

# FALK LAW FIRM, LLC.

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October 2, 2017

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

OCT 16 2017

S.C. SUPREME COURT

Re: Kelvin Jackson 2016-07-0399

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Ruston Neely, Kelvin Jackson 356452.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas  
Honorable R. Scott Sprouse, Circuit Judge

RECEIVED  
OCT 16 2017  
S.C. SUPREME COURT

Case No.: 2016-CP-07-0399


Kelvin Jackson 356452.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Kelvin Jackson appeals the Honorable R. Scott Sprouse's, September 14, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on September 28, 2017. A copy of the order on appeal is attached hereto.



James K Falk  
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PO Box 1058  
Charleston, SC 29402

October 2, 2017

Ruston Neely, Esq.  
Office of S.C. Attorney General  
PO Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED  
OCT 16 2017  
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable R. Scott Sprouse., Circuit Judge

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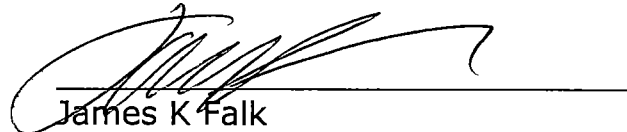
Kelvin Jackson 356452.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Ruston Neely, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this October 2, 2017.



James K Falk  
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PO Box 1058  
Charleston, SC 29402

STATE OF SOUTH CAROLINA )  
 COUNTY OF BEAUFORT )  
 )  
 Kelvin Jackson, Sr., #356452, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 THE FOURTEENTH JUDICIAL CIRCUIT

Case no. 2016-CP-07-0399

**ORDER OF DISMISSAL**

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 OCT 16 2017  
 S.C. SUPREME COURT

This Court convened an evidentiary hearing into the matter on February 15, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General’s Office, represented Respondent.

Applicant’s trial counsel, Virgin Johnson Jr. (Counsel), Esquire, and Applicant were present and testified. This Court also had the opportunity to listen to their testimony and rule on their credibility. This Court had before it a copy of the trial transcript, the records of the Colleton County Clerk of Court regarding the subject conviction, Applicant’s records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter. This Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant was indicted by the July 2011 term of the Beaufort County Grand Jury for Murder (2011-GS-07-1329). Virgin Johnson, Jr., Esquire and Korey L. Williams, Esquire represented him. On July 29, 2013, Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Maite Murphy sentenced Applicant to confinement for forty-five (45) years.

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A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v. California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Jackson, Op. No. 2015-UP-512 (filed on November 12, 2015). The Remittitur was issued on May 11, 2016.

## **II. ALLEGATIONS**

Applicant alleged the following grounds in his application:

1. "Ineffective Assistance of Trial Counsel"
  - a. "Failure to investigate, develop, and present all available, relevant, and admissible mitigating evidence"
    - i. "Failure to object to inadmissible evidence"
  - b. "Failure to retain own handwriting expert"
  - c. "Harmful statements in opening argument stating to the jury that his client had lied"
  - d. "Prejudice because counsel put his own client's character at issue"
  - e. "Failure for not putting a police report into evidence that could have been used"
2. "Prosecutorial Misconduct"
  - a. "Violation of Sixth Amendment Right to Fair Trial"
  - b. "Misconduct and presentation of false evidence by law enforcement and solicitor"
3. "The State violated due process when they allowed their witness to testify falsely"
  - a. "False presentation of false evidence"
  - b. "Fifth and Fourteenth Amendments"

## **III. SUMMARY OF FACTS**

The victim, Masako Yamaguichi Miller (hereinafter "the victim"), disappeared from her home in Hampton, S.C., after midnight on May 26, 2011. Her body was recovered four (4) days later in Beaufort County at the edge of the Broad River after having been submersed in water. Tr. pp. 250-251, 277-284, 308-313, 374-378, 355-358, 384, 393, 463-478, 403-428.

Applicant, Kelvin Jackson (Applicant), murdered the victim after a lengthy, tumultuous, "on again-off again," romantic relationship lasting approximately ten (10) years. Applicant and the victim had two (2) children together.

While the relationship was ongoing, police had been called to the couple's home several times over the years regarding domestic violence. The victim had also had police put a Vardar [motion detector] Security System in her house. In the same year the victim died, a co-worker and close friend of the victim overheard over the phone the victim and Applicant arguing. The following morning, the friend saw bruises on the victim's face and arm. Another friend saw Applicant and the victim argue and "tussle" at her home, and Applicant tried to force the victim to come with him; and, he attempted to check the friend's cell-phone thinking it was the victim's phone. The police were called to the friend's home with regard to this incident as well. The same friend had seen hand prints or bruises on the victim's arms and neck while the victim and Applicant were romantically involved. The victim's daughter testified she had witnessed Applicant hit her mother in the chest with a thick wooden block, and Applicant had done something to her mother on another occasion in the bathroom. Applicant had even pushed the daughter down on one (1) occasion when she tried to protect her mother from Applicant. The daughter also testified Applicant was jealous of the victim, and the daughter had to hide the victim's cell phone from Applicant. Approximately two (2) weeks before the victim's murder, the victim was visiting with one (1) of her sons at the hospital when Applicant came to the hospital, and there was another incident. The close friend and co-worker mentioned above *and also* the victim's new boyfriend both overheard Applicant cursing the victim and accusing her of "disrespecting" him because she was seeing another man. The victim was approximately five (5) foot, (2) inches tall, and Applicant was approximately six (6) foot, one (1) inch tall and weighed approximately two hundred and fifty (250) pounds. The testimony at trial established the victim was afraid of Applicant. Tr. 243-68, 269-73, 279-80, 305-06, 321, 336, 338-40, 513-14.

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Applicant had lived with the victim until January/February of 2011, when the victim made Applicant move out of her home. The victim kicked Applicant out because of his abuse of her, and she had met the new boyfriend who was not abusive. Before leaving, Applicant argued with the victim about being evicted. Applicant then moved to Columbia, S.C. At the time of the victim's murder, Applicant both lived and worked in Columbia. The victim still lived at 206 Middle Street in Hampton with her three (3) children. Tr. 243-68, 301-04, 484.<sup>1</sup>

The day before her disappearance, the victim closed a joint checking account she had with Applicant at Palmetto State Bank in Hampton, and she opened a checking account solely in her name. At that time, she was given one (1) debit card for the new account by the bank. The day before her disappearance, the victim also called Applicant and informed him she was taking him off of her insurance. The victim had also filed a DSS lien against Applicant for child support. Applicant also had a baby by another woman. Applicant had previously been to jail before for non-support. Tr. 360-72, 259, 267.

On the afternoon of May 25, 2011, the victim was at a local park with her children. A friend, Stephanie Williams, who lived across from the park, asked the victim to meet her there. Stephanie had previously borrowed money from the victim for wedding attire. On that afternoon, Stephanie paid the victim \$260.00 in cash. Tr. 512-518.

That night, May 25, 2011, the victim was at home with her children. The victim also saw her new boyfriend, face to face, at her residence that night and spoke with him on her back porch and then spoke with him again by text messages around 10:15 p.m., after he returned to his own residence. The victim's new boyfriend testified the victim was alive and well at both the time he left her home and at the time of their last text. Tr. 277-281

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<sup>1</sup> The victim's oldest child, a daughter, was not Applicant's child.

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The victim's oldest child, who was fourteen (14) years old at the time of trial, but twelve (12) at the time of her mother's murder, testified she and the other children went to bed at approximately 10:00 p.m. Her mother was alive and well at that time. Tr. 301-319.

That night, the victim's air conditioning was not working and a repairman had come to the home and worked on the unit. Rather than driving his work van, the repairman drove his personal vehicle and parked it in the victim's driveway. The repairman testified he last saw the victim at approximately 11.00 p.m., and the victim was alive and well when he left the residence. Tr. 524-527.

At approximately 10:00 p.m., on May 25, 2011, a couple of hours before the victim was murdered and disappeared, two (2) residents of Hampton who lived in the same area the victim lived in; an area called "the Bottoms," were standing by the side of the road talking. As they were talking, the two (2) men saw Applicant come walking up the road and spoke to him as he walked past. Applicant was headed toward the victim's residence on foot. The two (2) men did not see Applicant's car. Applicant had in fact parked the car further down the road in the Bottoms so he could approach the victim's residence on foot without detection. Tr. 475-476, 518-22, 486-487.<sup>2</sup>

The victim's usual morning routine was to get up around 5 to 6 a.m., open the front door for a friend's child who rode the school bus with the victim's children, and then leave and go to work at Scottsman United System. The victim trained employees there and had to be at work at

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<sup>2</sup> One (1) of the men who saw Applicant walking toward the victim's residence, Kevin White, died before trial; however, Applicant later admitted in his 2<sup>nd</sup> statement to police that he saw Kevin White as he was on foot walking toward the victim's residence. Applicant claimed he parked some distance from the victim's residence so his new girlfriend [not the victim] would not see his car at the victim's residence. The other man who was talking with Kevin White and saw Applicant on foot walking toward the victim's residence shortly before her murder and disappearance testified at trial and identified Applicant. (State's Ex. 32, R. p. 591, Tr. p. 626).

6:00 a.m. to 7:00 a.m. The usual routine was for the friend's child to come in the victim's home at about 5:00 to 5:45 a.m., go back to sleep on the couch, and then the victim's children would get up, eat breakfast, and catch the school bus together with the friend's child and attend school. The victim would wake up her children and the friend's child before leaving for work. Testimony at trial established Applicant knew the victim's usual morning routine. Tr. 308-310, 325, 327-328.

On the morning of May 26, 2011, the friend's child arrived at 5:30 a.m. as planned and the front door was unlocked, but the victim was not in her home. The child fell asleep as usual. The victim's children subsequently overslept for school. When they got up around 8:00 a.m., they noticed their mother was gone, but her oldest child found a yellow sticky note on the kitchen counter stating she [the victim] had gone off with someone, but she would be back. The note purported to be from the victim, but the handwriting on the note *was not the victim's*. The victim's oldest child testified the handwriting on the note looked like Applicant's handwriting, with which she was familiar. A handwriting expert also testified at trial that portions of the note were most probably written by Applicant. A close friend of the victim's also testified the note was not in the victim's handwriting.<sup>3</sup> And, the child who rode to school with the victim's children also testified the note was not in the victim's handwriting. On the morning of May 26, 2011, the victim's daughter also noticed the victim's bed was un-made, which was unusual, because the victim always made her bed before leaving for work; pillows were on the floor, and perfume bottles on the dresser were overturned in one (1) specific direction. She also located the victim's purse and wallet and did not see any cash in the same. Tr. 308-315, 256, 328-331.

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<sup>3</sup> The same friend also testified in the fifteen (15) years she had known the victim, she had never known her to leave her children at home alone at night. (R. pp. 232-36, Tr. pp. 269-73). The mother who dropped her child off every morning testified similarly. (R. p. 298, Tr. p. 334).

When the victim did not appear for work or call her employer, a co-worker and friend was immediately suspicious and notified police. Failure to appear for work without notice was cause for termination. The co-worker and friend had talked to the victim the night before, and the victim had ended the phone conversation by telling the co-worker that she would see her the following morning at work. Police and the co-worker went to the victim's apartment to perform a welfare check but did not find the victim. The victim's new car, on which she was making payments, was parked in the driveway. Police and the co-worker found the victim's work-bag was packed, and her work shoes were still on the floor. The back door to the home was unlocked, which was unusual, because it was always kept locked. Tr. 243-268, 323.<sup>4</sup>

Police immediately began investigating the victim's disappearance. One (1) of the first things police did was to check to see if there was any activity on the victim's credit cards or bank accounts. Police discovered that on the night of the victim's disappearance, *May 26, 2011*, at *2:26 a.m.*, someone had attempted to use the victim's new bank debit card at a Shell Station in the city limits of Hampton. Tr. 354-358, 374-381.

Police spoke with the clerk at the store and reviewed video surveillance footage and discovered Applicant was the person who attempted to use the victim's new bank debit card in an attempt to purchase gasoline at the station. The store clerk also testified at trial that Applicant, who she knew, attempted to use the debit card at *2:26 a.m.* on *May 26, 2011*, and after the pump would not accept the card, Applicant came into the store and purchased gas with cash. The store surveillance video showing Applicant attempting to use the card at the pump and purchasing gas in the store was also introduced at trial. Tr. pp. 354-358, 374-381.<sup>5</sup>

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<sup>4</sup> It is believed Applicant murdered the victim in her bedroom most probably on the bed. He then carried her body out the back door to avoid awakening the children and to avoid detection.

<sup>5</sup> The jury reviewed this video again shortly before returning with its verdict of guilty.

On the morning of *May 26, 2011*, around 6:30 a.m., Dennis Stephens of Yemassee was getting his morning exercise by doing his usual 2 mile walk from his home, off Highway 21, to Exit 42 on Interstate 95. On the walk to the I-95 Bridge, Mr. Stephens found a cell phone on the side of the road. He brought it home and got the phone to work, and there were several messages from people concerned about the whereabouts of the phone's owner. Mr. Stephens' wife was concerned about his picking up this phone, and she told him to get rid of it. Mr. Stephens took the phone and tossed it in some standing water. Police subsequently contacted Mr. Stephens and his wife, and Mr. Stephens took police to where he had thrown the phone. Police recovered it. It was the victim's cell phone that Mr. Stephens found on the morning of *May 26, 2011* at approximately *6:30 a.m.* on the side of Highway 21 near the I-95, Exit 42, bridge. Tr. 381-395, 398-402.

Four (4) days later, the victim's decomposing body was discovered at the edge of the Broad River in Beaufort County by a fisherman. The body had previously been submersed in water. The location of the body was immediately down-stream from the Highway 170 Bridge where the Broad River and Archer's Creek intersect. The fisherman immediately contacted authorities, and the victim's body was recovered, identified by dental records, and the cause of death was determined to be most probably suffocation or strangulation. The manner of death was ruled homicide. Tr. 403-10, 411-17, 418-28, 569-79:

Police subsequently discovered Applicant had stayed at a motel in Walterboro, S.C., at least some of the night-time hours of the victim's disappearance, *May 26, 2011*. Police eventually determined Applicant had rented a room at the *Palm Inn* in Walterboro well after midnight. Tr. 532-549.

The investigation revealed Applicant had rented the room under a false name, Calvin Sanders; however, the hotel clerk had required identification, and upon looking at the same realized Applicant's real name was Kelvin Applicant *not* Calvin Sanders. The clerk also noticed Applicant had registered under a false driver's license number. The clerk corrected the last name and the driver's license number on the motel registration form. Applicant paid *cash* for the room. Upon checking their computer records, the motel determined Applicant had checked in and first entered his motel room at the *Palm Inn* at **4:36 a.m.** on *May 26, 2011*. Tr. 532-549.

At trial, the motel clerk testified and identified Applicant as the person who checked into the *Palm Inn* in the early morning hours of *May 26, 2011*. The clerk also testified Applicant paid *cash* for the room. The State also introduced the motel's registration which showed Applicant had registered in his own handwriting using a false name and driver's license number, and that the motel clerk corrected the name and driver's license number after checking Applicant's i.d. The State also introduced the computer records of the motel which showed Applicant first swiped his motel room key card at *4:36 a.m.* on *May 26, 2011*. Tr. 532-549.

Police questioned Applicant about his whereabouts the night of the victim's disappearance. Applicant initially lied to police and told them he was in another county the night of the victim's disappearance and stated he was not in Hampton County at all. Applicant claimed he was at his girlfriend's house in Fairfax in Allendale County and spent the night there. He also denied he used the victim's debit card that night. Tr. 346-357, 359<sup>6</sup> Applicant also told police he

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<sup>6</sup> Applicant's girlfriend, Tara Evans, testified at trial that Applicant did not spend the night with her the night of the victim's disappearance. She testified he spent the night with her the night of May 24<sup>th</sup>/May25<sup>th</sup>, 2011. On the morning of May 25, 2011, she had to give Applicant money to put gas in his automobile because Applicant had no money. (R. pp. 491-93, Tr. pp. 527-29). Applicant did not receive his paycheck at work until the afternoon of May 26, 2011. (R. pp. 514-16, Tr. pp. 550-52).

had not seen the victim in about three (3) weeks, approximately sometime in early May. Tr. pp. 463-465.

When confronted with the fact police could prove he was in Hampton that night through an eyewitness who saw him walking, and through video at the Shell station, Applicant admitted he was in Hampton that night. He claimed he drove to Hampton from Fairfax to get gasoline for the car. He claimed the victim had given him the debit card before that night. Tr. 356-357.

When told police could put him near the victim's home, Applicant admitted he had been with the victim starting around 11:00 p.m. on the 25<sup>th</sup> of May until the early morning hours of May, 26<sup>th</sup>. Applicant claimed when he arrived the victim was on the phone with her mother in Japan or China. Applicant stated he and the victim "messed around," [i.e. had sex] and the victim gave him the debit card, and he went to the Shell station to get gas for the car, and then returned to the victim's home after 2:36 a.m. and returned the debit card to her telling her it did not work. He denied he killed the victim. However, he had no explanation why the victim would give him a debit card to an account that had no money in it as of yet. Applicant's admission put him in the victim's home with the victim from 11:00 p.m. May 25<sup>th</sup>, until around 2:40 a.m. to 3:00 a.m. on May 26, 2011. Tr. 457-479.

Applicant admitted he then drove to Walterboro, a trip taking approximately thirty (30) minutes, and rented a room at the *Ramada Inn*. Police eventually determined he did not stay at the *Ramada Inn* but the *Palm Inn* where he gave the false identity. Applicant could not account for his whereabouts from the time he left the victim's residence until he checked into the *Palm Inn* at 4:36 a.m. Upon searching the motel room at the *Palm Inn*, police discovered a blood stain in the motel room sink. D.N.A. testing confirmed the blood stain belonged to Applicant [1 in 2.2

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trillion that it was someone else's D.N.A. other than Applicant's, i.e. a scientific match]. Tr. 457-479.

In the victim's home in Hampton, in her bedroom, police recovered a pillow. This pillow contained D.N.A. of both the victim, in a blood stain near the center of the pillow case, and of Applicant, on the edges of the pillow case, i.e. touch D.N.A.. Tr. 436-439, 441-444, 445-457, 580-593, 606-608.

S.L.E.D. Agent David Williams, who investigated the case, drove the route from the victim's residence to the Hwy. 170 Bridge over the Broad River near where the victim's body was recovered and then to the *Palm Inn* in Walterboro. Driving the speed limit, and driving in daytime traffic, the Agent was able to accomplish this complete trip in one (1) hour and fifty (50) minutes, including a fifteen (15) minute stop on the bridge to theoretically dispose of the body. This meant Applicant could have murdered the victim and driven from Hampton, S.C. at approximately **2:26 a.m.**, [the time Applicant attempted to pass the victim's debit card at the Shell station] to the Broad River, and dumped the victim's body, and then drove to the *Palm Inn*, in Walterboro and checked in, well within the time period possible given his **4:36 a.m. check in time** at the motel. This would also account for Applicant's whereabouts from 2:26 a.m., when he used the debit car, until 4:36 a.m. when he checked into the *Palm Inn* in Walterboro, which was only thirty (30) minutes from Hampton. Tr. 613-625

At trial, the States' handwriting expert testified that the victim did not write the note found by her children the morning after her disappearance. The handwriting expert also testified the note was most probably written by Applicant. The expert also testified Applicant had attempted to disguise his handwriting when he gave a handwriting exemplar prior to trial. Tr. 707-717.

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Witnesses also testified that Applicant came to the victim's grandmother's home the day after the victim went missing and was acting inappropriately for the victim being missing. Before coming to the home, Applicant had told his sister on the phone that he was on the way there but he was getting his car washed. Tr. p. 284.

#### **IV. SUMMARY OF TESTIMONY**

Counsel testified he was hired to represent Applicant by Applicant's family. He reviewed Applicant's discovery. In preparation for trial, he interviewed witnesses, prepared legal briefs, as well as pre-trial motions. He attempted to have the jurisdiction moved to Hampton, as he believed it was a better venue. Applicant had a plea offer of 18 years' incarceration, but he insisted he wasn't guilty. He and Applicant discussed whether to call witnesses or have last argument. They both agreed that last argument was preferable to calling witnesses. There were no alibi witnesses with proof that could have been called. The DNA evidence was not harmful as it could not be narrowed to a specific time frame and it was undisputed Applicant resided at that location for periods of time.

Applicant testified Counsel spoke with him concerning the questions law enforcement asked him. Counsel should have looked into why the bedroom was messed up. Counsel used an investigator, but didn't investigate why the bedroom was messed up. No one testified as to how the victim got bruises. Counsel should have investigated how she got the bruises. He lived with the victim on and off. Counsel did not tell me about the bruising, I would have called daughter to testify the bruises came from my daughter. Counsel should have hired a handwriting expert. Handwriting expert was uncertain that it was Applicant's handwriting.

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## **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court finds that Applicant has failed to satisfy his burden to prove that Counsels were deficient or that he was prejudiced by Counsels' alleged deficiencies. Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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 [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether Counsels provided representation within the range of competence required in criminal cases. Id.

This Court finds Applicant's testimony lacked credibility. This Court finds that Applicant has failed to satisfy his burden to prove that Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by the alleged deficiencies. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant. This Court finds Counsel rendered adequate assistance and exercised professional judgment his decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

### **A. Ineffective Assistance of Counsel**

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels’ 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

1. Failure to investigate.

Applicant failed to show how further investigation by Counsel would have benefited Applicant at trial. Applicant’s assertion Counsel should have investigated the bedroom being messed up and bruises is spurious. Applicant did not prove what Counsel would have found if his expert had further investigated the bruises or the room being messed up. Further, the State provided evidence the bruises on the victim came from Applicant. Tr. 209-211. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. “The applicant’s mere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.” State v. Glover, 318 S.C. 496, 498–499, 458 S.E.2d 538, 540. Moorehead v. State,

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329 S.C. 329, 496 S.E.2d 415 (1998) (“Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result”).

Accordingly, this Court finds Applicant failed to prove Counsel failed to properly investigate or that Applicant was prejudiced by Counsel’s lack of investigation. Accordingly, this Court denies and dismisses this allegation.

2. Failure to obtain handwriting expert.

Applicant failed to call a handwriting expert to provide evidence of the testimony that would have been helpful to Applicant’s case. Without an expert’s testimony at the hearing, this Court can only speculate as to whether their testimony would have been helpful at trial. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Applicant failed to show how further investigation by Counsel would have benefited Applicant at trial. “The applicant’s mere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.” State v. Glover, 318 S.C. 496, 498–499, 458 S.E.2d 538, 540. Accordingly, Applicant has failed to prove deficiency or prejudice under Strickland.

Accordingly, this Court finds Applicant failed to prove Counsel should have hired a handwriting expert or that Applicant was prejudiced by Counsel’s failure to hire a handwriting expert. Accordingly, this Court denies and dismisses this allegation.

3. Harmful statements in opening argument.

Applicant did not present any evidence on this allegation at the PCR hearing. Further, Applicant made several statements to law enforcement that were proven to be false. Counsel's decision to address that weakness in his opening argument and attempt to lessen its effect was a reasonable trial strategy. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Accordingly, this Court finds Applicant failed to prove Counsel's opening statement was deficient or that Applicant was prejudiced by Counsel's opening statement. Accordingly, this Court denies and dismisses this allegation.

4. Placed Applicant's character at issue.

Applicant did not present any evidence on this allegation at the PCR hearing. Further, Counsel did not place Applicant's character at issue. In the first instance, the trial court ruled the testimony only showed a "tumultuous relationship." Tr. 124. Counsel argued vigorously against further evidence coming in showing the difficulties between Applicant and the victim. Tr. 187-190. The Court limited the State on the breadth of its questioning after listening to Counsel's argument Tr. 190. This Court finds Counsel did not place Applicant's character at issue and competently argued to prevent Applicant's acts from being admitted into evidence.

Accordingly, this Court finds Applicant failed to prove Counsel placed Applicant's character at issue. Further, Counsel's argued against the introduction of Applicant's prior acts of violence against the victim. This Court finds Applicant also failed to prove he was prejudiced by Counsel's arguments against the evidence's introduction. Accordingly, this Court denies and dismisses this allegation.

5. Failed to put police report into evidence.

Applicant did not present any evidence on this allegation at the PCR hearing. Further, law enforcement reports are not evidence. They are summaries written by law enforcement for purposes of investigation and record. As with any written statement of a testifying witness, the statement itself is not admissible. "When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney." Rule 613, SCRE.

Accordingly, this Court finds Applicant failed to prove Counsel should have admitted the law enforcement report or that Applicant was prejudiced by its lack of admission. Accordingly, this Court denies and dismisses this allegation.

6. Overwhelming Evidence

The evidence of Applicant's was overwhelming. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt). His guilt was conclusively proven, and no other rational conclusion could have been reached. The State proved Applicant had the *motive* to murder the victim [she had broken up with him, was severing all ties, and had a new boyfriend of whom Applicant was jealous]; Applicant had the *opportunity* to commit the murder [Applicant attempted to use her debit card just minutes from the victim's home & Applicant's admitted to police he was the last person with her before her murder and disappearance at the approximate time she disappeared and was murdered and inside the apartment where it is believed she was murdered and then disappeared]; and, Applicant had the *means* to commit the murder [the pillow from the victim's bedroom contained Applicant's D.N.A. on its edges and the victim's D.N.A. in the center of the pillow,

and Applicant had a vehicle nearby which he could drive to the home and remove the victim's body from the back door and drive it to the Broad River and dump it].

Further, the State showed Applicant repeatedly lied to police and only admitted being with the victim at the time of her disappearance when confronted with evidence placing him in Hampton around the time of her murder and disappearance. Finally, the State showed Applicant had plenty of time to murder the victim, dump her body in the Broad River, and eventually arrive at and check into the Palm Inn under a false identity and false driver's license number at 4:36 a.m. This evidence also explained Applicant's whereabouts from 2:26 a.m. until 4:36 a.m. on the night in question, because Walterboro is only approximately 20 to 30 minutes from Hampton, and Applicant told police he left Hampton around 3:00 a.m.

This Court finds the evidence against Applicant was overwhelming. Therefore, this Court finds Applicant is unable to prove there was a reasonable probability any deficiency of Counsel would have changed the result of the proceeding. Accordingly, this Court denies and dismisses these allegations.

#### **B. Prosecutorial Misconduct and False Testimony**

Applicant's allegation that there was prosecutorial misconduct and false testimony is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith,

490 U.S. 794, 109 S. Ct. 2201 (1989). Further, Applicant failed to provide any credible evidence the State offered any evidence in bad faith or elicited perjury testimony. Applicant's own assertion a witness failed to tell the truth is not sufficient evidence on which to base this allegation. No evidence was presented or testimony elicited proving the State used false testimony in convicting Applicant.

Therefore, this Court finds Applicant has failed to show why this allegation is appropriate for PCR. Further, this Court finds Applicant failed to prove the State presented any false testimony. Accordingly, this Court dismisses this allegation.

## **VI. CONCLUSION**

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

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from 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, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are 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

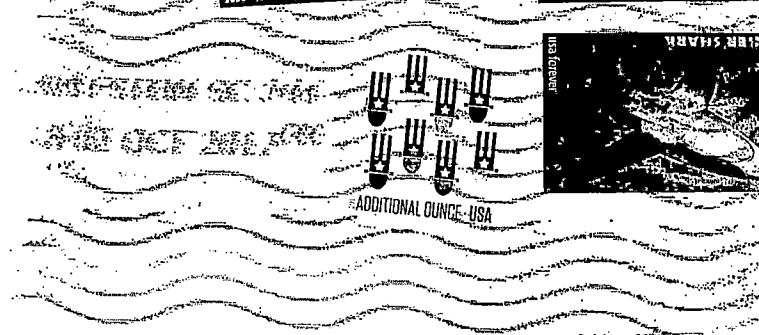
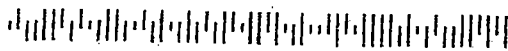
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 14 day of September, 2017.



R. SCOTT SPROUSE  
Presiding Judge  
14<sup>th</sup> Judicial Circuit

Waltham, South Carolina



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