stabbing" is improper. Applicant has failed to meet his burden in proving counsel was deficient in any regard and cannot prove any resulting prejudice. Additionally, this Court notes its previous finding that Applicant can show no prejudice as there was clear overwhelming evidence of guilt.

Ineffective assistance of trial counsel in failing to call witnesses on Applicant's behalf and in failing to raise a third party guilt defense

This Court finds Applicant has failed to present any evidence with regards to the allegations of failing to call witnesses on Applicant's behalf and in failing to raise a third party guilt defense. Further, prejudice from counsel's failure to call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An 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, 509 S.E.2d 807 (1998). As clarified in Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), "a defendant [can] introduce evidence of third-party guilt regardless of the strength of the State's case if the evidence offered by the accused as to the commission of the crime by another person is limited

to such facts as are inconsistent with his own guilt and that raise a reasonable inference or presumption as to his own innocence." Miller v. State, 379 S.C. 108, 114 n.2 (2008). This Court finds that the Applicant has failed to meet his burden of proof as to this claim. This Court finds Applicant's testimony on the issue to be not credible. Additionally, this Court notes its previous finding that Applicant can show no prejudice as there was clear overwhelming evidence of guilt. Therefore, it is denied and dismissed.

Ineffective assistance of trial counsel in failing to utilize Jannie Simmons and Ann Wallen

Applicant further alleges that counsel was ineffective in failing to properly utilize defense witnesses, Applicant's aunts, Jannie Simmons and Ann Wallen, on their examinations. This Court notes that Applicant also called Emma Dingle who is also Applicant's aunt. Dingle did not testify at the PCR hearing, so this Court will not address any deficiency with regards to what Applicant believes she would have testified to. Applicant alleges Simmons and Wallen would have testified that he did not use the front door to the victim's house often. They also testified that they did not smell any accelerant or see any blood in the victim's car. This Court finds Applicant failed to meet his burden of proving counsel was ineffective in failing to utilize these witnesses. Applicant's testimony on this matter is not credible. This testimony is peripheral to the question of Applicant's guilt. It is of no consequence that Applicant did not normally use the front door to the victim's house. Applicant has failed to overcome the presumption of effective assistance in this regard. See Cherry, 300 S.C. 115, 386 S.E.2d 624 (Applicant must overcome presumption that counsel rendered adequate assistance). This Court finds this testimony is not such that would have changed the outcome of the trial. Additionally, this Court notes its previous finding that Applicant can show no prejudice as there was clear overwhelming evidence of guilt. This allegation is denied and dismissed with prejudice.

Ineffective assistance of trial counsel in failing to make a pre-trial motion to exclude the testimony of Victoria Baskin and in failing to object to the State's comments regarding Baskins in closing arguments

Applicant also alleges trial counsel was ineffective in failing to move to suppress the testimony of Victoria Baskins who was at the time a medical officer at the jail where Applicant was housed. Baskin testified that Applicant said that if he does not get his medications that he would kill her like his killed the victim. Trial Tr. p. 307, lines 2-19. This Court finds this testimony is clearly admissible. The testimony is undeniably relevant in that it directly implicates Applicant through his own statements. Rule 401, SCRE. The statement is not hearsay, and it is admissible as an admission by a party-opponent. Rule 801(d)(1)(2), SCRE. This Court finds there was no viable objection to be made in support of an objection to keep the statement out. Therefore, counsel was not ineffective in failing to make a pre-trial motion to exclude the testimony of Baskin. Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (counsel not be deficient for failing to make specific arguments where "it would have been futile for [counsel] to have made such arguments"). Applicant cannot prove deficiency with regards to the solicitor recapping her testimony in closing arguments as the statements were properly admitted. Applicant also has failed to prove any resulting prejudice. Additionally, this Court notes its previous finding that Applicant can show no prejudice as there was clear overwhelming evidence of guilt.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d

at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. 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 deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

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

Here, appellate counsel argued the trial judge erred in dismissing a juror before the second day of trial because the juror stated on his return that he only finished the second (2nd) grade and did not have a sixth (6th) grade education or its equivalent. See Brief of Appellant. Appellate counsel took issue with the trial court overruling counsel's objection and argument that the court should first question the juror to determine if he actually had the equivalent of a six grade education by his life experiences. Id. Appellate counsel argued the juror could have innocently not responded to the question. Id. An abuse of discretion standard of review applied. Id.

As an initial matter, this Court notes that appellate counsel did not testify at the PCR hearing. This Court finds that a presumption of effectiveness applies and that it is Applicant's burden to prove that appellate counsel was ineffective in failing to raise stronger issues that would have resulted in a reversal of Applicant's conviction. This Court cannot speculate as to whether appellate counsel considered raising these issues or believed they would have any merit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. Applicant alleges appellate counsel was ineffective in failing to raise four separate issues on appeal. The Court will review each in turn.

Denial of Motion to Relieve Counsel

Applicant alleges appellate counsel was ineffective in failing to raise the denial of the motion to relieve counsel as an issue on appeal. This Court finds this allegation without merit. This issue is not clearly stronger than the juror issue raised by appellate counsel.

Applicant has also failed to meet his burden in proving he was prejudiced by appellate counsel's failure to raise the trial court's denial of Applicant's *pro se* motion to have counsel relieved. Applicant cannot show that the denial was an abuse of discretion. See State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) (citation omitted) ("[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion."). This Court finds the contrary is true as the trial judge went through a thorough colloquy with Applicant and Counsel Hinds. In this exchange, Applicant argued that counsel did not have an investigator and that they had not interviewed potential witnesses. Trial Tr. p. 12. Counsel Hinds countered that they in fact had four different investigators on the case. Trial Tr. p. 27. The trial judge obviously found Applicant's argument incredible. This Court finds this issue would have not have been successful on appeal. This allegation is easily denied and dismissed with prejudice.

Jackson v. Denno *Ruling*

Next, Applicant alleges appellate counsel was ineffective in failing to raise the trial court's denial of counsel's motion to suppress Applicant's statements to investigators. This Court finds this allegation without merit as Applicant has failed to meet his burden of proof. See State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996) ("On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion."). Applicant cannot show that appellate counsel was deficient in

any regard. This Court finds this issue is not clearly stronger than the juror issue raised.

Furthermore, Applicant cannot show this issue would have been meritorious on appeal. The totality of the circumstances does not demonstrate that Applicant was coerced or overborn by law enforcement. See State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). It is clear from the record that Applicant freely and voluntarily gave the statements as he admits he was read his rights, understood them and then signed a waiver form. Trial Tr. 78-82. Applicant failed to meet his burden in proving he was prejudiced by appellate counsel's failure to raise this issue.

Denial of Objection to Pictures

Next, Applicant alleges appellate counsel was ineffective in failing to raise the issue of whether the trial court erred in admitting certain photographs of the victim's body as found at the scene, specifically State's Trial Exhibit 7. This Court notes Applicant was unable to provide State's Trial Exhibit 7 for this Court's review. The Orangeburg County Clerk of Court was unable to locate this exhibit. Therefore, this Court must dismiss this allegation outright as Applicant failed to meet his burden of production. Butler, 334 S.E.2d 813. This Court will not speculate as to which picture was contained in this exhibit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. This allegation is readily denied and dismissed with prejudice.

Denial of Motion for a Mistrial

Applicant further alleges appellate counsel was ineffective in failing to raise the issue of whether the trial court erred in denying Applicant's motion for a mistrial after the prosecuting solicitor asked witness James Gilmore about a statement he gave to investigators where Gilmore said, "I hope he didn't kill his mama." Counsel Mellard promptly objected before the witness had an opportunity to answer the question.

The decision to grant or deny a mistrial is within the sound discretion of the trial court

and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.' " State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct.App.2000) (quoting Gilliam v. Foster, 75 F.3d 881, 895 (4th Cir.1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

This Court finds Applicant failed to meet his burden of proving appellate counsel was ineffective in failing to raise the denial of Applicant's motion for a mistrial. This issue is particularly meritless as the solicitor did not finish his question, the witness did not give an answer to the question, and the trial court sustained Counsel Mellard's timely objection. Applicant has failed to show any prejudice in this issue not being raised as it would have been at best a frivolous issue on appeal.

Denial of Objection to Deputy Coroner's Testimony

Finally, Applicant alleges appellate counsel was ineffective in failing to raise the issue of the trial court's ruling on George Bonnette, the deputy coroner's testimony. Counsel Mellard objected to this testimony and argued that the coroner was not qualified as an expert and therefore should not be able to testify as to the victim's cause of death. Trial Tr. p. 245-47. Bonnette then testified that the victim's skull seemed to have suffered severe blunt force trauma. Trial Tr. p. 250.

This Court finds Applicant failed to show that this issue is stronger than the juror issue raised on appeal. It is clear to this Court that this issue would not have been successful on appeal. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Jennings, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011). An abuse of discretion occurs when the trial court's ruling is based on an error of law or when grounded in factual conclusions, is without evidentiary support. Id. at 477-78, 716 S.E.2d at 93. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

This Court finds this issue would not have resulted in a reversal of Applicant's conviction. It is not likely that the appellate court would have found the trial court abused his discretion by allowing the coroner to testify to what he saw at the crime scene. Applicant

attempts to argue that the coroner was testifying to the cause of death, but Bonnette only testified to what he observed and that he concluded the skull looked to have suffered severe blunt force trauma. The witness also noted that he had been to over 1,000 (eleven hundred) scenes in his capacity as deputy coroner. Trial Tr. p. 250. This Court denies and dismisses this allegation with prejudiced as Applicant has failed to meet his burden.

This Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient in any regard, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised three stronger, meritorious issues on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had any of the issue address above been raised. Additionally, this Court notes its previous finding that Applicant can show no prejudice as there was clear overwhelming evidence of guilt and finds that the appellate court would have utilized a harmless error analysis on all issues. These allegations are denied and dismissed with prejudice.

All Other Allegations

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

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 31 day of August, 2015.

MAITÉ MURPHY
Presiding Judge

St. George, South Carolina

RECEIVED
JUL 26 2017
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

July 12, 2017

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
P.O. Box 2147
Leesville, SC 29070

Re: **Willie Bell, Jr., #254817 v. State of South Carolina**
06-GS-38-0751

Dear Ms. Blanchette:

Enclosed is a copy of the **Order Denying Motion to Alter or Amend the Order of Dismissal** in the above-captioned case signed by The Honorable Maite Murphy and filed with the Orangeburg County Clerk of Court.

Sincerely,

Ruston W. Neely
Assistant Attorney General

RWN/dgr
Enclosure(s)

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Willie Bell, Jr., #254817,

Applicant,

v.

State of South Carolina,

Respondent.

2009-CP-38-1261

ORDER DENYING MOTION TO ALTER OR AMEND THE ORDER OF DISMISSAL

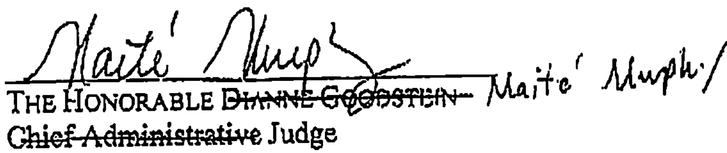
This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 29, 2009. An evidentiary hearing into the matter was convened May 20, 2015, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General J. Clayton Mitchell of the South Carolina Attorney General's Office. By written Order signed August 31, 2015, and filed September 15, 2015, this Court denied and dismissed Applicant's post-conviction relief action with prejudice.

Applicant made a motion pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, in which he asks this Court to alter or amend its order dismissing his PCR application. Respondent made its return to the motion, requesting this motion be dismissed.

Based upon careful reconsideration of the evidence in this case, including Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend its judgment. This Court further finds oral argument would not aid in the reconsideration of the original judgment. The Order of Dismissal issued by this Court contains the required findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion be denied and dismissed.

AND IT IS SO ORDERED this 20 day of April, 2017.



THE HONORABLE ~~DIANNE GOODSTEIN~~ Maite' Murphy
~~Chief Administrative~~ Judge

St. George, South Carolina

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

WILLIE BELL, JR., #254817 Applicant,

v.

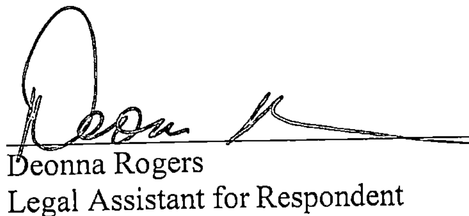
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

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

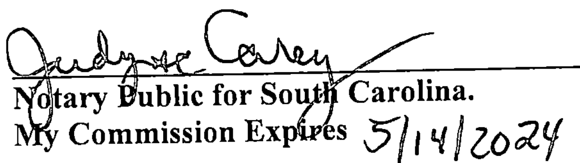
Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
P.O. Box 2147
Leesville, SC 29070

This 12th day of July, 2017.



Deonna Rogers
Legal Assistant for Respondent

SWORN to before me this 12th day of July, 2017.



Notary Public for South Carolina.
My Commission Expires 5/14/2024