FALK LAW FIRM, LLC.

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February 5, 2018

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

Re: Mack Washington Jr. v State, 2016-CP-15-0366

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Colleton 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, Mack Washington, Jr.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

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S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

Honorable Thomas A Russo Circuit Judge

Case No.: 2016-CP-15-0366

Mack Washington, Jr. 314550.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Mack Washington appeals the Honorable Thomas A Russo's November30, 2017 Order of Dismissal. Undersigned counsel received notice of entry of the order on January 13, 2018. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

February 5, 2018

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

RECEIVED

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

Honorable Thomas A Russo, Circuit Judge

Case No.: 2016-CP-15-0366

Mack Washington, Jr. 314550.....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 February 5, 2018.

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February 5, 2018

Colleton Circuit Court Clerk

Common Pleas

PO Box 620

Walterboro, SC 29488

Re: Washington v State, 2016-CP-15-0366

Dear Madam Clerk

Please find the enclosed copy of a Notice of Appeal I filed in the above Post-Conviction Relief action.

Regards

James Falk

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	IN THE COURT OF COMMON PLEAS THE FOURTEENTH JUDICIAL CIRCUIT
Mack Washington Jr., #314550, Applicant, v. State of South Carolina, Respondent.	)	Case no. 2016-CP-15-0366 **ORDER OF DISMISSAL**

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2018 JAN 10 AM 8:44

The above-captioned matter comes before the court via an application for post-conviction relief (PCR) filed by Mack Washington Jr., on April 7, 2016. This Court convened an evidentiary hearing into the matter on October 11, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Everett W. Bennett Jr., (Counsel), Esquire, and Applicant were both present and testified. Assistant Solicitor Tameaka Legette (the solicitor) and Loretta Beckett (Beckett) also testified. This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also 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.

I. PROCEDURAL HISTORY

Applicant was indicted by the August 2012 term of the Colleton County Grand Jury for kidnapping (2012-GS-15-0416) and armed robbery (2012-GS-15-0417). Applicant was subsequently indicted by the August 2013 term of the Colleton County Grand Jury for kidnapping (2012-GS-15-0560), armed robbery (2013-GS-15-0753), and possession of a weapon during the

commission of a violent crime (2013-GS-15-754). Assistant Solicitors Tameaka Legette and Carra Henderson prosecuted the case.

On March 17-20, 2014, Applicant proceeded to trial before The Honorable Perry M. Buckner, III and a jury. Applicant was found guilty as indicted on all charges. Judge Buckner sentenced Applicant to incarceration for thirty years for each charge of kidnapping and armed robbery, concurrently. Applicant was also sentenced to five years for the weapons charge, consecutively.

Applicant filed a timely notice of appeal. Tiffany Lorraine Butler, Esquire, represented Applicant on appeal and filed an *Anders* brief. Applicant also filed a *pro se* supplemental brief. On March 2, 2016, the South Carolina Court of Appeals dismissed Applicant's appeal after review. State v. Washington, Op. No. 2016-UP-101 (S.C. Ct. App., Filed March 2, 2016). The Remittitur was returned on March 21, 2016.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Counsel
   a. Failure to investigate alibi defense and failure to call Loretta Beckett to testify at trial.
   b. Failure to object and ask for a curative instruction on Lt. Jason Chapman's testimony.
   c. Failure to request a jury charge and/or instruction that the out-of-court inconsistent statements of Tyheem Lewis can only be used to impeach the witness, and not as substantive evidence of the facts to find guilt.
   d. Failure to object to the solicitor's statement, in her closing argument, that Tyheem Lewis is a gentle soul.
   e. Failure to protect Applicant's right to a fair and impartial trial when he declined the Judge's offer to give a curative instruction to the jury to disregard the solicitor's statements that Applicant had "a pattern of "manipulating young people and luring them and

intimidating them," "a pattern of violence," "a pattern of intimidating old folks, kidnapping old folks, [and] holding them up."

f. Failure to request the trial judge investigate juror misconduct after Applicant informed Counsel on several occasions that Rosa Singleton, a juror, was sleeping.

III. SUMMARY OF FACTS

Joan Klem testified that on January 7, 2012, she and her husband, Frank, were driving from Michigan to their winter home in Florida. R. 218. They stopped in Walterboro, South Carolina, and checked into the Rice Planters Inn. R. 220. After checking in at the front desk, she took her dog for a walk while her husband moved the car. R. 220. When the Klems reached their hotel room, "two men were at the door." R. 220. One man grabbed her at her waist and held a knife near her. R. 220. The other man demanded her purse and car keys. R. 220 - R. 221. After taking the purse, wallet, and car keys from the room, the two men "took off running and immediately got in the car and left." R. 223. Frank Klem ran to the hotel's main office and called the police. R. 223. Tyneshia Young testified that she and Applicant were "close friends." R. 288. Applicant had a key to her Druid Hills apartment, C-7, in Walterboro and would "hang out" there almost every other day. R. 289. Young claimed that on the night of January 8, 2012 Applicant came over to her apartment. She heard a knock at the door and asked Applicant who was there. R. 294. He said "nobody." After hearing another knock on the door, she looked out of the peephole and saw the police outside. R. 294.

According to Young, Applicant pushed her into the bathroom to prevent her from opening the front door. R. 294. Applicant then took two guns out of her closet and put them underneath her bed. R. 294. He also grabbed Young's phone and carried it into the bathroom. R. 294. While Young was in the bathroom, she called her mother, who lived in the building next door and had seen the

police outside. R. 294. Young's mother walked over to her apartment and put Lieutenant Jason Chapman on the phone to speak to Young. R. 295. After speaking with her mother and Lt. Chapman, Young opened the door and allowed the police to come inside and take the guns. R. 297. The police identified the two guns as belonging to the Klems. R. 323. Young ultimately gave a statement that Applicant and his co-defendant, Tyheem Lewis, brought the guns to her apartment. R. 335 - R. 336. Young stated that the next day, she started having trouble with her toilet. R. 298. She called the maintenance man to come unclog it. R. 298 - R. 299. When he unclogged the toilet, he found an ID card that was "an older white woman." R. 299. After the toilet continued to get clogged, the maintenance man took it apart and found credit cards that had been flushed down. R. 299. Young claimed Applicant flushed the credit cards down the toilet because it started clogging up after Applicant had been in the bathroom. R. 300. Joan and Frank Klem's names were on the credit cards. R. 280. Lt. Jason Chapman (Lt. Chapman) investigated the case. R. 313. On January 8, 2012, he received a call from a confidential informant. The informant told him that two guns that were taken during the armed robbery at the Rice Planters Inn may be located inside Druid Hills' apartment C-7. R. 3 14. Lt. Chapman read the police report from the robbery and saw that the Klems told police two guns were stolen. R. 314. Lt. Chapman called his informant back to confirm that the guns stolen were rifles. R. 314. He then called for backup and drove to Druid Hills apartments.

After speaking to Tyneshia Young, Lt. Chapman and other officers went into apartment C-7 and recovered the two guns. R. 323. On January 10, 2012, Lt. Chapman received information that property that possibly belonged to the Klems was located at Cuckhold's Landing in Walterboro County. R. 323. He and other officers drove to the landing and found closed suitcases and personal papers strewn all over the ground. R. 323. They found mail with the Klem's name on

it. R. 323. The Klems identified the two guns, suitcases and personal papers as theirs. R. 334. On January 30, 2012, Lt. Chapman received information that Applicant was driving a white Chevrolet Impala, like the one stolen from the Klems, in the Turkey Hill area of Walterboro. R. 327. Lt. Chapman was also told that Applicant had sold it to two people and remnants of the car were left behind a house at 703 Turkey Hill Road in Green Pond, South Carolina. R. 328. Police located the vehicle and, after finding the secondary vehicle identification number, were able to confirm that it belonged to the Klems. R. 333 - R. 334.

Based on the statement from Tyneshia Young that Tyheem Lewis and Applicant brought the guns to her apartment, Lt. Chapman interviewed Lewis. R. 335 - R. 336 . Lewis admitted to robbing the Klems and was charged with armed robbery, kidnapping, and possession of a weapon during a violent crime. R. 338. Based on Lewis' confession, as well as the other evidence discovered during the investigation, Lt. Chapman charged Applicant with armed robbery, kidnapping, and possession of a weapon during a violent crime. R. 338.

Lewis pled guilty to strong arm robbery and was sentenced under the Youthful Offender Act for a term not to exceed six years. R. 375 - R. 376. Lewis testified against Applicant at trial, claiming Applicant was the mastermind of the robbery and the one holding the knife on Joan Klem. R. 360 - R. 361. According to Lewis, they found the guns inside the trunk of the car. R. 372. After throwing away the clothes that were in the car, he and Applicant dropped the guns off at Young's apartment. R. 373. Then, they drove to "the village" to park the car until the next day. R. 373.

IV. SUMMARY OF PCR HEARING TESTIMONY

Applicant testified he sent letters to and spoke with Counsel regularly. He testified Counsel asked about potential alibi witnesses and he told Counsel of Loretta Beckett. Applicant stated he spoke with Beckett before the trial and she told him she was never contacted by Counsel. Applicant stated he never explained to Counsel he was with Becket when he was accused of committing the acts he was charged with. Applicant stated he never told Counsel of the alibi because Counsel advised him he did not have to prove his innocence. Applicant also stated his defense rested solely on alibi witnesses. Applicant testified the juror, Rosa Singleton (Juror), was dozing off during the trial. Applicant stated he did not live at Greenpond or Turkey Hill, only at Druid Hills. Applicant stated he told his codefendant to write a statement absolving him of guilt and told his codefendant to "fix it." Applicant testified Beckett had a grey Impala, not a white one.

Beckett testified and at the end of her testimony, this Court found her testimony wholly unreliable, finding Beckett's story to be completely lacking in credibility; appearing to be a poorly-planned lie on Applicant's behalf. Beckett testified that she was present at Applicant's trial and would have testified that Applicant was with her on the night of January 7, 2012, the night the incident took place. Beckett stated that she spoke to Applicant while he was in SCDC after his conviction. Contrary to Applicant's testimony, Beckett testified that she never spoke with Applicant during his pre-trial incarceration. Beckett testified that after she left Applicant on January 8, 2012, her sister told her Applicant had been arrested, but her sister did not tell her why he was arrested. Beckett testified she never contacted law enforcement, Counsel, or Applicant with this information. She testified she hoped to be called as a witness and was surprised when she was not called. However, she testified that she never spoke to anyone concerning Applicant's presence in her vehicle the night of the incident. She testified that she was concerned and thought of Applicant every day, but never attempted to contact him or anyone else concerning this

information because she "[was] not a millionaire." She testified she did not know when the incident happened or when he was arrested, but merely showed up at court without obtaining this information.

Counsel testified he received the discovery from the public defender's file after being appointed to the case in open court by Judge Buckner. Counsel testified he served a Rule 5 motion on the solicitor's office on December 6, 2013. Counsel testified Applicant refused the plea offer on the day of the offer's deadline on March 14, 2014. Counsel had Applicant sign a paper stating he refused the offer. Counsel had never heard of Loretta Beckett and testified that she was never on the witness list. Counsel never informed the solicitor's office of an alibi involving Beckett because Counsel had no knowledge of her. Counsel testified Applicant told him he was at Tyneshia Young's house when the incident occurred. Counsel testified Applicant mentioned he was riding in a purple car; the stolen car was "creamy white."

Counsel testified he did not believe Lt. Jameson's testimony was problematic or prejudicial because, in the small town of Walterboro, law enforcement knew almost everyone. Counsel testified he did not think the solicitor's remark concerning Tyheem Lewis being a gentle soul was prejudicial, but he made his mistrial motion based on the entire closing statement. Counsel testified he was concerned with the "pattern" language used by the solicitor in her closing argument.

Assistant Solicitor Tameaka Legette testified that she was familiar with Rosa Singleton (Juror), the juror Applicant alleged was asleep during trial. The solicitor testified Juror had a son in prison for a triple homicide, so she was particularly aware of her. The solicitor testified Juror was never asleep during the trial and, if she had been, the solicitor would have requested the alternate substitute for her. The solicitor testified her intent in using the word "pattern" during her

closing argument was to show the pattern of intimidation and manipulation by Applicant throughout this specific incident.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds Applicant has failed to satisfy his burden to prove Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Counsel's testimony was credible. This Court finds Applicant and Beckett's testimony was not credible. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in 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, 669 (1984). 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 counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "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." Id. "[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 alibi defense and failure to call Loretta Beckett to testify at trial.

This Court finds Counsel was not ineffective for failing to call Beckett as an alibi witness because Counsel had no knowledge of Beckett. Further, this Court finds Beckett's alibi account was wholly unbelievable. Applicant alleged Counsel was ineffective for failing to call Beckett as an alibi witness during Applicant's trial. This Court finds Counsel's testimony credible. Counsel testified he was never aware of Beckett or her alibi account and Applicant's alibi account to Counsel was always he was at Tyneshia Young's house when the incident occurred. Applicant testified he told Counsel of Beckett and that he was in her car when the incident occurred. Beckett's testimony at the PCR hearing was illogical and inconsistent. Beckett testified she showed up at the trial expecting and hoping to be called as a witness, but she never contacted anyone concerning her alibi account. Applicant testified he and Beckett spoke during his pre-trial incarceration, while Beckett testified that they did not speak during that time. Beckett also testified she did not know when Applicant's crime was committed, but believed her account to be pertinent to Applicant's innocence. She testified she was unable to contact law enforcement, Applicant, or Applicant's attorney with her story because she was "not a millionaire" or an important person. This Court finds these excuses diaphanous and false. This Court finds Beckett's and Applicant's testimony completely lacks credibility. This Court finds Applicant failed to show Counsel was ineffective for not calling Beckett as an alibi witness.

Secondly, this Court finds Counsel credibly testified he investigated and interviewed Tyneshia Young as a potential alibi witness. Counsel asserted his trial strategy was to present

Young as Applicant's alibi witness. Young testified Applicant was at her house when she went to sleep and at her house when she woke up. "Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead, 308 S.C. at 417 S.E.2d at 52. This Court finds Counsel's decision was based on sound professional judgment and should not be disturbed due to the benefit of hindsight.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not calling Loretta Beckett as a witness. This Court also finds Applicant failed to prove Counsel's actions prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

2. Failure to object and ask for a curative instruction on Lt. Jason Chapman's testimony.

This Court finds Lt. Jason Chapman's testimony was not inappropriate and any objection would have been overruled. Applicant asserts Lt. Chapman's testimony was inappropriate because he stated he knew Applicant and where Applicant resided. R. 320–321. Counsel testified Lt. Chapman knew most everyone in Colleton County, as it is a small community. Counsel did not believe the statement prejudiced Applicant or that the jury would draw the conclusion Applicant had been arrested or had negative interactions with law enforcement in the past. This Court agrees with Counsel's assessment and finds Lt. Chapman's testimony did not indicate Applicant had a prior criminal history. This Court finds an objection or a request for a curative instruction by Counsel regarding Lt. Chapman's testimony would have been overruled. Therefore, Counsel was not deficient for failing to object and Applicant was not prejudiced.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to Lt. Chapman's testimony. This Court also finds Applicant failed to prove Lt. Chapman's testimony prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different had it been excluded. Accordingly, this Court denies and dismisses this allegation.

3. Failure to request a jury charge and/or instruction that the out-of-court inconsistent statements of Tyheem Lewis can only be used to impeach the witness, and not as substantive evidence of the facts to find guilt.

Applicant alleges Tyheem Lewis's prior inconsistent statement could not be used as substantive evidence. This is an incorrect statement of the law. "A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." State v. Stokes, 381 S.C. 390, 398–99, 673 S.E.2d 434, 438 (2009). Lewis testified at trial and was subject to cross-examination. Therefore, this Court finds Counsel was not deficient for failing to request an incorrect jury instruction.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient. This Court also finds Applicant failed to prove such a jury instruction would have created a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

4. Failure to object to the solicitor's statement, in her closing argument, that Tyheem Lewis is a gentle soul.

This Court finds the solicitor's remark "Tyheem Lewis is a gentle soul" did not bolster Lewis's credibility as a witness or prejudice Applicant's case. R. 489. Applicant alleges the solicitor's comment was inappropriate bolstering of a witness and Counsel should have objected. Counsel testified he saw nothing wrong with the comment and did not think calling Lewis "gentle" was bolstering or objectionable. This Court agrees. This Court finds the solicitor's comment was

an explanation of facts presented at trial. Namely, the State's case presented Lewis as the weaker individual who was manipulated and bullied by Applicant. This Court finds the solicitor's use of the word "gentle" was not inappropriate or a comment on Lewis's credibility; thus, any objection would have been overruled. Further, this Court finds the solicitor's label of Lewis as "gentle" was not so egregious as to cause a reasonable probability the result of the trial would hinge on that label.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the solicitor's labeling Lewis as 'gentle.' This Court also finds Applicant failed to prove Counsel's failure to object prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different had he objected. Accordingly, this Court denies and dismisses this allegation.

5. Failure to protect Applicant's right to a fair and impartial trial when he declined the Judge's offer to give a curative instruction to the jury to disregard the solicitor's statements that Applicant had a "pattern" of "manipulating young people and luring then and intimidating them," and "pattern" of violent, "intimidating old folks, kidnapping old folks, and "holding them up."

Applicant alleges Counsel should have contemporaneously objected or accepted the trial judge's offer of a curative instruction after the trial judge denied Counsel's request for a mistrial.

> Mack Washington has a — he has a pattern of manipulating young people and luring them and intimidating them. He has a pattern of violence, throwing Tyneshia Young to the floor and intimidating and manipulating her into lying for him. He has a pattern of robbing old folks, intimidating old folks, kidnapping old folks, holding them up. And also, trying to manipulate Captain Jamison.

R. 492, ll. 5-12.

At the conclusion of the solicitor's closing argument, Counsel objected outside the presence of the jury and requested a mistrial on the basis that the solicitor's use of the word "pattern" implied Applicant had past criminal actions. R. 497–498.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (internal cites omitted). The trial court disagreed with Counsel's argument and denied his motion for a mistrial. R. 499. The trial court asked Counsel if he wanted a curative instruction given and Counsel stated he did not wish a curative instruction. R. 499. At the PCR hearing, Counsel stated he did not want a curative instruction because he believed it would draw attention to the use of the word "pattern" and believed the instruction would be more harmful than beneficial to his client's case. "[D]efense counsel testified at the PCR hearing that as a trial strategy, he did not request curative instructions because they tend to bring into focus precisely the item the objector has kept out. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (internal cites omitted). This Court finds Counsel provided a valid trial strategy for declining the curative instruction. Therefore, this Court finds Counsel was not deficient for failing to request a curative instruction.

Applicant argued Counsel failed to preserve this issue for appellate review. This Court agrees Counsel failed to preserve the issue for review because he refused the curative instruction. The South Carolina Supreme Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim

is meritorious and would have resulted in a reversal on appeal to a reasonable probability. "Since the [issue] was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in [applicant's] PCR claim. When the defendant claims counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded." Id. at 465, 746 S.E.2d at 47. This Court notes Counsel's reasons for refusing the curative instruction was a valid trial strategy, even though the refusal meant the error was not preserved for review. Counsel also believed he had a valid argument for a mistrial, which could have been granted at the conclusion of the closing argument outside of the jury's presence. This Court finds the solicitor's use of the word "pattern" appropriately described Applicant's consistent *modus operandi* of intimidation and manipulation. Therefore, this Court finds Applicant has failed to prove the result of his direct appeal would have been different had Counsel preserved the issue for review.

The trial court believed the use of the word "pattern" did not create any confusion regarding Applicant's potential criminal history. R. 502, ll. 14-16. This Court agrees with the trial court and finds the solicitor's use of the word "pattern" did not indicate a past criminal history. The State presented evidence that Applicant robbed and kidnapped two elderly victims, intimidated Tyneshia Young to prevent her from speaking with law enforcement, attempted to flush evidence down a toilet, threatened his codefendant into writing a letter recanting his implication of Applicant as a codefendant, and attempted to manipulate an officer into notarizing a recantation letter. This Court believes the solicitor's use of the word "pattern" appropriately directed the jury's attention to the Applicant's consistent use of intimidation and manipulation. The solicitor did not reference Applicant's prior criminal history or imply that he had one. Therefore, this Court finds Applicant

was not prejudiced because the jury had no reason to believe he had a prior criminal history from the solicitor's comments.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not requesting a curative instruction and for failing to preserve the issue for review. This Court also finds Applicant failed to prove Counsel's failure to request a curative instruction prejudiced Applicant such that there was a reasonable probability the result of the trial or appeal would have been different. Accordingly, this Court denies and dismisses this allegation.

6. Failure to request the trial judge investigate juror misconduct after Applicant informed Counsel on several occasions that Rosa Singleton, a juror, was sleeping.

Based on the testimony of the solicitor and Counsel, this Court finds Juror was not asleep during the trial. Applicant testified Juror was sleeping during the trial and he pointed this out to Counsel through written notes during the trial. Counsel denied receiving any notes regarding a juror being asleep and never saw Juror appearing to sleep. The solicitor testified she was particularly attentive of Juror because Juror was the mother of a defendant who was convicted of a triple homicide prosecuted by the Attorney General's office. The solicitor also testified she never noticed Juror asleep and would have brought it to the trial court's attention if she had noticed. The record does not mention or note any juror falling asleep. This Court finds Counsel's and the solicitor's testimony credible and Applicant's testimony lacked credibility. Therefore, this Court finds Counsel was not deficient.

Applicant also failed to prove he was prejudiced by a sleeping juror. "The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence. Where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting

prejudice." State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005) (cited omitted). Applicant presented no evidence on when exactly the juror was asleep or how he was prejudiced when a full jury of twelve members found him guilty unanimously.

Accordingly, this Court finds Applicant failed to prove Juror was asleep during the trial. This Court also finds Applicant failed to prove one juror being asleep for portions of his trial prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different had it been called to the Court's attention. Accordingly, this Court denies and 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.

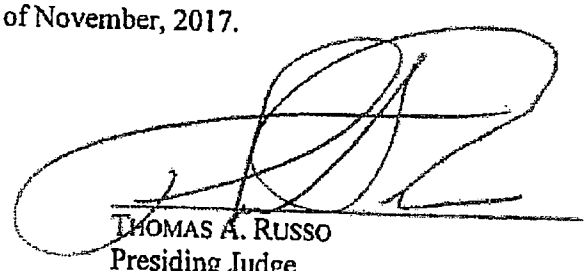
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, 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:

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 30th day of November, 2017.



THOMAS A. RUSSO
Presiding Judge
14th Judicial Circuit

Florence, South Carolina

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AMOUNT
$1.84
R2305K141335-16

'ALK LAW FIRM
'O Box 1058
:harleston, SC 29402

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