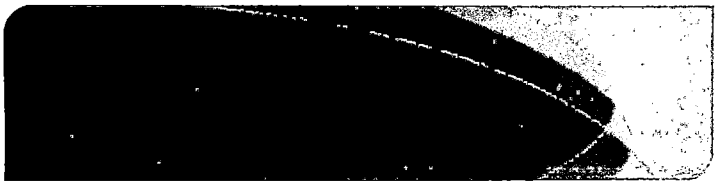

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January 30, 2018

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Steven L. Morgan v. State of South Carolina; Case #: 2015-CP-08-2742

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post-Conviction Relief (PCR) case. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal on the Respondent;
(2) The Order of Dismissal; and
(5) A Request for Representation on Appeal.

The Applicant - Appellant was represented by me as indigent, pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR case. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support, thereof, are signed by me as attorney for Applicant - Appellant. Should you need anything further, do not hesitate to contact me.

Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar #: 12396
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com

Enclosure(s). As stated above.
RDD/mmt

cc: Megan H. Jameson, Assistant Attorney General
Kimberly McCall, Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles

Case #: 2015-CP-08-2742

Steven L. Morgan, Appellant.

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Steven L. Morgan appeals the denial of his Post-Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Michael G. Nettles on August 1, 2017. Counsel for the Appellant received the filed Order of Dismissal on or about January 8, 2018.

January 17, 2018

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles

Case #: 2015-CP-08-2742

Steven L. Morgan, Appellant.

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy, via US Mail, to the address of record, Lindsey A. McCallister, P.O. Box 11549, Columbia, South Carolina 29211-1549, on January 18, 2018.

January 18, 2018

Michelle Moore Trimble
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Attorney for Respondent

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Steven Lee Morgan, #355128, Applicant, v. State of South Carolina, Respondent.	)	C. A. No. 2015-CP-08-2742 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Steven Lee Morgan (Applicant) on December 4, 2015. Respondent made its Return on June 9, 2016. An evidentiary hearing into the matter was convened on August 1, 2017, at the Berkeley County Courthouse. Rodney Davis, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Chad Shelton, Esquire, (Counsel) also testified. This Court had before it a copy of the records of the Berkeley County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application, the State's Return, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Berkeley County Clerk of Court's orders of commitment. Applicant was indicted by the April 2012 term of the Berkeley County Grand Jury for one count each of first-degree burglary, first-degree criminal sexual conduct, kidnapping, attempted murder, and possession of a weapon during the commission of a violent crime (2012-GS-08-0496, -0497, -0498, -0499, -0500). Chad Shelton, Esquire, represented Applicant. On April 23, 2013, Applicant proceeded to a jury trial

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before the Honorable R. Markley Dennis, Jr. After the jury convicted Applicant as indicted, Judge Dennis sentenced Applicant to confinement for forty years for the count of first-degree burglary, and thirty years each for first-degree criminal sexual conduct, kidnapping, and attempted murder. The sentences were to be served concurrently. Applicant was also sentenced to five years for the count of possession of a weapon during the commission of a violent crime, which will run consecutively to Applicant's sentences on the other charges.

A notice of appeal was filed on Applicant's behalf, and an appeal was perfected by Laura Baer, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Morgan, Op. No. 2015-UP-492 (filed on October 21, 2015). The remittitur was issued on November 13, 2015.

SUMMARY OF FACTS ADDUCED AT TRIAL

In December of 2011, Rose Lampkin (Victim), who had been in a relationship with Applicant for the preceding two years, decided to end her relationship with Applicant because he was treating her in an increasingly threatening and possessive manner. Tr. p. 109; pp. 111-12; p. 158. To end the relationship, Victim loaded Applicant's belongings into her pickup truck with the help of her college-aged son, left the truck for Applicant to pick up from a truck stop, and instructed Applicant not to return to her home.[1] Tr. pp. 110-13; p. 147; p. 158; p. 160. A few weeks later, Applicant went to Victim's home shortly after midnight and attempted to force his way inside. Tr. pp. 147-49. Victim's son was home at the time and alerted the authorities of Applicant's actions. Tr. p. 148.

[1] Applicant was a professional truck driver at the time. Tr. p. 158.

However, at approximately 4:00 a.m., on January 29, 2012, Applicant returned to Victim's residence and threw a piece of wood through the rear sliding-glass door. Tr. pp. 103-104; pp. 113-15; pp. 129-31. The noise awakened Victim, and she started to go downstairs to investigate. Tr. pp. 113-15. As she did so, Applicant, who was armed with a knife, entered the house and ran up the stairs towards her. Tr. pp. 115-16. Applicant then grabbed Victim, began choking and striking her, and told her he would kill her if she did not do what he told her to do. Tr. pp. 115-16. Thereafter, Applicant threw Victim to her bed, removed her clothing, forced her to perform oral sex on him, and raped her both anally and vaginally. Tr. pp. 116-17; p. 122; p. 165; p. 222.

Once Applicant finished sexually assaulting Victim, he sat on the bed and smoked a cigarette. Tr. p. 117. Applicant then got up from the bed and looked out the window. Tr. pp. 117-18. When he did so, Victim grabbed her cell phone and tried to flee from the home. Tr. pp. 117-1). However, Applicant chased her, pushed her down the stairs, followed her to the bottom, and began slamming her head into the floor. Tr. p. 118. He then ordered Victim to return upstairs while threatening her with his knife, but she was unable to do so because she had badly injured her knee in the fall. Tr. pp. 118-19. Undeterred, Applicant cut Victim's neck with the knife, dragged her back upstairs by her hands and hair, threw her on the bed, and raped her again. Tr. pp. 118-19; p. 133.

After Applicant was finished sexually assaulting Victim, he began to pace around Victim's house. Tr. p. 120. He then retrieved a towel, wiped blood off of Victim's face, and attempted to wipe away any evidence from Victim's vagina. Tr. p. 120. He then tore the towel into strips, stuffed a strip of the towel into Victim's mouth, covered her face with another piece of towel and some tape, and hog-tied her hands and feet together using the towel and pieces of

wire hangers he retrieved from Victim's closet. Tr. pp. 120-21. Applicant took Victim's keys, destroyed her cell phone, covered her with clothing and blankets, informed her he was going to get coffee and would return, and left the residence. Tr. pp. 121-22; p. 136.

Victim remained bound on the bed for thirty to forty-five minutes but was eventually able to free herself from the restraints despite her injuries. Tr. pp. 123-24. Victim then crawled down the stairs, opened the front door, and screamed for help when she saw a neighbor walk by her house.[2] Tr. p. 124. The neighbor quickly alerted another of Victim's neighbors, John McCurdy, who rushed to Victim's home. Tr. p. 187. When McCurdy arrived, he observed Victim had beaten to such an extent her face was nearly unrecognizable, and he immediately called 911. Tr. pp. 188-89.

Within minutes, Officer William Tisdale of the Goose Creek Police Department arrived at Victim's residence and found her seated in the doorway to her home. Tr. pp. 193-95. At that time, Victim was "very" battered, her face was bloody and swollen, she was suffering from numerous cuts and bruises, and her kneecap was swollen and out of place. Tr. p. 195. Officer Tisdale briefly spoke with Victim, and Victim advised him Applicant had broken into her residence and sexually assaulted her. Tr. p. 196. In response, Officer Tisdale relayed a description of Applicant – and the truck in which Applicant left Victim's residence – to dispatch, and Victim was transported to the emergency room. Tr. pp. 196-97.

At the hospital, Victim was treated by medical personnel, who noted she was suffering from a knee deformity, abrasions to her knee, a puncture wound to the neck, eye redness symptomatic of strangulation, and extensive facial injuries. Tr. pp. 208-09; p. 213. Investigator Leroy Goodyear of the Goose Creek Police Department spoke with Victim and took a statement

[2] Victim could not walk or run due to her injuries, which included a broken kneecap. Tr. pp. 123-24; p. 156.

from her about the incident. Tr. p. 242; pp. 244-45. Several hours later, Victim was examined by Nancy Hall, a sexual-assault nurse examiner and registered nurse. Tr. p. 218. During the examination, Victim advised Hall she had been physically and sexually assaulted in her home earlier that morning, and Hall collected samples from Victim's body along with a DNA sample from Victim. Tr. pp. 222-23; p. 227. However, Hall was unable to perform a full examination of Victim due to Victim's knee injury. Tr. pp. 227-28.

Meanwhile, Wendy Myers, a crime scene investigator and evidence technician from the Goose Creek Police Department, processed Victim's residence for evidence. Tr. pp. 272-73. During her investigation, Myers located strips torn from a towel near the front door, a piece of wood leaning against a wall, a trail of broken glass leading from the piece of wood to a broken sliding glass door, several cigarette butts discarded onto the floor in the dining room and hallway, bloodstains leading up the stairwell, more strips of towel and some wire at the top of the stairs, even more strips of towel and wire in the master bedroom, a pile of clothing on the bed, a blood-stained green jacket with a hole in the collar on the floor, more cigarette butts on the floor next to the bed, and a stained sheet on Victim's bed. Tr. pp. 274-77; p. 284; pp. 288-89). Myers collected all of the evidence she discovered and sent it off for analysis. Tr. p. 276; pp. 285-89).

Later that day, Applicant was apprehended and arrested in Augusta, Georgia, while in possession of Victim's truck. Tr. p. 136; pp. 140-41; p. 246; p. 253. Following his arrest, Investigator Nicholas Powell of the Goose Creek Police Department collected a sample of his DNA for analysis, and Victim's truck was transported back to South Carolina and searched. Tr. pp. 246-48; pp. 265-66. Although no evidence was discovered in the initial search of the vehicle, a friend, Victor Mazyck, later bought the truck from Victim and discovered the set of keys Applicant took from Victim along with the knife Applicant had wielded during the incident after

removing the center console from the vehicle in order to replace it.[3] Tr. pp. 136-39; pp. 247-49; pp. 257-59). That evidence was turned over to authorities, and the knife was submitted for analysis. Tr. p. 249; p. 305.

Subsequently, the evidence collected from Victim's residence was transported to Intelligenetics, a DNA testing laboratory. Tr. p. 302; pp. 304-05. Dr. Daniel DeMiers, an expert in forensic science and DNA analysis, analyzed the submitted evidence, including the strips of towel, the green jacket, the pieces of wire, the cigarette butts, and the knife. Tr. pp. 304-05; p. 321. Based on this analysis, Dr. DeMiers determined Applicant's DNA was present on the green jacket in a concentration too significant to have resulted from casual contact, and Applicant's DNA and semen were present on the torn strips of towel. Tr. pp. 314-17; p. 336. Additionally, Dr. DeMiers located Applicant's DNA. on the pieces of wire and cigarette butts collected from Victim's bedroom and the hallway. Tr. pp. 318-21. Dr. DeMiers also concluded the DNA of three different contributors was present on the handle of the knife, and he could not exclude either Victim or Applicant as contributors of that DNA. Tr. pp. 321-24.

Similarly, the evidence collected during Victim's sexual-assault examination at the hospital was transported to SLED, where it was analyzed by Mary Boehm, a forensic DNA analyst. Tr. p. 356-58; pp. 373-74. As part of her analysis, Boehm developed DNA profiles from the samples collected during the sexual-assault examination and compared them to profiles developed from the known DNA of Applicant and Victim. Tr. pp. 360-63. Based upon that analysis, it was determined Applicant's DNA profile conclusively matched the profile developed

[3] The keys found in the truck were readily identifiable as belonging to Victim because the key ring had a leather band with Victim's first name on it attached to it. Tr. p. 249.

from semen found on a rectal swab collected during the sexual-assault examination of Victim. Tr. p. 364.[4]

Boehmn was unavailable to testify at trial. Tr. pp. 14. The solicitor moved instead to admit the expert testimony of Amanda Webb, a DNA analyst at SLED and a peer reviewer of Boehm's work on the case, in regard to Webb's opinion about the evidence originally analyzed by Boehm. Tr. pp. 14-15; p. 352; p. 354. Counsel objected, arguing Webb's testimony would impermissibly allow for the admission of Boehm's opinions without having Boehm present during trial. Tr. pp. 15-16. After considering the arguments of both sides, the trial judge ruled Webb's expert testimony would be admissible if she was properly qualified and instructed he would make a determination as to admissibility immediately before the testimony was presented to the jury. Tr. pp. 16-18. Following the judge's ruling, Counsel asked the trial judge to consider several proposed jury instructions in regard to expert testimony admitted under similar circumstances in the United States Supreme Court decision in Williams v. Illinois, 567 U.S. 50 (2012)."[5] Tr. pp. 17-18. After considering the proposed instructions, the trial judge determined those instructions would constitute a comment on the facts and indicated he intended instead to present the standard South Carolina jury instructions on expert testimony. (Tr. pp. 18-20). The trial judge then proceeded forward with the trial. Tr. p. 20; pp. 89-103.

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[4] Prior to the sexual-assault examination, Victim urinated several times at the hospital. Tr. p. 215. During trial, Hall, who was qualified as an expert in nurse examination, explained evidence could be lost from a sexual-assault victim's vaginal area if the victim urinated or the area was cleaned prior to the examination. Tr. pp. 219-20; pp. 228-29. That testimony was corroborated by an expert in forensic science and DNA analysis, who agreed urination or cleaning could eliminate sperm or semen from a victim's vagina. Tr. p. 355; p. 363.

[5] Specifically, Counsel indicated the Supreme Court's opinion stated the jury should be instructed "that out-of-court statements cannot be accepted for their truth and that an expert's opinion is only as good as independent evidence as the underlying premises. And that if the prosecution cannot muster any independent admissible evidence to prove that foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the triers of the facts." Tr. p. 18.

At trial, Victim recounted the details of the incident and identified Applicant in the courtroom as her assailant. (Tr. pp. 110-157). Likewise, McCurdy, the investigating officers, and the medical personnel who treated Victim after the incident testified concerning Victim's numerous visible injuries following the attack and sexual assault, her consistent identification of Applicant as her assailant, and the readily observable evidence of the struggle that had occurred in Victim's home. Tr. pp. 188-90; pp. 195-97; p. 201; p. 209; p. 213; pp. 222-23; pp. 227-28; p. 237; pp. 224-45; pp. 273-87. Further, Dr. DeMiers testified the results of his analysis of the evidence collected from Victim's home indicated Applicant's DNA was discovered on many of the pieces of evidence, and he confirmed Applicant's semen and DNA were present on the torn strips of towel recovered from Victim's home. Tr. pp. 314-24; p. 336.

Thereafter, Webb, who was qualified as an expert in forensic science and DNA analysis without objection, testified for the prosecution. Tr. p. 352; p. 355. During her testimony, Webb testified every DNA analysis conducted at SLED was reviewed by two other SLED analysts. Tr. p. 354. She confirmed she conducted a peer review of Boehm's work in this case. Tr. p. 354. Webb indicated she reviewed the case report, the incident report, the sexual-assault nurse examiner's notes, the evidence received by Boehm, and Boehm's notes and scientific data before checking the analyst's work for accuracy and scientific validity. Tr. p. 356. Based on that review, Webb opined – without objection – semen was present on both the vaginal and rectal swabs taken from Victim, no male DNA profile could be developed from the vaginal swab, and the DNA profile developed from the rectal swab matched Applicant. Tr. p. 360; pp. 362-64. Furthermore, during cross-examination, Webb readily acknowledged she was not present when the original laboratory work was performed, and her opinions and conclusions were based on

work performed by Boehm. Tr. p. 364. Webb also acknowledged her opinions were premised on her assumption Boehm conducted her analysis correctly. Tr. p. 365.

Following Webb's testimony, both the State and Applicant rested, and the trial judge conducted a charge conference to ascertain what jury instructions the parties desired to be presented to the jury. Tr. p. 372; pp. 383-89. During the charge conference, neither the solicitor nor Counsel requested any jury instructions based on the suggested instructions from the United States Supreme Court's decision in Williams. Tr. pp. 383-89. Thereafter, the solicitor and Counsel made their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. Tr. pp. 390-445. At the conclusion of the jury charge, the trial judge asked the parties if there were any exceptions to his instructions or any additional instructions desired, and Counsel directly responded: "No, sir." Tr. p. 445.

ALLEGATIONS

In his application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Counsel failed to hire an independent DNA expert and did not properly handle the issue of third-party DNA;
    b. Counsel failed to object to expert opinion testimony of a SLED analyst who did not personally perform the DNA analysis;
    c. Counsel refused to allow Applicant to testify, against Applicant's wishes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

In a post-conviction relief action, the 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, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Applicant testified Chad Shelton was appointed as his counsel, and they met "a few times" prior to trial. Applicant testified he and Counsel discussed Applicant's involvement in the case, and Applicant told Counsel he was "involved" but not responsible for the charges. Applicant further testified Counsel explained the elements of the charges, the proof required,

potential punishments, the strike rule, and the no-parole/85% rule. Applicant testified he and Counsel discussed the options between a guilty plea and a trial, and Counsel told him to proceed to trial. Applicant testified, however, Counsel never gave an opinion on whether he felt Applicant would be successful at trial.

Counsel testified he was a public defender with the Berkeley County Public Defender's Office when he was appointed to represent Applicant. Counsel testified he had approximately six years of experience at the time, exclusively in criminal law, including first-chair experience on other major cases where there was the potential for a life sentence and other cases involving DNA evidence and expert witnesses. Counsel testified he met with Applicant several times at the jail, and they discussed the elements of the crimes, possible defenses, and possible punishments. Counsel testified they also discussed the strike rule and no-parole offenses. Counsel testified he had a good relationship with Applicant, and he felt Applicant understood all of their conversations. Counsel further testified he discussed defense strategy with Applicant on several occasions and hired an investigator to look into issues with Victim's credibility. Counsel testified he engaged in plea negotiations on Applicant's behalf, as he felt a plea would be in Applicant's best interest, but the State would not offer less than thirty years, so he began preparing for trial.

Counsel testified the main evidence against Applicant was Victim's testimony and identification, the DNA evidence, and the general state of the crime scene, which indicated a struggle. On cross-examination, Counsel also described a letter written by Applicant to Victim apologizing and saying "the devil took over" him that night. Counsel testified Applicant maintained he was present at Victim's home that night, but the sexual encounter was consensual. Counsel testified Applicant's explanation was that Applicant and Victim had consensual sex,

then after Applicant left, another person broke into the house or Victim suffered an accidental fall. Counsel explained the issue with Applicant's version was that Victim suffered serious and extensive injuries, particularly to her face, such that she had to be transported from the scene via ambulance and spent several days in the hospital. Additionally, the back window had been broken from the outside, which Applicant could not explain, and Victim had been tied up with the strips of towel and wire.

Issue #1 – Counsel failed to hire a DNA expert and improperly handled the issue of third-party DNA at trial.

In order to prevail on a claim of ineffectiveness based on counsel's failure to call a favorable witness, the South Carolina Supreme Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis added). Applicant's speculation the witness' testimony would have been favorable cannot, by itself, satisfy his burden of showing prejudice. Glover v. State, 318 S.C. 396, 498-99, 458 S.E.2d 538, 540 (1995). Further, a defense counsel's failure to procure expert witnesses does not render his or her representation deficient when counsel vigorously cross-examines the State's witnesses and attacks 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) (finding trial counsel was not deficient in failing to procure expert witness to challenge DNA evidence where trial counsel vigorously cross-examined State's DNA experts and attacked accuracy of evidence).

Nonetheless, "criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an

independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). However, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Additionally, "[c]ourts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

Applicant testified he had limited discussions with Counsel regarding trial strategy and how to deal with the DNA evidence. Applicant stated he never denied being present at Victim's house that night, but what happened to her was not because of him. Finally, Applicant testified his DNA was found on so many pieces of evidence because he had recently lived in the house, and Applicant asserted he and Victim had consensual sex that night.

Counsel testified he did not see the need to hire a DNA expert. Counsel explained the items were sent to two different labs; the rape kit was tested by SLED, and the crime scene evidence was tested by an independent laboratory called Intelligenetics. Counsel testified he chose to rely on those results. Counsel further testified he explained the results to Applicant, as well as how the results would impact the defense and trial strategy. Counsel testified he classified the DNA results into three categories – those items from which Applicant's DNA was excluded, those that contained a mixture of DNA, and those that matched Applicant. Counsel further testified his focus was on those items of evidence that either matched Applicant or

contained a mixture of DNA, and his strategy was to argue whoever was the third contributor was the perpetrator. Counsel testified the defense did not contest the DNA results, and he could explain the presence of Applicant's DNA because Applicant had lived in the house and been in a relationship with Victim. Counsel testified some of the third-party DNA could be explained, and Intelligenetics matched the DNA on the bedsheet to a male relative of Victim, most likely her son, and the DNA on the knife to Victor Mazyck, the friend to whom Victim sold the truck after this incident.

This Court finds Applicant has failed to prove Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms in regards to his handling of the DNA evidence at trial. Applicant did not call any expert witness to testify on his behalf at the evidentiary hearing. Applicant's assertion alone an expert witness would have provided favorable testimony is not enough to meet his burden as to this allegation. See Glover, 318 S.C. at 499, 458 S.E.2d at 540 ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Finally, while the Constitution requires that a criminal defendant receive effective assistance of counsel, the presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense. Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995).

Additionally, this Court finds Counsel understood the issues created by the DNA results, and Counsel conducted vigorous and thorough cross-examination of the State's expert witnesses. Counsel's strategy of not contesting the DNA results was reasonable given Applicant admitted to a sexual encounter with Victim. Furthermore, the Court finds all of the information Applicant alleges is important to explain his version of the facts was brought out through the testimony and

cross-examination of the State's witnesses, including Victim's testimony. This allegation is therefore denied and dismissed.

Issue #2 – Counsel failed to object to expert opinion testimony of a SLED analyst who did not personally perform the DNA analysis.

The Sixth Amendment's Confrontation Clause guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The United States Supreme Court has held the admission of testimonial hearsay against an accused violates the Confrontation Clause if the declarant is unavailable to testify at trial and the accused has not had a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 59 (2004). "The touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." United States v. Palacios, 677 F.3d 234, 243 (4th Cir. 2012) (citation ommitted).

Counsel testified the issue of the SLED-analyst peer reviewer testifying in lieu of the analyst who actually performed the analysis and prepared the report was first brought up by the State during the pre-trial. Counsel testified it was argued orally as a motion in limine with no written response submitted. Counsel testified the trial judge indicated very quickly he would allow the testimony of the second analyst, which the trial judge believed was allowable under his understanding of the law at the time. Counsel testified he then requested a jury instruction regarding the weight to be given to expert opinions when the testifying expert is not the person who performed the testing, and the trial judge denied that motion saying it would be an impermissible comment on the facts. Counsel agreed the trial judge's determination on that issue was correct under South Carolina law.

Counsel further testified he felt it was a mistake not to renew his objection to the SLED analyst's testimony at the time she took the stand. However, Counsel also testified that even if the SLED analyst's testimony had been excluded, there was no objection he could have made to the testimony of the expert from Intelligenetics. Counsel testified the Intelligenetics expert, Dr. DeMiers, personally performed the tests he testified about. Counsel explained Intelligenetics tested all of the items collected from the crime scene, including the towel, cigarettes, and the pieces of the wire hangers, all of which contained Applicant's DNA. Further, Counsel testified Dr. DeMiers performed testing on the bedsheet, which found Victim's son was the likely third-party contributor of the DNA on that item.

This Court finds it was error for Counsel to fail to renew his objection to the SLED analyst's testimony at the time that testimony was presented to the jury. However, this Court also finds Applicant has failed to prove he was prejudiced by such error because there is independent, overwhelming evidence of Applicant's guilt such that it is not reasonably likely the result of the trial would have been different even if the SLED agent's testimony had been excluded. This Court finds the testimony from Intelligenetics could not have been excluded, and that testimony was the most damaging to Applicant's defense. Counsel testified it was part of his trial strategy not to contest the DNA findings, since Applicant never denied he had a sexual encounter with Victim. Therefore, the testimony of the SLED analyst confirming Applicant's DNA was found on swabs from the rape kit was not inconsistent with Applicant's defense. Furthermore, Victim's testimony and identification of Applicant was compelling. Finally, this Court finds the trial judge made the correct ruling as to Applicant's request regarding the language of the expert-witness jury instruction, and anything else would have constituted a

comment on the facts. Therefore, Counsel was not deficient for failing to renew his request for an additional instruction. This allegation is therefore denied and dismissed.

Issue #3 – Counsel refused to allow Applicant to testify, against Applicant's wishes.

"The right of a criminally accused to testify or not to testify is fundamental." State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52, (1987)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Id. Further, it is the defendant who retains the ultimate authority to decide whether or not to testify. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). Under Strickland, in order to prove ineffective assistance of counsel based on his claim Counsel prevented him from exercising his right to testify, Applicant must show both that his attorney violated his right to testify and that his testimony had a "reasonable probability" of changing the outcome. United States v. Rashaad, 249 F. App'x 972, 973 (4th Cir. 2007).

Applicant first testified he could not recall any discussions with Counsel about whether Applicant should testify. Applicant testified he asked Counsel twice about testifying, but he could not recall whether Counsel gave him any advice. Applicant further testified he did not remember whether the judge asked him if he wished to testify. Applicant later testified he did recall Counsel telling him he should not take the stand because it would allow the State to bring up Applicant's past, which would not be good for Applicant's case. After reviewing the trial transcript, Applicant conceded he discussed his right to testify with the trial judge, and he told the judge it was his decision not to testify.

Applicant stated if he had testified, he would have explained he was at Victim's house that night because Victim asked him to come over, she showed him the renovations she was

doing while they smoked a few cigarettes, then they had consensual sex, and he left some time later. Applicant testified he did not see any broken glass when he was there, although the window was already broken. Applicant testified Victim had been drinking. Applicant also testified he did not see anyone else in the area when he left, and at that time, Victim appeared to be fine and had no physical injuries.

Counsel testified he and Applicant discussed Applicant's right to testify multiple times throughout the course of the representation. Counsel testified he reviewed Applicant's prior record and explained which convictions could be used against Applicant for impeachment purposes. Counsel testified he used his discussions with Applicant about the facts of the case to try to gauge how Applicant would testify and how he would react to cross-examination. Counsel explained the main issues he saw with Applicant's testimony were his inability to explain the shattered glass door and the varying reasons Applicant gave for Victim's injuries. Counsel further testified he never told Applicant he couldn't testify, but he likely did advise Applicant it was not a good idea based on Applicant's responses during their discussions and inconsistencies in Applicant's version of the facts. Counsel testified it was ultimately Applicant's decision not to testify.

This Court finds Applicant has failed to prove Counsel was deficient in his advice to Applicant regarding his right to testify. This Court finds Counsel's testimony on this issue to be credible and also finds Applicant's testimony was not credible. Applicant had no independent recollection of the facts surrounding his decision not to testify. On the other hand, Counsel testified he discussed the issue with Applicant and advised him not to testify because Applicant's version of the facts was inconsistent, and he felt Applicant did not have a good explanation for Victim's injuries or the broken sliding glass door. Counsel testified it was ultimately Applicant's

decision as to whether or not he wanted to testify. This Court has reviewed the trial transcript, which confirms Counsel's testimony and reflects the trial judge advised Applicant of his right to testify if he wished. Tr. p. 379. Applicant informed the trial judge he had made the decision not to testify. Tr. p. 379.

Further, this Court finds Applicant failed to prove prejudice because it is not reasonably likely his testimony would have changed the outcome of the case. Applicant testified his explanation for the DNA evidence would have been that he had lived in the house, and he and Victim had consensual sex on the night in question. Counsel was able to put this same information in front of the jury through cross-examination of Victim and other witnesses, as well as during closing arguments. This allegation is therefore denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by any alleged deficiencies in Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty 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, Applicant must serve and file a notice of appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent.

AND IT IS SO ORDERED this 13 day of Dec, 2017.

MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE SUPREME COURT OF SOUTH CAROLINA
	)	
COUNTY OF BERKELEY	)	Case #: 2015-CP-08-2742
	)	
	)	
STEVEN L. MORGAN,	)	
	)	
Applicant.	)	REQUEST FOR REPRESENTATION ON APPEAL
	)	
-versus-	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;

2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;

3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;

4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;

5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,

Rodney D. Davis
South Carolina Bar #: 12396

Charleston, South Carolina.
January 17, 2018

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)

CASE #: 2015-CP-08-2742

VERIFICATION

PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* to be filed on behalf of the Applicant-Appellant, **Steven L. Morgan**, and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.

Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me this
17 day of January, 2018.

Notary Public for South Carolina
My Commission expires 4/26/2026

MICHELLE MOORE TRIMBLE
NOTARY PUBLIC
SOUTH CAROLINA
COM. EXP. 04-26-2026

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January 30, 2018

Kimberly McCall
South Carolina Commission on Indigent Defense
PO Box 11433
Columbia, SC 29211-1433

RE: Steven L. Morgan v. State of South Carolina; Case #: 2015-CP-08-2742

Dear Ms. McCall:

Enclosed is a duplicate set of Appeal documents that I have forwarded to the Clerk of the Supreme Court of South Carolina concerning the above-listed Post Conviction Relief (PCR) case. I was appointed to the PCR case pursuant to a contract that I have with your office. I have requested that your office assume the appeal of this case.

Should you have any questions, please do not hesitate to contact me.

Thank you for your assistance with this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar # 12396
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
Davis@LowCountryLawOffice.com

Enclosure(s). As stated above.
RDD/mmt

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles

Case #: 2015-CP-08-2742

Steven L. Morgan, Appellant.

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Steven L. Morgan appeals the denial of his Post-Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Michael G. Nettles on August 1, 2017. Counsel for the Appellant received the filed Order of Dismissal on or about January 8, 2018.

January 17, 2018

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Other Counsel of Record:
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Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles

Case #: 2015-CP-08-2742

Steven L. Morgan, Appellant.

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy, via US Mail, to the address of record, Lindsey A. McCallister, P.O. Box 11549, Columbia, South Carolina 29211-1549, on January 18, 2018.

January 18, 2018

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The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of SC
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Columbia SC 29211-1330