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March 28, 2018

RECEIVED

MAR 30 2018

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: George William Hughes, #364900 v. State of South Carolina; 2015-CP-38-1350.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. An Order of Dismissal denying this client's Application for Post-Conviction Relief was filed on January 18, 2018 and received by me on February 26, 2018. I have been *retained* by the family to handle this appeal. I have already received the transcript of the PCR hearing held in this matter and therefore, request that the time limits for this appeal be set from the date this Notice of Appeal is filed. The Appellate Division of the South Carolina Commission on Indigent Defense has been copied on this correspondence so they will make note that I am retained in this case, and won't need to send me an inquiry concerning this appeal. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is fluid and cursive, with a large initial "T" and "S".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: Christian Saville, Assistant Attorney General (w/enclosure)
Paula Murdoch, South Carolina Commission on Indigent Defense, Office of Appellate Defense (w/enclosure)
George W. Hughes, #364900 (w/enclosure)
Frances Hughes (w/enclosure)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Robert E. Hood, Presiding Judge

RECEIVED

MAR 30 2018

S.C. SUPREME COURT

2015-CP-38-1350

GEORGE WILLIAM HUGHES, #364900,

Applicant,

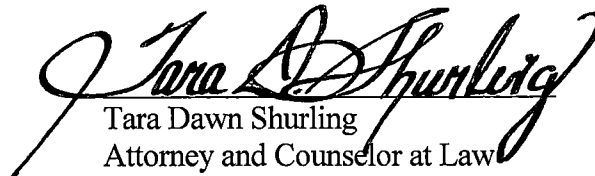
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned Counsel, giving notice of his appeal from the Final Order of Dismissal denying his Application for Post-Conviction Relief. Said Order of Dismissal was filed on January 18, 2018 and was received by Counsel on February 26, 2018.



Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

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ATTORNEY FOR APPLICANT

This 28th day of March, 2018.

Other Counsel of Record:

Christian Saville, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Robert E. Hood, Presiding Judge

2015-CP-38-1350

RECEIVED

MAR 30 2018

S.C. SUPREME COURT

GEORGE WILLIAM HUGHES, #364900,

v.

Applicant,

THE STATE OF SOUTH CAROLINA,

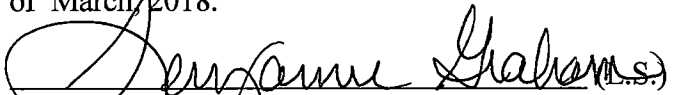
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Christian Saville, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 28th day of March, 2018.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE me this 28th day
of March, 2018.


Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
George William Hughes, #364900,)
Applicant,)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2015-CP-38-1350

ORDER OF DISMISSAL

v.

ATTEST: TRUE COPY

State of South Carolina,

Winnifred B. Clark
Respondent.

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

CLERK OF COURT
ORANGEBURG, SC

2017 JAN 18 A 11:41

FILED FOR RECORD
WINNIFRED B. CLARK

This Court convened an evidentiary hearing into this matter on May 25-26, 2017 at the Dorchester County Courthouse. Applicant was present at the hearing and represented by Tara Dawn Shurling, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant's trial counsel was Gerald Jaren Davis (Counsel), Esquire, who was present and testified. This Court had the opportunity to listen to the testimony of the witnesses and judge their credibility. This Court had before it the records of the Orangeburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings in this matter, and the exhibits introduced by the State and Applicant at the evidentiary hearing. This Court finds as follows:

I. PROCEDURAL HISTORY

Applicant was indicted at the January 2015 of the Court of General Sessions for Orangeburg County for murder (2015-GS-38-0077). Applicant was represented by Counsel. On July 30, 2015, Applicant proceeded to trial before the Honorable Edgar W. Dickson. The jury found Applicant guilty of murder. Judge Dickson sentenced Applicant to thirty years imprisonment. Applicant did not appeal his conviction or sentence.

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Applicant filed an application for post-conviction relief (PCR) on October 26, 2015. The day of the evidentiary hearing, May 25, 2017, Applicant filed an amended application. The State was provided with a preliminary copy of the amendments before the hearing. At the conclusion of the evidentiary hearing, this Court gave Applicant and Respondent leave to draft proposed orders and memoranda in support of their positions.

II. STATEMENT OF FACTS

Applicant was the landlord of the victim, Michael Kemmerlin. Tr. 437. Applicant went to the victim's house to collect money from the victim for an unpaid electric bill. Applicant was armed with a handgun at the time. Tr. 438. Applicant had a concealed weapons permit for the handgun he was carrying. Tr. 470. Applicant shot the victim five times, resulting in the victim's death. Tr. 330. The shot to the victim's face was from a distance of mere inches. Tr. 333. Applicant called law enforcement and reported the shooting. Tr. 382. There were four shell casings inside the victim's house and one against the under-skirting of the house. Tr. 255. When law enforcement arrived, there was a knife in the hand of the victim. Tr. 337. Dr. Janice Ross testified it would be atypical for a weapon to remain in the hand after the victim was shot and went unconscious. Tr. 338. Officer William Ketcherside took pictures of a knife (car knife) found in Applicant's vehicle, but did not take it into evidence. Tr. 222. Ketcherside testified he took a picture of the knife because he wanted to determine if it was the same brand as the knife (victim knife) in the victim's hand. Tr. 221. The deputy admitted he did not see any evidentiary value in taking the car knife into evidence. Tr. 222. The brand name of the car knife was Frost Cutlery. Tr. 224. The victim knife was a different type of knife and not of the same brand as the car knife. Tr. 222-224; Applicant Ex. 12.

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III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ineffective Assistance of Counsel

This Court finds Applicant failed to satisfy his burden to prove Counsel was deficient. 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 “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 trial counsel provided representation within the range of competence required in criminal cases. Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that 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. The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. This Court finds the testimony of Counsel was credible and the testimony of Applicant lacked credibility. Due to the numerous allegations of Applicant this Court has grouped them into

similar categories. This Court finds Counsel was not deficient nor was Applicant prejudiced by any of the allegations for the following reasons:

1. Allegations concerning opening and closing arguments.

Trial Counsel was ineffective for making opening arguments to the jury at Applicant's trial which undermined Applicant's trial strategy to present a claim of self-defense.

Trial Counsel was ineffective for making statements in his closing argument to Applicant's jury which undermined the strength of Applicant's claim of self-defense.

Trial Counsel was ineffective for failing to adequately summarize for the jury in closing arguments all of the evidence adduced at trial which supported Applicant's claim of self-defense and for failing to sufficiently highlight for the jury how the evidence adduced by the state's own witnesses provided a sufficient basis for a finding of self-defense.

Trial Counsel was ineffective for failing to object to numerous portions of the State's closing argument which were either factually inaccurate, addressed matters not in evidence or which were calculated to appeal to the passions and prejudices of the jury.

Trial Counsel was ineffective for failing to adequately argue in closing argument the reasons why, if the jury did not find that Applicant acted in self-defense, they should convict him of the lesser included offense of voluntary manslaughter as opposed to murder.

Counsel testified his statements regarding bringing a knife to a gunfight were part of his trial strategy. Tr. 67. Counsel returned to this same theme in his closing argument. Tr. 529. There was no dispute that Applicant shot and killed the victim. Counsel inferred that the only reason the victim attacked Applicant with a knife was because he did not know Applicant was armed with a gun. This argument is well-suited to Applicant's assertion that the homicide was committed in self-defense. Counsel testified he does not like to object to every little thing in the State's closing argument. This Court finds none of the arguments or assertions made by the State in closing argument were so egregious that they required objection and correction. "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). A strategic or tactical decision does not have to be articulated by counsel. A court may infer from the record that Counsel’s actions reflect strategic decisions and, thus, should not be disturbed under Strickland. See Wood v. Allen, 558 U.S. 290 (2010). This Court finds Counsel elucidated reasonable trial strategies for his opening and closing arguments. Counsel’s opening and closing arguments were well within the bounds of professional norms as required by Strickland. Therefore, this Court finds Counsel was not deficient for his opening and closing argument or failing to object to the State’s opening or closing argument.

Applicant has not shown he was prejudiced under Strickland. None of the additional arguments or objections suggested by Applicant would have created a reasonable probability the result of the trial would have been different. Counsel thoroughly presented Applicant’s case to the jury. “To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled.” Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (internal cites omitted). Therefore, this Court finds Applicant was not prejudiced by failing to argue as Applicant alleges or in failing to object to the Solicitor’s closing argument.

Accordingly, this Court denies and dismisses these allegations.

2. Allegations concerning knife found in vehicle.

Trial Counsel was ineffective for neglecting to file a Motion *in limine* requesting that the State be prohibited from introducing any testimony, or other evidence, concerning a knife found in Applicant’s automobile were said evidence was not relevant to the crime for which the Applicant was charged and its introduction was highly prejudicial to Applicant’s claim of self-defense where the State used the presence of that knife to imply Applicant had planted the knife found in the hand of the deceased.

Trial Counsel was ineffective for arguing that the knife found in Appellant's car was "missing" where the testimony of Investigator Ketcherside clearly indicated that he made a conscious decision not to preserve the knife as evidence.

Trial Counsel was ineffective for neglecting to investigate the whereabouts of the knife referenced as having been found in Applicant's car, and for failing to produce it at Applicant's trial so the jury could compare that knife with the knife found in the Victim's hand.

Trial Counsel was ineffective for failing to object to testimony from a State witness concerning the fact that a knife found in Applicant's automobile was the same brand as the knife found in the hand of the deceased where the knife in question was not preserved by the State after being found in Applicant's car and was therefore not available for inspection at trial for comparison to the knife found in the deceased's hand.

Trial Counsel was ineffective for failing to object to the introduction of testimony and other evidence concerning a knife found in Applicant's automobile where the State admitted that the knife was not tied to the crime for which Applicant was on trial and where photographs of both sides of the knife found in the hand of the deceased did not reflect a brand name insignia of any sort.

Trial Counsel was ineffective for failing to cross-examine Crime Scene Investigator William Ketcherside concerning his claim that the knife found in the hand of the deceased was the same brand as a knife found in Applicant's automobile. Tr. p. 221, ll. 14-20.

Trial Counsel was ineffective for failing to examine the knife found in the Victim's hand, introduced at trial as State's Exhibit No. 12, closely to determine that it bore no markings connecting it with the knife found in Applicant's car following this incident.

Trial Counsel was ineffective for failing to utilize State's Exhibit No. 12, the knife found in the Victim's hand, to refute the State's claim that it was the same brand knife as a knife discovered in Applicant's vehicle at the scene.

Trial Counsel was ineffective for neglecting to point out to the jury that there were no distinguishing brand-name markings on the knife found in the hand of the deceased thereby readily refuting the claim that this knife was the same brand as a knife found in Applicant's car.

Trial Counsel was ineffective for failing to request a mistrial when a State witness claimed that the knife found in Applicant's automobile was the same brand as the knife found in the hand of the deceased where the evidence did not support that claim and, even if true, did not provide a sufficient nexus to this case to warrant a finding of relevance where there had been no demonstration that the brand name in

question was rare or otherwise unusual in anyway or that the two knives were the same age.

This Court finds Applicant was not prejudiced by any of Counsel's comments or lack of clarification concerning the car knife. This Court finds the car knife and the victim knife were visibly and noticeably different brands and types of knives. Applicant Ex. 2; 5. This distinction was pointed out by Counsel and the jury had a picture of the car knife and the actual victim knife to view. Tr. 224.

The statement, on which Applicant bases his argument, does not support his contentions. "I wanted to verify that by photographing it, if that's what you're asking about, I wanted to verify that it was the same brand and type of knife that was found on the scene." Tr. 221, l.17-20. Applicant argues Ketcherside claims the car knife and victim knife are the same brand and type. That is not an accurate portrayal of the record or evidence. Ketcherside says he took the picture because he wanted to verify if the car knife and victim knife were the same. The evidence clearly shows they were not the same type or brand. Ketcherside's desire to prove they were the same did not bear out. Ketcherside's statement that he "wanted" to verify if the car knife was the same brand or type of knife as the victim knife was not an assertion that he was able to do so. Tr. 221. Ketcherside's desire was not born out by the evidence Therefore, Ketcherside testified the car knife had no bearing on the case and it could not prove anything. Tr. 221; 223. There was also no prejudice to Applicant where law enforcement continually disclaimed the relevance of the evidence in question. On multiple occasions during cross-examination, Ketcherside testified the knife had no significance. Counsel also testified he saw no relevancy to the car knife and that it was obviously a different brand and type of knife.



This Court finds Applicant was not prejudiced by the car knife or Counsel's failure to object or distinguish the type or brand of the car knife from the victim knife. Ketcherside continually testified there was no connection. The lack of connection was also obvious to the jury via visual examination. "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. at 670.

Counsel was also not deficient for failing to object to or clarify the existence of the car knife. Counsel could have objected to the car knife on relevancy grounds. However, Counsel used the car knife's existence on cross-examination as an example of law enforcement's failure to thoroughly investigate the case. Tr. 220-223.

Accordingly, this Court finds Counsel was not deficient and Applicant was not prejudiced by Counsel's lack of objection concerning the car knife, argument concerning the car knife, or lack of clarification concerning the car knife.

3. Failure to advise and discuss trial strategy with Applicant.

Trial Counsel was ineffective for neglecting to discuss the decision concerning whether to argue against a verdict of the lesser-included offense of voluntary manslaughter to the jury with Applicant and for failing to advise him concerning the risks inherent in proceeding only on the charge of murder.

Trial Counsel was ineffective for neglecting to advise Applicant that he could assert his claim of self-defense while at the same time arguing that the evidence presented by the State failed to establish malice beyond a reasonable doubt.

Trial Counsel was ineffective for neglecting to advise Applicant that while asserting a claim of self-defense he could alternatively argue that if the jury did not find that he acted in self-defense, they should consider the absence of proof beyond a reasonable doubt of malice as the basis for a finding of guilt only as to the lesser-included offense of voluntary manslaughter.

Counsel testified he discussed the option of voluntary manslaughter with Applicant and Applicant wanted to solely pursue a verdict of not guilty based on self-defense. Counsel also testified the trial judge indicated pre-trial that he would be willing to consider giving Applicant five years' incarceration on the charge of voluntary manslaughter. Applicant would not consider pleading to that potential offer. Counsel testified he considered arguing alternative defenses, but decided to pursue self-defense as his strongest strategy. "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.' The United States Supreme Court has cautioned that every effort be made to eliminate the distorting effects of hindsight and evaluate counsel's decisions at the time they were made. Accordingly, we must be wary of second-guessing trial counsel's tactics." Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Counsel testified he argued, in chambers, against voluntary manslaughter being sent to the jury as a potential lesser-included charge. The trial judge decided to include the voluntary manslaughter charge anyway. Counsel's strategy of pursuing Applicant's strongest defense and not attempting to muddy the waters with a lesser-included charge is a valid strategy. Further, Applicant's refusal to consider a potential five year plea deal to voluntary manslaughter clearly evidenced Applicant's desire to pursue the all or nothing strategy of asserting self-defense. Applicant was not prejudiced by Counsel's failure to argue for a voluntary manslaughter conviction where that was against Applicant's express wishes.

This Court finds Counsel was not deficient nor was Applicant prejudiced by Counsel's sole pursuit of the not-guilty verdict Applicant desired or Counsel's decision to assert only Applicant's strongest defense. Accordingly, these allegations are denied and dismissed.

4. Failure to request and object to jury instructions.

Trial Counsel was ineffective for neglecting to request a jury instruction which would have clarified the standard for self-defense to insure that the jury was aware that they could properly evaluate the evidence of self-defense in light of Applicant's age and physical condition.

Trial Counsel was ineffective for failing to request a jury charge informing the jury that the standards for expert witnesses only applied to witnesses expressly qualified as expert witnesses, and even then, only applied to their testimony concerning areas in which that witness was qualified as an expert.

Trial Counsel was ineffective for failing to object to improper jury instructions given in Applicant's trial which were contrary to South Carolina Law and which improperly diluted the State's burden of proof.

Counsel testified he did not believe the trial court's jury instruction on expert witnesses was incorrect nor did he think clarification was necessary. This Court agrees. The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). The trial judge's charge to the jury on expert witnesses:

The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education and experience, have become expert in some art, science, profession or calling may state an opinion as to relevant and material matter in which the witness claims to be an expert and may also state the reasons for the opinion. You should consider any expert opinion received in evidence in this case, and like other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness' testimony is to be given no greater weight than that of other witnesses, simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted. The trial court's expert witness charge was appropriate and any objection would have been correctly overruled. Counsel was, therefore, not deficient for failing to object to an appropriate jury charge.

Tr. 557.

This Court finds the trial judge's charge on expert witnesses was sufficient and Counsel was not deficient for failing to object. The trial judge is required to charge only the current and correct law of South Carolina. State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000).

Applicant alleges Counsel should have requested a jury charge instructing the jury that the difference between the age, weight, and health of the victim compared to that of Applicant could be considered in assessing Applicant's reasonable fear of great bodily injury. Applicant was 69 years old. Tr. 536. The victim was 59 years old, his height was 6'1", and his weight was 220 pounds according to Dr. Ross or 260 pounds according to his driver's license. Tr. 146; 331. The victim was disabled, had cirrhosis of the liver, an enlarged heart, an enlarged liver, and an enlarged spleen. Tr. 341. Applicant testified he was disabled, had a heart transplant, and stage three kidney disease. Tr. 372. Applicant's weight and size was never entered into the record. "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). Both Applicant and the victim had serious health problems. Without Applicant's weight and size at the time of the shooting, there was no evidence that Applicant and the victim were appreciably dissimilar such that a charge instructing the jury they could consider the dissimilarity was appropriate. The frailness of the victim and of Applicant were argued by both Counsel and the State in closing arguments. Counsel argued the jury should consider the victim's size in determining his capacity for violence and, thus, Applicant's reasonable fear of great bodily injury. Tr. 507. The State argued there was no appreciable difference between the victim and Applicant. Tr. 536.

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The trial judge did give an instruction that jury could consider the prior bad blood between the two parties in determining whether Applicant acted in self-defense. Tr. 565. The Court's self-defense and bad blood charges were appropriate given the facts of the trial. Further, the record does not support Applicant's requested charge. Therefore, this Court finds Counsel was not deficient for failing to request a jury instruction on the differences between Applicant and the victim.

Applicant was also not prejudiced by the trial judge's jury instructions or the lack of Applicant's proposed jury instructions. The trial judge's jury instruction on expert witnesses was a correct statement of the law. The proposed jury instruction on appreciable differences was not supported by the record. Both Applicant and the victim had major health problems and were advanced in age. Applicant's weight and height at the time of the shooting were never put into the record to compare to the victim's. Further, Counsel argued for the jury to consider the victim's size in determining the danger he posed to Applicant. So the jury was able to consider that argument. Applicant has failed to meet his burden to prove there was a reasonable probability that the result of the trial would be different if his proposed jury instructions were given.

Accordingly, this Court finds Counsel was not deficient in failing to request the proposed jury charges and Applicant was not prejudiced by the lack of proposed jury charges.

5. Failure to obtain an expert.

Trial Counsel was ineffective for failing to investigate the use of an expert witness to testify to the consistency between the Applicant's position concerning the circumstances surrounding the Victim's death and the forensic evidence in this case.

Any prejudice created by Counsel's failure to call a forensic expert is purely speculative. "First, because [Applicant] failed to have an expert on child sexual abuse testify at the PCR hearing, we hold that any finding of prejudice is merely speculative. Second, we find that counsel's

decision not to call an expert witness to rebut the state's expert witness was a legitimate trial strategy." Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005). "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. at 670. Applicant did not put forward the testimony of a forensic expert at the PCR hearing. Therefore, this Court finds any prejudice to Applicant is purely speculative and Applicant has not proven there was a reasonable probability the result of the trial would have been different if Counsel had obtained a forensic expert.

This Court also finds Counsel was not deficient for failing to hire a forensic expert in this case. Applicant has not proven his case required a forensic expert in order to be adequately defended. Therefore, this Court finds Applicant has failed to prove Counsel was deficient.

Accordingly, this allegation is denied and dismissed.

6. Failure to properly cross-examine witnesses.

Trial Counsel was ineffective for failing to cross-examine the pathologist in this case concerning the results of the toxicology screen conducted on the deceased at the time of his autopsy.

Trial Counsel was ineffective for failing to cross-examine State witnesses as to whether the Victim had a lawful prescription for amphetamines at the time of his death.

Trial Counsel was ineffective for neglecting to adequately cross-examine the State's pathologist concerning the guidelines for describing a gunshot wound as close versus distant.

Trial Counsel was ineffective for failing to expressly cross-examine Corporal Lamonte Edwards concerning what the Sheriff's Department's policy was concerning obtaining a Waiver of Rights from a suspect.

Trial Counsel erred in failing to cross-examine Corporal Lamonte Edwards concerning why he would not have gotten Applicant to sign a Waiver of Rights



form in a homicide case, if Applicant had in fact been given his rights and agreed to waive them.

Trial counsel was ineffective for failing to cross-examine law enforcement witnesses as to whether the Victim had a lawful prescription for stimulants at the time of his death.

Trial Counsel was ineffective for failing to adequately cross-examine State witness Lamonte Edwards concerning his claims that Applicant had informed him at the scene that the incident that led to the Victim's death all happened on the front porch and in the doorway, and further that Applicant had stated that he never went inside the residence.

Trial Counsel was ineffective for failing to adequately question Applicant on the record concerning the circumstances under which he was questioned by Corporal Lamonte Edwards at the scene.

Trial Counsel was ineffective for failing to adequately cross-examine State witness Jeffrey Rivas concerning his claim that Applicant had informed him at the scene that the incident that led to the Victim's death all happened on the front porch and in the doorway, and further that Applicant had stated that he never went inside the residence.

Trial Counsel was ineffective for failing to adequately cross-examine Corporal Edwards concerning the incident reports he submitted in this case.

Trial Counsel was ineffective for failing to more thoroughly cross-examine Corporal Edwards concerning his claim that Applicant was fully advised of his rights before he questioned him at the crime scene concerning the events which led to the death of the victim.

Trial Counsel was ineffective for failing to cross-examine Corporal Lamonte Edwards concerning why he would not have signed, dated and preserved the Miranda form he allegedly used to advise Appellant of his rights even if he did not succeed in getting Applicant to sign that document.

Trial Counsel was ineffective for failing to adequately cross-examine state witnesses concerning the position the screen door to the trailer was in when law enforcement officers, and EMS personnel, first arrived at the scene.

Trial Counsel was ineffective for failing to adequately cross-examine state witnesses concerning the distance a spent shell casing from a .380 semi-automatic pistol can travel when ejected after firing.

Trial Counsel was ineffective for neglecting to cross-examine Corporal Lamonte Edwards concerning any hand written notes made by him which were disclosed in the discovery materials.

Trial Counsel was ineffective for neglecting to adequately cross-examine Investigator Ketcherside concerning his education and training with regard to forensic evidence.

Trial Counsel was ineffective for failing to adequately cross-examine the State's ballistics witness, James "Jamie" Green.

Trial Counsel was ineffective for failing to cross-examine the victim's daughter concerning what type of disability her father was receiving disability income for.

Trial Counsel was ineffective for neglecting to question SLED Agent Jamie Green, Who was qualified by the court at the State's request as an expert in fire arms examination, concerning the distance at which a shell casing from a 380 semi-automatic pistol could travel after ejection.

Trial Counsel was ineffective for failing to more thoroughly to cross-examine State's CSI following his assertion that .38 caliber ammunition and 380 caliber ammunition are in the same "family", thereby inviting the jury to draw the erroneous inference that 38 caliber bullets will fit in a 380 caliber pistol and could be fired by a 380 handgun.

Trial Counsel was ineffective for neglecting cross-examine Corp. Lamont Edwards concerning why he would not have felt it necessary and appropriate to reduce any oral statement he took from Applicant to writing and to give Applicant opportunity to review it for accuracy to make necessary changes and to sign it to verify he had read it and agreed with its accuracy.

Trial Counsel was ineffective for advising Applicant to waive his right to a *Jackson v. Denno* hearing where Applicant expressly denied making the statements attributed to him by Officers Lamonte Edwards and Jeffrey Rivas.

Trial Counsel was ineffective for failing to question Patrol Officer Jeffery Rivas concerning whether he took any notes during the interview of Applicant by Corporal Rivas at the scene of the shooting.

Applicant has alleged Counsel should have asked numerous additional questions on cross-examination. These allegations are made with the full benefit of hindsight and a cold record. That is not the standard by which trial attorneys are judged in PCR. "We recognize that representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant

in another. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled.” Chandler, 218 F.3d at 1313 (internal cites omitted). For the reasons set out below, this Court finds Counsel’s cross-examination of the witnesses was appropriate and well within the professional norms.

Dr. Ross could not testify concerning the toxicology results. She did not perform the tests nor were they records from her office. Any cross-examination concerning the results of the toxicology results would have been hearsay from a record not in evidence. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel’s conduct.

The guidelines for close versus distant were unhelpful for Applicant in this case. There was stippling around the gunshot wound to the victim’s face. Tr. 332. Based on that stippling, Dr. Ross testified the gun was mere inches from the victim’s face when the shot was fired. Tr. 333. The further away Applicant was from the victim when the shots were fired the weaker Applicant’s case for self-defense becomes because Applicant is in less potential danger. Therefore, Counsel was not deficient for failing to cross-examine Dr. Ross to prove Applicant was further from the victim than Dr. Ross testified. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel’s conduct.

The Sheriff Department’s policy concerning waivers of rights was not substantive for this case. This line of questioning was not probative and its lack was not prejudicial. Accordingly, this

Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel did cross-examine Officer Lamonte Edwards and Jeffrey Rivas on Applicant's lack of written waiver of rights. Tr. 114-115; 129. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel did cross-examine Officer Lamonte Edwards and Jeffrey Rivas on law enforcement's failure to prove he waived his rights. Tr. 114-115; 129. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

The victim did not need a prescription to obtain pseudoephedrine, which also produces amphetamines in a toxicology report. Applicant's assertion Counsel should have questioned State's witnesses on prescriptions is based on speculation. Applicant did not present evidence the victim did not have a prescription for an amphetamine producing medication. Further, the presence of amphetamines in the victim's system was irrelevant to this case and would have been ripe for a relevance objection. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel testified he didn't want a *Jackson v. Denno* hearing because he didn't want to divulge Applicant's full account of events before the State's case. Applicant gave a statement to the 911 operator generally describing what took place, which would certainly have come into evidence. Applicant did not speak extensively with officers before he requested the services of an attorney.

Applicant testified he was in the doorway when the shooting happened. Tr. 369. Counsel was not deficient for failing to object to Rivas' testimony, which was consistent with Applicant's testimony at trial. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Applicant testified that he was in the doorway when the shooting happened. Tr. 369. Counsel was not deficient for failing to object to Edwards' testimony, which was consistent with Applicant's testimony at trial. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Law enforcement also did not substantively deviate from the incident report. Therefore, Counsel had no opportunity to point out substantial inconsistencies and, thus, Counsel appropriately declined this line of questioning. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

The position of the screen door when EMS and law enforcement arrived was irrelevant to this case. Time had passed since the incident had occurred and the screen door was not a substantive part of the self-defense argument. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

At the PCR hearing, James Green testified neither he nor SLED give opinions on the distance a shell casing will eject because the distance is not sufficiently predictable. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Applicant misstates the evidence in the record concerning Edwards' notes. Counsel did cross-examine Edwards on his lack of notes and, during closing argument, argued his lack of notes was indicative of his lack of credibility. Tr. 116; 485. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

If Counsel had cross-examined Ketcherside on his former training and experience that cross-examination could have served to bolster Ketcherside's credibility with the jury. Bolstering law enforcement's credibility was not in Applicant's best interest. Therefore, this Court finds Counsel had a valid trial strategy for not attempting to question Ketcherside's education and training. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel adequately cross-examined James Green. Applicant never denied that he fired the bullets or owned the gun that was used to kill the victim. None of Green's testimony was harmful to Applicant. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel's decision not to cross-examine the victim's daughter concerning the victim's disabilities was a valid trial strategy. Attempting to attack the deceased through the victim's daughter could certainly be viewed negatively by a jury. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

The caliber of the bullets had no bearing on this case. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.



Applicant misstates the evidence in the record concerning Counsel's cross-examination of Edwards on Applicant's statement. Counsel did cross-examine Edwards on his failure to record Applicant's statement. Tr. 111-113. Counsel used this lack of evidence in his closing argument. Tr. 485-486. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel adequately cross-examined Rivas on his lack of experience, including the fact he was only there to be trained by Edwards. Tr. 128-130. Rivas' lack of notes was not substantive to his credibility. Rivas did not write the incident report or have any further involvement with Applicant's case. Counsel appropriately attacked Rivas' training officer, Edwards, on his lack of notes. Tr. 116. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Accordingly, this Court denies and dismisses these allegations.

7. Failing to introduce evidence.

Trial Counsel was ineffective for failing to introduce into evidence the report issued by the South Carolina Law Enforcement Division concerning the toxicology screen conducted on the victim.

Trial Counsel was ineffective for failing to introduce readily available evidence to document the propensity of the victim for violence and aggression.

Trial Counsel was ineffective for failing to introduce evidence concerning Applicant's positive reputation for veracity and peacefulness in the community.

Counsel testified the victim's toxicology report contained a minuscule amount of marijuana and amphetamines. Counsel believed the evidence of marijuana in the victim's system was irrelevant due to the low amount of marijuana in the victim's system and the length of time that marijuana remains in the victim's system. Counsel believed the evidence of amphetamines in the victim's system was irrelevant due to the legality of cold medicine. Counsel stated he made the



strategic decision not to attack the victim's reputation because there was evidence the State could use to attack his client's reputation.

At the PCR hearing, Applicant called two witnesses, Rupel and Pooser, who stated they would have testified to Applicant's good reputation in the community, which is allowed under Rule 404(a)(1). "Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Rule 404(a)(1), SCRE.

Counsel testified Mr. Rupel did not want to testify and Counsel was reluctant to call someone who was hesitant to testify. At the hearing, Mr. Rupel testified he was surprised when he wasn't called because he came to the court expecting to be called. Counsel testified Mr. Pooser said he would come, but did not know Applicant beyond a business transaction. At the hearing, Mr. Pooser stated he did not know Applicant beyond business transactions, but that Applicant fixed a broken part after its warranty date was finished. Counsel testified he was worried about potentially character damaging past incidents coming in to evidence. Under Rule 404(a)(1), the State could introduce potentially damaging testimony concerning Applicant's past incidents if Counsel asserted Applicant's good reputation.. Neither Mr. Pooser nor Mr. Rupel presented strong character testimony and the potential for damaging rebuttal was strong. Counsel knew of at least one potential incident involving Sean Garvin's wife and Applicant, alleging Applicant made lewd advances and remarks to Garvin's wife. Therefore, this Court finds Counsel's decision not to call these character witnesses was a valid trial strategy. Accordingly, Applicant failed to prove Counsel was deficient for failing to do so. Applicant also failed to prove he was prejudiced by the lack of testimony concerning his good reputation. The testimony for Applicant was not strong and the testimony that could have been raised against him in rebuttal was potentially damaging.



At the PCR hearing, Applicant called two witnesses who attacked the credibility and violent nature of the victim's family and the victim. The testimony concerning the victim's family was irrelevant and made up the majority of the testimony. Almost the entirety of the testimony was also based on hearsay. Applicant failed to show specific instances of violence by the victim against the Applicant, so closely connected to time and occasion with the homicide, that would be admissible at trial. "[I]n the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other *specific instances of violence* on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate *the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm.*" State v. Douglas, 411 S.C. 307, 324, 768 S.E.2d 232, 242 (Ct. App. 2014) (original emphasis). At trial, there was testimony concerning a general bad blood between Applicant and the victim. Tr. 347-348. Accordingly, the trial judge gave an instruction that the jury could consider the bad blood in ascertaining whether Applicant acted in self-defense. Tr. 565. At the PCR hearing, Applicant failed to show specific instances of violence by the victim against the Applicant that would be admissible at trial. Therefore, Counsel was not deficient for failing to attack the victim's violent nature. Applicant has also failed to meet his burden to prove the proffered testimony had a reasonable probability the result of the proceeding would have been different.

Accordingly, this Court denies and dismisses these allegations.

8. Failure to adequately advise Applicant of his direct appeal rights.

Trial Counsel was ineffective for advising Applicant not to pursue a direct appeal from his convictions and sentences without adequately explaining to him the distinctions between the types of issues which may be raised on direct appeal as

opposed to those issues which may only be raised in a Post-Conviction Relief action on collateral review.

Trial Counsel was ineffective for procuring a waiver of direct appeal rights from the Applicant based on his assertion to Applicant that he had no issues for appeal without fully explaining the significance of the decision in *Anders v. California* 386 U.S. 738 (1967) along with a comprehensive explanation of the *Anders* procedural requirements.

Counsel testified he asked Applicant if Applicant wanted him to file a direct appeal on Applicant's behalf. Applicant told him he did not. Counsel informed Applicant he would lose his right to a direct appeal if he did not file a notice to appeal within 10 days and Applicant reiterated he did not wish Counsel to file an appeal. Counsel testified he informed Applicant the office of indigent defense would handle his appeal for free and Applicant still did not wish to appeal. Based on his conversations with Applicant, Counsel had Applicant sign a waiver indicating he did not want Counsel to file a notice of appeal. Applicant testified Counsel told him there were no issues to appeal and he would lose on appeal. Counsel disagreed with this assertion and testified he neither encouraged nor discouraged Applicant to appeal because he does not handle appeals. Counsel testified that he did not describe or discuss an *Anders* brief with Applicant. This Court finds Counsel's testimony credible and Applicant's testimony lacks credibility.

Applicant's allegation Counsel inappropriately advised Applicant not to appeal is incorrect. Here, Counsel did not advise Applicant not to appeal. Counsel consulted with Applicant to determine whether he wished to file a direct appeal. Based on the fact that Applicant went to trial and was found guilty as indicted, Counsel reasonably presumed a rational defendant would want to appeal. Counsel has a constitutionally-imposed duty to consult with defendant about appeal when there is reason to think either (1) that rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Accordingly, Counsel consulted with Applicant as required. Applicant informed Counsel it was his desire that Counsel not file a notice of appeal on his behalf. Due to this clear and unequivocal desire not to appeal, Counsel had Applicant sign a waiver to formalize his desire not to appeal. This Court finds Counsel was not deficient for failing to file a notice of intent to appeal where Applicant clearly told Counsel he did not wish to file an appeal.

Applicant was not prejudiced by Counsel's failure to file an appeal because he did not wish for an appeal to be filed. To show prejudice, an Applicant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. *Id.* 528 U.S. at 484, 120 S. Ct. at 1038. Counsel's testimony and Applicant's signature show Applicant did not wish to file an appeal. Therefore, there was no reasonable probability that Applicant would have appealed, but for Counsel's actions or inactions.

Accordingly, this Court denies and dismisses these allegations.

9. The broken window.

Trial Counsel was ineffective for failing to make a motion *in limine* to prohibit the State from introducing any evidence and testimony concerning the fact that the windows of the Victim's automobile had been shattered where law enforcement was aware at the time of this trial that the damage to this automobile was old and was unrelated to events surrounding the Victim's death.

Ketcherside testified, "[T]he back glass of the vehicle outside was broken out. I'm not sure how that happened" would have created a reasonable probability that the result of the trial would have been different. Ketcherside never indicated Applicant broke the window or that the window had any relevance to Applicant's case. Instead, Ketcherside stated he did not know how the window was broken and he did not remark on it again. 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.” Cherry, 300 S.C. at 118, 386 S.E.2d at 625. “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. at 670. There is no potential prejudice from the mention of a broken window where it is not associated with Applicant. Certainly, there is no prejudice such that it could reasonably change the result of the proceeding. Therefore, this Court finds Applicant was not prejudiced by Counsel’s failure to object to a court reporter’s notation.

This Court also finds Counsel’s failure to object to Ketcherside’s brief mention of a broken window did not fall below the range of competence required in criminal cases. 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. Therefore, this Court finds Applicant has failed to overcome his burden to prove Counsel was deficient.

Accordingly, this Court denies and dismisses this allegation.

10. Failure to introduce evidence of Applicant’s infirmity.

Trial Counsel was ineffective for neglecting to introduce readily available evidence which would have that Applicant was using a walker at the time of his visit to the trailer where the deceased was shot.

Trial Counsel was ineffective for failing to question Appellant on the record concerning his height, and the length of his arms, where said testimony would have been directly relevant to questions concerning the distance he would have been standing from the victim when the shot to the head was fired.



Trial Counsel was ineffective for failing to introduce evidence at trial concerning the length of Appellant's arm where the length of his reach was relevant to issues raised at his trial.

Trial Counsel was ineffective for failing to present medical testimony from one, or more, physicians who had treated Applicant prior to the incident date where their testimony concerning Applicant's heart transplant and his physical condition would have been relevant to Appellant's self-defense claim.

Applicant's health conditions were never challenged by the State and were in evidence through Applicant's testimony. Applicant testified he was disabled, had a heart transplant, and stage three kidney disease. Tr. 372. Applicant asserts Counsel should have introduced further evidence of Applicant's heart transplant and Applicant's use of a walker. Counsel was not deficient for failing to produce additional evidence to support facts that were not in dispute. Applicant was also not prejudiced by Counsel's failure to support facts that were not in dispute. If the State had challenged the veracity of Applicant's health conditions, Counsel could have provided evidence to prove Applicant's assertions regarding his health conditions. Without such a challenge, there was no reason to provide additional evidence. Therefore, Counsel was not deficient and Applicant was not prejudiced by Counsel's failure to provide more evidence against an unchallenged assertion.

The length of Applicant's arms has no bearing on whether his shooting of the victim was done in self-defense and, thus, Applicant was not prejudiced by Counsel's failure to admit evidence of the length of his arms. The jury was able to see Applicant in person and could see the length of his arms, which presumably did not change in length from the time of the shooting to the time of the trial. Further, there was no testimony concerning the position of Applicant's arms when he was shooting the victim. Applicant has failed to satisfy his burden to prove Counsel was deficient for failing to introduce evidence of his arm's length. Applicant has also failed to show

there was a reasonable probability that the result of his trial would have been different had the length of his arms been in evidence.

Accordingly, this Court denies and dismisses these allegations.

11. Failure to investigate

Trial Counsel was ineffective for neglecting to subpoena any and all records from the Orangeburg Sheriff's Department concerning the circumstance of Corporal Lamont Edward's departure from that law enforcement agency, and any disciplinary records pertaining to that Officer from the 12 month period prior to and including the date of the killing in this case; November 6, 2014.

Trial Counsel was ineffective for neglecting to issue a subpoena for the Orangeburg County Sheriff's Office for any handwritten notes made by any of the law enforcement officers during their investigation of this case.

Trial Counsel was ineffective for failing to investigate evidence concerning what type of disability the deceased had which had been the basis for him to qualify for and receive disability payments, where testimony concerning the fact that the deceased was receiving disability checks, and that Appellant knew it, could have been construed by the jury to negatively impact the question of whether Appellant reasonably feared grave bodily injury or death at the hands of the victim.

Trial Counsel was ineffective for failing to investigate and subpoena the medical records of the victim to determine if he had a valid prescription for Adderal at the time of his death.

Trial Counsel was ineffective for failing to file Supplemental *Brady* and Rule 5 Motions demanding production of any and all handwritten notes made by law enforcement officers in their investigation of this case after reviewing discovery materials which did not include any such notes.

Trial Counsel was ineffective for failing to move for the production of any notes taken by law enforcement officers after Corp. Lamont Edwards testified that he could not recall whether he had taken any notes at the scene during his interrogation of Applicant.

Any prejudice created by Counsel's failure to obtain records from the Orangeburg County Sheriff's Department concerning Edwards' departure is speculative because the records were not introduced at the PCR hearing. "First, because [Applicant] failed to have an expert on child sexual abuse testify at the PCR hearing, we hold that any finding of prejudice is merely speculative.

Second, we find that counsel's decision not to call an expert witness to rebut the state's expert witness was a legitimate trial strategy." Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005). "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. at 670. Further, Counsel impeached Edwards on the circumstances surrounding his decision to leave the Orangeburg County Sheriff's Department. Tr. 106-107. Therefore, the jury was able to consider Edwards disagreement with the Sheriff's department in determining his credibility. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel was not ineffective for failing to subpoena, file a supplemental Brady motion, or file an additional Rule 5 motion on the Orangeburg County Sheriff's Department for notes that Edwards testified did not exist. Applicant has also not shown that those records were in existence, probative to Applicant's case, or beneficial to Applicant. Thus, any prejudice is purely speculative. Counsel cross-examined Edwards on his lack of notes and argued, during closing argument, that his lack of notes was indicative that he was not a credible witness. Tr. 116; 485. Edwards testified he could find no notes and he did not recall if he wrote any. Tr. 112. Further, Counsel's Brady and Rule 5 motion require continual disclosure by the State. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel was not ineffective for failing to determine the nature of the victim's disability. Dr. Ross testified the victim had many medical problems. Tr. 340-341. The nature of the victim's

unnamed disability was not a substantive part of the trial. Neither the State nor Counsel argued the victim's disability factored into Applicant's self-defense claim. Applicant has also not shown what victim's disability was, how it was probative, or how it was beneficial to Applicant. Thus, any prejudice is purely speculative. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Applicant's assertion that Counsel should have investigated the victim's potential Adderall usage is without merit. Applicant's assertion that the victim used Adderall is purely speculative and irrelevant to this case. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

12. Bullet fragment

Trial Counsel was ineffective for failing to move to suppress any and all evidence pertaining to a bullet fragment found in the yard at the crime scene where there was no forensic evidence adequately connecting the bullet fragment in question to the incident which led to the death of the deceased and no competent forensic evidence tying that bullet fragment to the weapon used to kill the deceased in this case.

Applicant has not shown how he was prejudiced by the bullet fragment. Applicant does not dispute that he shot the victim. He testified he shot the victim from the doorway. The bullet fragment was within the nexus of the shooting. Applicant presented no credible evidence the he was prejudiced by the bullet fragment. There was also no evidence the bullet fragment was not from the shooting, which admittedly took place mere feet away from the fragment. Therefore, the bullet fragment was properly presented as part of the State's case. "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. at 670. Therefore, Applicant has failed to show how the exclusion of this evidence would have created a reasonable probability that the trial result would have been different.

Applicant has also failed to show why Counsel should have objected to this evidence. Therefore, this Court finds Counsel was not deficient for failing to object to the bullet fragment.

Accordingly, this allegation is denied and dismissed.

13. Ketcherside’s testimony

Trial Counsel was ineffective for neglecting to make a Motion to Strike, and a request for an appropriate curative charge, after a defense objection to testimony from Investigator Ketcherside was sustained on the ground that the witness was not qualified to give the opinion testimony he asserted concerning the amount of blood you would expect to find on a knife if it had been in the victim’s hand as compared with the amount of blood on the weapon found in the hand of the deceased at the scene.

Trial Counsel was ineffective for failing to object to testimony from Investigator Ketcherside in which he stated his opinion concerning the direction in which blood found at the scene of the shooting appeared to be moving in where this witness had not been qualified as an expert witness in the field of blood splatter evidence, and related types of forensic evidence relating to blood evidence, but rather had merely stated that he had taken a course in blood splatter evidence.

Trial Counsel was ineffective for failing to object to testimony from Investigator Ketcherside concerning his testimony in which he claimed that what appeared to be a bloodstains on the knife found in the hand of the deceased was not blood, but rather was part of the blade itself, where this witness was not qualified by the Court as an expert who’s field of expertise would permit him to give competent opinion testimony on this subject matter, nor did he testify to any tests he personally conducted on that portion of the knife which supported that assertion.

Trial Counsel was ineffective for failing to object to testimony from Investigator Ketcherside concerning fingerprint evidence, and more specifically, the fact that the knife found in the victim’s hand was not a viable surface from which to get fingerprints, where this witness had not been qualified by the Court as an expert in fingerprint technology.

Trial Counsel was ineffective for opening the door to the introduction of State’s Exhibit No. 75, a particularly gruesome photograph of the deceased, by raising

questions concerning the relative volume of blood found at various locations at the scene.

Trial Counsel was ineffective for failing to make a proper objection to testimony from Investigator Ketcherside concerning his speculation that the volume of blood located at one place at the scene appeared to be due to the fact that the victim may have been trying to hide, where this witness was not qualified to render expert testimony concerning blood evidence, where his testimony was based on sheer conjecture and appealed to the passions and prejudices of the jury without evidentiary foundation and was prejudicial to Applicant claim of self-defense.

Counsel objected to Ketcherside's testimony when he attempted to give opinion testimony concerning what the amount of blood on the knife meant. Tr. 181. Counsel's objection interrupted Ketcherside before he could give his opinion. Applicant's allegation that a curative instruction should have been requested is without merit. No curative instruction was necessary because the improper evidence never reached the ears of the jury.

Ketcherside gave an opinion concerning the direction the blood appeared to be moving. Counsel testified this opinion was not harmful to Applicant. Applicant testified the victim continually backed into the house after being shot. Ketcherside's opinion, the blood trail showed movement towards the kitchen by the victim, was consistent with Applicant's version of events. Tr. 177; 374.

The rest of Ketcherside's testimony was not expert testimony. Counsel's cross-examination of Ketcherside revealed that Ketcherside could not give a specific opinion as to why the blood was there, because it was beyond his expertise. Tr. 248. Ketcherside's testimony was appropriate lay testimony concerning what he observed at the scene. Therefore, Counsel was not deficient because he properly objected to the opinion testimony he felt would prejudice Applicant's case. The other instance of opinion testimony by Ketcherside was consistent with Applicant's testimony and, therefore, not harmful to Applicant's case. The remainder of Ketcherside's testimony was appropriate lay testimony. Applicant has also failed to prove Ketcherside's

testimony, where objectionable, was prejudicial to Applicant and its exclusion had a reasonable probability of changing the outcome of the case. Therefore, this Court finds Applicant was not prejudiced by Ketcherside's testimony. This Court also finds Counsel was not deficient for failing to object to testimony that was not harmful to Applicant's case.

Counsel's cross-examination of Ketcherside concerning the location of the blood was not deficient. Over Counsel's objection, the State introduced State's exhibit 75 (75), a picture of the victim, in response to Counsel's cross-examination. Tr. 261. 75 showed the victim with a large amount of blood under his body. Tr. 262. Counsel testified his strategy concerning the blood was to show the victim bled out where he fell. This Court finds Counsel's cross-examination was appropriate. While Counsel did not want 75 admitted his conduct did not fall below professional norms. "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled." Chandler, 218 F.3d at 1313. This Court finds Counsel's performance did not fall below the threshold of the constitutionally guaranteed professional norms. Therefore, this Court finds Applicant has not proven Counsel was deficient under Strickland.

At trial, Counsel argued 75 was more prejudicial than probative, but the trial court allowed it in over his objection. Tr. 265. At the evidentiary hearing, Counsel testified 75 was not "damning," but did feel obligated to object to the picture at trial. 75 was similar to other pictures already in evidence and only showed more blood than the other pictures. Tr. 262. In this case, 75 was not overly prejudicial. The victim's death by five bullet wounds and the pictures concerning the victim's blood trail were already in evidence. 75 was not particularly gruesome compared to other pictures and wounds. This Court finds the introduction of 75 was not so prejudicial that its

exclusion would have had a reasonable probability of changing the outcome of the case. Therefore, this Court finds Applicant has not proven he was prejudiced by the introduction of 75.

Accordingly, these allegations are denied and dismissed.

14. Failure to impeach State's witnesses

Trial Counsel was ineffective for neglecting to obtain a ruling from the trial court concerning the admissibility of the prior criminal record of certain state witnesses for impeachment purposes pursuant to 608(c), SCRE.

Counsel testified he did not attempt to impeach Sean Garvin because he wanted him off the stand and did not want to give him the opportunity to attack Applicant's character. Counsel testified that Sean Garvin believed Applicant made lewd comments and advances on his wife and Counsel did not want to give Garvin the chance to testify about that incident. "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). A strategic or tactical decision does not have to be articulated by counsel. A court may infer from the record that Counsel's actions reflect strategic decisions and, thus, should not be disturbed under Strickland. See Wood v. Allen, 558 U.S. 290 (2010). Further, the charge Applicant asserts Counsel should have used to impeach Garvin is from 1998, more than ten years prior to the trial.

This Court finds Counsel elucidated a reasonable trial strategy for deciding not to impeach Garvin. Further, this Court finds the conviction Applicant alleges Counsel should have used to impeach Garvin was not appropriate for impeachment. "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed... unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the

adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.” Rule 609(b), SCRE. Counsel did not provide the State with written notice of his intention to use the 1998 conviction nor was the conviction so probative that it substantially outweighed the prejudicial effect. Therefore, Counsel was not deficient for failing to impeach Garvin with his conviction.

Applicant also alleges Counsel should have impeached Garvin on whether he was testifying against Applicant because Applicant obtained a restraining order against him. Counsel testified he did not want to impeach Garvin on the restraining order because the restraining order was obtained over the very event Counsel wished to avoid Garvin discussing. Counsel believed that attacking Garvin’s potential bias against Applicant would open the door for Garvin to testify about the underlying incident and, thereby, attack Applicant’s character. Counsel believed getting Garvin off the stand before he could damage Applicant’s credibility was more important than any potential impeachment of Garvin. This Court finds Counsel provided a valid trial strategy reason for deciding not to impeach Garvin. Therefore, this Court finds Counsel was not deficient for deciding not to impeach Garvin.

Accordingly, this Court denies and dismisses this allegation.

15. Failure to adequately cross-examine pathologist.

Trial Counsel was ineffective for neglecting to adequately cross-examine Dr. Janice Edwards Ross concerning her assertion that the presence of stippling around a wound on the victim’s left cheek indicated that the gun was well within inches of the victim’s cheek.

Trial Counsel was ineffective for neglecting to adequately cross-examine Dr. Ross concerning her testimony that when a person bleeds out and becomes unconscious their muscles relax causing anything they are holding to fall to the floor or whatever surface they were on, as well as her claim that, “it’s not typical to see your weapon remaining in the hand that way.”

Trial Counsel was ineffective for failing to adequately examine Dr. Ross, the State's pathology witness, concerning the forensic explanation for the apparent void in the blood found inside the hand in which the Victim was found holding a knife, and the fact that there was no forensic evidence tending to prove that there had been an effort to clean away blood from the Victim's palm.

Trial Counsel was ineffective for failing to cross-examine Dr. Ross concerning whether she had access to the Victim's medical records at the time of the autopsy, and whether either her physical examination of the deceased, or any medical records made available to her, reflected evidence of a physical disability.

Trial Counsel was ineffective for failure to cross-examine Dr. Ross concerning her assertion that one of the Victim's wounds was stellate in order to clarify that it was an exit wound, not an entrance wound, that exhibited that pattern and the significance of that distinction.

Counsel was not ineffective for failing to cross-examine Dr. Ross concerning her testimony the victim was very close when the shots were fired, which was consistent with Applicant's testimony. Tr. 332; 370. Therefore, because it was consistent with Applicant's testimony concerning the distance between himself and the victim, the stippling around the gunshot wound to the victim's face was helpful to Applicant. Tr. 332. Based on that stippling, Dr. Ross testified the gun was mere inches from the victim's face when the shot was fired. Tr. 333. The further away Applicant was from the victim when the shots were fired the weaker Applicant's case for self-defense becomes. Therefore, Counsel was not deficient for failing to cross-examine Dr. Ross to prove Applicant was further away from the victim than Dr. Ross testified. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Counsel was also not ineffective for failing to re-iterate testimony from Dr. Ross that was harmful to Applicant's case. Dr. Ross testified it would not be typical for a knife to remain in the hand the way Applicant's knife was when law enforcement arrived. Tr. 338. At the PCR hearing, Dr. Ross testified she was 99% sure the weapon would not remain in the victim's hand the way it

appeared in the picture and the position was consistent with cases she had where the weapon was staged. This testimony would have been very harmful to Applicant's case. Counsel's decision not to cross-examine Dr. Ross concerning the position of the victim's knife prevented this harmful expert opinion testimony from coming in at trial. Therefore, Counsel was not deficient for keeping harmful testimony from coming in at trial. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

No Evidence was presented indicating the victim's hand had been cleaned of blood nor do the photographs depict a lack of blood on the palm of the victim's hand. Plaintiff ex. 10. Therefore, this proposed line of questioning would have been inconsistent with the evidence. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Dr. Ross testified concerning the victim's various serious medical conditions and health problems. Counsel's decision not to cross-examine Dr. Ross to ascertain if the victim had more disabling medical problems was sound. Asserting the victim had more disabling medical problems could only serve to weaken Applicant's self-defense argument. Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Accordingly, this Court denies and dismisses these allegations.

16. State's closing argument.

Trial Counsel was ineffective for failing to object to the State's closing argument on the law applicable to this case, where the prosecution improperly advised the jury that the use of a deadly weapon *was* evidence of malice thereby arguing a mandatory presumption of malice from the use of a deadly weapon.

Trial Counsel was ineffective for failing to object to the State's closing argument on the law where the prosecution improperly advised the jury that the use of a deadly weapon in this case was evidence of malice when the Appellant had asserted self-defense and where the trial judge had already indicated his intent to submit the lesser-included charge of Voluntary Manslaughter to the jury.

Applicant's assertion that Counsel should have objected, based on Belcher, to the State's argument for malice during the State's closing argument misunderstands the holding of Belcher. The Supreme Court of South Carolina specifically held that the State may assert this argument. "In addition, we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). Accordingly, this Court finds Applicant has failed to satisfy his burden under Strickland to prove Counsel was deficient or Applicant was prejudiced by Counsel's conduct.

Accordingly, this Court denies and dismisses these allegations.

17. Failure to object to misstatement of evidence.

Trial Counsel was ineffective for neglecting to object to State's Exhibit No. 15 being referenced in Court as, "Defendant's Affidavit" where the document was not an original, was not signed by Applicant and was not notarized.

State's exhibit no. 15 was never referenced in Court as defendant's affidavit. The record clearly shows the court reporter marked State's exhibit 15 as 'Defendant's affidavit.' Applicant has not shown how the court reporter's identifying note, which was never heard or viewed by the jury, on State's exhibit 15 would have created a reasonable probability that the result of the trial would have been different. 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." Cherry, 300 S.C. at 118, 386 S.E.2d at 625. "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. at 670. Therefore, this Court finds Applicant was not prejudiced by Counsel's failure to object to a court reporter's notation.

This Court also finds Counsel's failure to object to the court reporter's note did not fall below the range of competence required in criminal cases. 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. Therefore, this Court finds Applicant has failed to overcome his burden to prove Counsel was deficient.

Accordingly, this Court denies and dismisses these allegations.

18. Cumulative

Applicant asserts that the cumulative prejudice arising from the numerous errors and omissions of Trial Counsel to be argued and proven by him in his Post-Conviction Relief action is such that it clearly warrants the reversal of his conviction and sentence on the ground that he received ineffective assistance of Counsel in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution.

This Court finds Applicant has failed to show Counsel was deficient and Applicant was prejudiced by any of the alleged grounds." When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice. Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (internal cites omitted). Accordingly, this Court also finds

the sum of the actions or inactions of Counsel did not equate to a deprivation of Applicant's constitutional rights. Further, the Court has not recognized whether cumulative error warrants relief in South Carolina and this Court also declined to do so.

Accordingly, this Court denies and dismisses these allegations.

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 10 day of jan, ~~2017~~ 2018



ROBERT E. HOOD
Presiding Judge
1st Judicial Circuit

Conway, South Carolina

LAW OFFICE OF



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MAR 30 2018

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March 28, 2018

Christian Saville, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

RE: George William Hughes, #364900 v. State of South Carolina; 2015-CP-38-1350.

Dear Mr. Saville:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. The family has retained me to handle this appeal. If you will not be handling this appeal for any reason, please let me know. I remain,

Sincerely yours,

A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

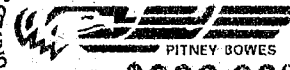
TDS/sg

Enclosure

cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina ✓
George William Hughes, #364900
Frances Hughes



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