

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

MAY 16 2018

**S.C. SUPREME COURT**

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APPEAL FROM THE COUNTY OF HORRY

Court of Common Pleas

The Honorable Circuit Court Judge, Steven H. John

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Case No.2015-CP-26-8539

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JULIA SHAWNETTE GORMAN, SCDC #348815..... Petitioner,

v.

State of South Carolina, .....Respondent.

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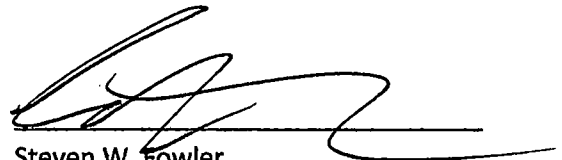
**NOTICE OF APPEAL**

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The Petitioner appeal the Honorable Steven H. John, Judge Order filed on April 11, 2018, denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on May 14, 2018 and copy of the said Order on appeal is attached to this Notice.

This is the 14th day of May, 2018.



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SC Bar #69683

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JULIA SHAWNETTE GORMAN, SCDC #348815 \_\_\_\_\_ Petitioner,

v.

State of South Carolina, \_\_\_\_\_ Respondent


**PROOF OF SERVICE**

I, Steven W. Fowler, court- appointed attorney for Petitioner, certify that I have today served within Notice of Appeal and Copy of the Order signed by the presiding Judge upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

- 1) Assistant Attorney General, PO Box 11549, Columbia, SC 29211 and
- 2) Clerk of the South Carolina Supreme Court , 1231 Gervais St, Columbia, SC 29201
- 3) Paula Murdoch, Appellate Defense Division, SCCID PO Box 11433 Columbia, SC 29211-1433

I further certify that all parties required by Rule to be served have been served on this below named date.

This is the 14 day of May, 2018.



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT	
COUNTY OF HORRY	)		
Julia Shawnette Gorman,	)	Case No.: 2015-CP-26-08539	
S.C.D.C. No. 348815,	)		
	)		
Applicant,	)	<b>ORDER OF DISMISSAL</b>	
v.	)		
State of South Carolina,	)		
	)		
Respondent.	)		

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 Horry County SC

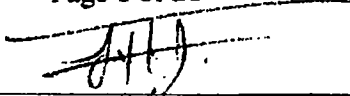
This matter comes before the Court by way of an application for post-conviction relief filed by Julia Shawnette Gorman ("Applicant") on December 3, 2015. Respondent made its return on or about May 5, 2016. The Court convened an evidentiary hearing into the matter on Wednesday, February 21, 2018, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Applicant's trial counsel, James C. Galmore, III, Esq. ("Counsel"), Applicant's appellate counsel, Susan B. Hackett, Esq. ("Appellate Counsel"), and the prosecutor on the case, Candice A. Lively, Esq. ("Solicitor") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

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**S.C. SUPREME COURT**

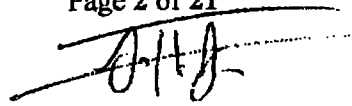


## I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the September 2008 term of the Horry County Grand Jury for homicide by child abuse (2008-GS-26-03756). Applicant was further indicted at the February 2010 term for unlawful conduct towards a child (2010-GS-26-00841), and at the May 2010 term for aiding and abetting homicide by child abuse (2010-GS-26-02194). James C. Galmore, III, Esq. represented Applicant, and Candice Lively, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On November 14, 2011, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on November 18, 2011. Judge Hyman sentenced Applicant to imprisonment for concurrent terms of 35 years for the homicide, 10 years for the unlawful conduct, and 20 years for aiding and abetting.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Susan Hackett, Esq., who raised the following issues on appeal:

1. Appellant's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution was violated by the introduction of her statements to police where the first statement was the product of an interrogation by officers who failed to advise Appellant of her Miranda warnings and the second statement was tainted by the initial violation and was the product of an involuntary waiver.
  - a. The court erred in admitting the statement made by Appellant prior to officers advising Appellant of her Miranda rights and obtaining a valid waiver of those rights where Appellant clearly was in custody based upon the totality of the circumstances.
  - b. The court erred in admitting the statement made by Appellant subsequent to the officer advising her of her Miranda rights and obtaining an involuntary waiver of those rights because the statement was tainted by the initial violation where the same officers questioned appellant in the same interview room and in close temporal proximity to the prior unwarned interrogation.



- c. The court erred in admitting the statements made by Appellant because the statements were not the product of a voluntary waiver of Appellant's rights due to Appellant's lack of sleep, state of shock and grief over the loss of her grandson, lengthy detention for interrogation, and ingestion of a prescription anti-anxiety drug during the interrogation.
2. The trial court erred in failing to direct a verdict of acquittal in Appellant's favor where the state failed to present any direct or substantial circumstantial evidence that Appellant committed the alleged criminal acts.

The parties proceeded to oral arguments on October 9, 2013. By opinion decided February 12, 2014, the South Carolina Court of Appeals affirmed Applicant's convictions for homicide and unlawful conduct towards a child, but reversed her conviction for aiding and abetting. State v. Palmer/State v. Gorman, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014).

Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, raising the following issue:

Did the Court of Appeals err in failing to direct a verdict of acquittal where the state failed to present any direct or substantial circumstantial evidence that Petitioner committed homicide by child abuse and unlawful conduct toward a child?

The Supreme Court granted certiorari by order dated September 24, 2014. The parties proceeded to oral arguments on June 17, 2015. By opinion decided July 29, 2015, the Supreme Court of South Carolina sustained the Court of Appeals holdings with respect to Applicant.<sup>1</sup> State v. Palmer/State v. Gorman, 413 S.C. 410, 776 S.E.2d 558 (2015). The Remittitur was issued on September 23, 2015.

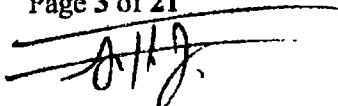
#### **Present Application**

In her post-conviction relief application, Applicant alleges she is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that:

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<sup>1</sup> The Court reversed the two remaining convictions against Applicant's co-defendant, Robert Palmer.



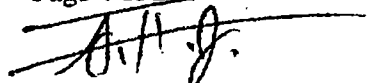
- a. "trial counsel failed to provide alibi witness and alibi defense"
- b. "did not ask for a direct verdict based on the county which was prejudiced & didn't raise severance"
2. Ineffective assistance of appellate counsel; and
3. Prosecutorial misconduct, in that:
  - a. "of suppression of evidence by prosecution"

Applicant requested relief as follows:

- "direct verdict of acquittal"

Upon motion by Respondent, the Honorable William H. Seals, Jr. issued a Conditional Order of Dismissal dated May 11, 2016, and filed May 23, 2016, finding Applicant exclusively sought relief to which she was not entitled, and granting Applicant twenty days to give specific reasons why the order should not become final. Applicant timely responded and clarified the allegations set forth in the application:

1. Ineffective assistance of counsel, in that:
  - a. "My Fifth and Fourteenth Amendment rights to due process of law against self-incrimination was violated when the detectives interrogated me without properly issuing me my Miranda Rights. My trial counsel was ineffective; in the fact, he failed to satisfy the court by not retracting the tainted statements. The coerced statements were the product of an involuntary waiver."
  - b. "Trial counsel was further ineffective in that my Fifth Amendment right was violated. Trial counsel failed to have the evidence of the coerced video tape suppressed. The court erred in admitting the statements were made under duress. It was not the product of a voluntary statement; due to the shock, grief, the loss of my grandson [REDACTED], the lack of sleep, and the influence of medication (Xanax) during the lengthy, berating, harsh interrogation."
  - c. "In addition, my trial counsel, failed to supply any alibi witness and/or alibi defense."
2. Ineffective assistance of appellate counsel, in that:
  - a. "My appellate defense attorney was ineffective due to the fact she did not request severance of jurisdiction from my co-defendant Robert Andrew Palmer on the Appeal level."



b. "In addition, my appellate defense attorney should have requested automatic motion for acquittal of my sentence due to the lack of evidence found by the prosecution. Singleton v. State, 313 S.C. 75, 85, 437 S.E.2d 53, 59-60 (1993)."

3. The trial court lacked jurisdiction.

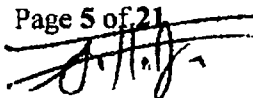
Upon the recommendation of Respondent at the outset of the evidentiary hearing, this Court vacated the Conditional Order of Dismissal and proceeded to a full hearing on the merits of the application, as functionally amended by Applicant's response to the Conditional Order. Applicant additionally testified to *numerous* grounds for relief not specifically pled.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.



"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. 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

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dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

***1. Failure to Challenge, Successfully Suppress Statements to Law Enforcement***


Applicant alleges Counsel was ineffective in failing to object to and win the suppression of her recorded statements to law enforcement after the victim's death.

Upon motion by the State seeking the admission of Applicant's video recorded statements to law enforcement, the Court conducted on October 31, 2011, a pre-trial hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964). After extensive *in camera* testimony by Detective Timothy Troxell, of the Horry County Police Department, and the full proffer of the 82 minute video recording of Applicant's statement of July 18, 2008, Applicant objected to the admission of her statement. (Hrg. 49-195).<sup>2</sup> Counsel argued Applicant's statement was not knowingly and voluntarily given in light of her continuous 40 hours without sleep, as well as her use of medication during the interview. (Hrg. 195, ll. 13-24). Counsel also noted Applicant's statements during the interview that she went to "two bars" during the night before the interview was given. (Hrg. 196, ll. 8-19). The Court found Applicant's statement was voluntary and indicated it would be admitted. (Hrg. 196-97). Counsel renewed his objection when the State sought to introduce the recorded statement at trial. (Tr. 674-75).

As previously indicated in the recitation of the procedural history, the voluntariness of Applicant's statement formed the basis of one of her issues on appeal, and the adequacy of her Miranda warnings another. The South Carolina Court of Appeals found the trial court's ruling as to the voluntariness of her statement was supported by the record. Palmer/Gorman, 408 S.C. at 236, 758 S.E.2d at 205. The Court of Appeals found "the police did not interrogate [Applicant]

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<sup>2</sup> Following the approach utilized by Appellate Counsel, the Court annotates the pre-trial transcript of October 31, 2011, as "Hrg."

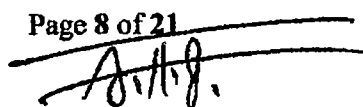


before giving her Miranda rights and thus no Miranda violation occurred.” Palmer/Gorman, 408 S.C. at 235, 758 S.E.2d at 204. These issues were not raised as part of the petition to the Supreme Court of South Carolina and, thus, were undisturbed.

At the evidentiary hearing, Applicant she did not know she was going to be interrogated. Applicant explained that at the time of the interview she was tired and medicated to the point that the police were able to convince her that she shook the victim, resulting in his death. Applicant admitted Counsel brought the matter to the Court’s attention, but felt he could have done more. Applicant noted Counsel “just said ‘okay’” after the Court denied his motion to suppress. Applicant similarly argued that her Miranda rights were violated because she did not know she was going to be interrogated and did not know she would be recorded during her interview. Applicant conceded her belief that Counsel did the best that he could and that “he did good.” Applicant further conceded she met voluntarily with law enforcement and that she could recall being read her Miranda rights.

Counsel testified he argued the statement was not freely and voluntarily made due to Applicant’s extended lack of sleep and use of medication. Counsel noted he thought he’d argued both Denno and Miranda to the satisfaction of issue preservation, but acknowledged the Court of Appeals found part of his Miranda arguments were not preserved.

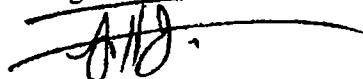
The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel clearly and effectively challenged the voluntariness of Applicant’s statement, raised the issue to the trial court, and received a ruling on the issue. That issue was then raised to the Court of Appeals, which also ruled upon it. Applicant did not offer in her testimony anything additional Counsel could have argued on the issue. The same applies to any potential argument on the basis of Miranda, and no conceivable additional argument meaningfully existed in light of the fact

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that, as noted by the Court of Appeals, “the police did not interrogate [Applicant] before giving her Miranda rights and thus no Miranda violation occurred.” Palmer/Gorman, 408 S.C. at 235, 758 S.E.2d at 204. Counsel did exactly what he was supposed to do—he sought relief, raised the issues, and was denied by the trial court. Applicant has failed to meet her burden as to either prong of Strickland; accordingly, her request for relief by way of this allegation is **DENIED**.

## ***2. Failure to Present Alibi Defense, Call Alibi Witness***

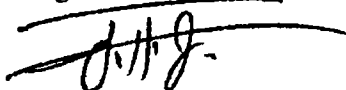
Applicant alleges Counsel was ineffective by failing to investigate an alibi defense at trial or call an alibi witness in her defense. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). Similarly, “[a] PCR applicant cannot show that he [or she] was prejudiced by counsel’s failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.” Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).



Applicant testified at trial that the victim was in the co-defendant's care and custody during the day on a daily basis. (Tr. 917, ll. 9-14). Applicant set forth a timeline of events occurring on July 14, 2008:

- Applicant woke at 4:15 AM (Tr. 917, ll. 16-18);
- Applicant clocked in to work at a Bass Pro Shop at 6:00 AM (Tr. 919, ll. 1-5);
- Applicant clocked out of work at 3:45 PM, but took another 10-15 minutes to exit the store (Tr. 919-20);
- Applicant drove 45-50 minutes directly home, arriving around 4:30 to 4:45 PM (Tr. 920, ll. 10-25);
- Applicant found the victim napping in his crib, then left the house 10 minutes later to conduct errands to an IGA grocery store some five minutes away, which Applicant corroborated with a bounced check with a time-stamp of 3:52 PM, which Applicant suggested was off by an hour (Tr. 921-27);
- Applicant spent five to ten minutes in a video rental store near the IGA in Aynor, then returned home some five minutes later (Tr. 927-28);
- Applicant immediately set to making dinner without checking on the victim, which took 20-30 minutes (Tr. 928-30);
- Applicant and co-defendant ate dinner for an indeterminate period of time, after which she checked on the victim and discovered him seizing; Applicant called 911 (Tr. 931-32).

Given a 911 dispatch call at 6:06 PM, Dr. Ann Abel, the State's expert witness in child abuse pediatrics, opined on cross-examination that the injury occurred either that day or, possibly, in the middle of the previous night. (Tr. 553-54). Dr. John Cacace, the State's expert witness in emergency medicine and trauma, testified Applicant demonstrated seizures resulting from intracranial injury upon arriving at the emergency room around 7:00 PM, that the injury was the result of non-accidental "tremendous force to the skull," and that given the injuries the victim suffered would be "immediately symptomatic[.]" (Tr. 352-75). Dr. Donna Day Roberts, the State's expert witness in neuro-radiology, concurred that a person with the victim's brain injury would be "immediately severely symptomatic" including "alteration or loss of consciousness,



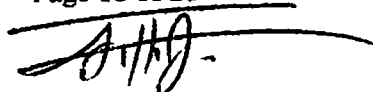
alteration in breathing, likely seizures, a child would not be able to walk, move, play with toys, cat.” (Tr. 419, ll. 3-14).

At the evidentiary hearing, Applicant testified Counsel did not adequately investigate an alibi defense. Applicant argued Counsel should have pulled video footage of her from the various retail establishments she visited over the course of the day. Applicant claimed Counsel only got the stamped check from the IGA and never explained why he didn't research the defense further. Counsel, in his own testimony, described the defense as a “not quite alibi” defense, for which he did not believe witnesses were necessary. Counsel conceded he could have called the video store, but noted his greater problem was with the clocked time on the check bounced at this IGA—the time between Applicant's clock-out at the Bass Pro Shop and the bounced check was roughly 9 minutes, and travel between the North Myrtle Beach and Aynor locations in that time was impossible.

The Court finds Applicant cannot prove any prejudice from her suggested courses of investigation. No alibi witnesses were presented at the evidentiary hearing, nor was any video evidence from the retailers, nor anything else of like kind. As such, all that is before the Court to support Applicant's allegation is mere speculation, which is simply not enough. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

### ***3. Failure to Sever Trial***

Applicant alleges Counsel was ineffective in failing to argue for severance of her trial from her co-defendant. “Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right.” State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999) (citations omitted). “A defendant who alleges he [or she] was improperly tried jointly must show prejudice before this Court will reverse his conviction.” Id. “The general rule

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allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." Id. "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001).

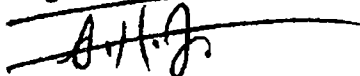
At the pre-trial motion hearing, Counsel motioned the Court sever Applicant's trial from that of her co-defendant, who opposed the motion. (Hrg. 6-7). Counsel argued that Applicant's specific trial right to a directed verdict would be jeopardized by a joint trial, and that the co-defendant was originally a cooperative witness for the State before the prosecution revoked his proffer. (Hrg. 8-12). The State clarified it would not call the co-defendant as a cooperative witness. (Hrg. 13, ll. 6-9). The State thereafter argued "[w]e have the same victim, the same time line[,]" and that severance would not be appropriate since there would be no deprivation of a crucial trial right, such as a Bruton<sup>3</sup> issue. (Hrg. 12-16). The Court found the case "should appropriately be tried together" and effectively denied the motion. (Hrg. 16-17).

At the evidentiary hearing, Applicant asserted Counsel should have fought harder in his motion and cited more caselaw in support of his motion. Counsel simply observed that he made the motion to the Court and was denied.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel properly moved for severance before trial, set forth grounds for his motion, and secured a ruling from the trial court. Applicant does not identify any specific trial rights that were compromised by the joint trial and which should have been raised by Counsel in arguing his motion, but only broadly argues that Counsel should have had "more fight." Nor does this Court observe any

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<sup>3</sup> Bruton v. U.S., 391 U.S. 123 (1968).



grounds upon which Applicant could have or should have been entitled to severance. Counsel did all that is reasonably expected of competent counsel in this state. Applicant has not and cannot prove either prong of Strickland and, accordingly, her request for relief by way of this allegation is **DENIED**.

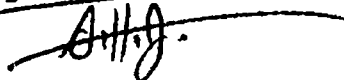
***4. Failure to Challenge Venue***

Applicant argued in her original application that Counsel was ineffective for failing to seek dismissal of the charges on the basis of venue. No testimony was provided at the evidentiary hearing on this subject, and the record before the Court clearly and unequivocally indicates the injuries to the victim were incurred in Aynor, South Carolina, which is situated in Horry County. The Court finds this allegation is abandoned by Applicant and is otherwise patently without merit; accordingly her request for relief by way of this allegation is **DENIED**.

***5. Failure to Call Expert Witnesses***

Applicant, during her testimony at the evidentiary hearing, raised for the first time an allegation that Counsel was deficient for failing to call an expert witness in her defense; namely an independent pathologist. In addition to Applicant's failure to properly raise this issue in her original application or by way of any amendment prior to the start of the evidentiary hearing, Applicant did not produce any such expert witness at the evidentiary hearing, nor was any evidence provided to show what such an expert's testimony would have been, and as such she cannot show prejudice. See Dempsey, 363 S.C. at 369, 610 S.E.2d at 814.

Furthermore, at the evidentiary hearing, Counsel testified he retained an expert witness, Dr. Juan Troncoso, a pathologist from John's Hopkins University, and had him available to testify. However, Counsel concluded the State's doctors conceded everything he felt Applicant needed to present her defense and, as such, no contradictory expert was necessary. Counsel

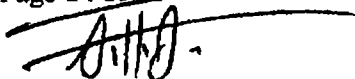
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indicated he did not wish to give the State any additional time by calling an unnecessary witness. Counsel having articulated a valid strategic reason at the evidentiary hearing, this Court cannot deem Counsel's conduct ineffective. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Accordingly, Applicant cannot meet her burden under Strickland and her request for relief by way of this allegation is **DENIED**.

***6. Failure to Call Character Witnesses***

Applicant, during her testimony at the evidentiary hearing, raised for the first time an allegation that Counsel was deficient for failing to call character witnesses in her defense. Just as above, in addition to Applicant's failure to properly raise this issue in her original application or by way of any amendment prior to the start of the evidentiary hearing, Applicant did not produce any such character witnesses at the evidentiary hearing, nor was any evidence provided to show what such an expert's testimony would have been, and as such she cannot show prejudice. See Dempsey, 363 S.C. at 369, 610 S.E.2d at 814.

Furthermore, Applicant conceded at the evidentiary hearing that Counsel explained to her why he would not call any character witnesses—the trial would become a circus. Counsel confirmed that explanation in his own testimony, and further reasoned that putting Applicant's character at issue would bring in matters relating to Applicant's "bad blood" with her daughter, the victim's mother, and could potentially open the door to the admission of prior investigations by social workers in California. Counsel having articulated a valid strategic reason at the evidentiary hearing, this Court cannot deem Counsel's conduct ineffective. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Accordingly, Applicant cannot meet her burden under Strickland and her request for relief by way of this allegation is **DENIED**.

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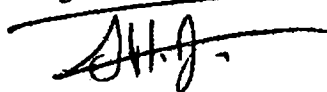
### **7. Failure to Object to Hearsay**

Applicant, during her testimony at the evidentiary hearing, raised for the first time an allegation that Counsel was deficient for failing to object to instances of purported hearsay. The out-of-court statement of a defendant, offered against him or her, is not hearsay. See Rule 801(d)(2)(A). At the evidentiary hearing, Applicant argued that testimony by witnesses that she stated “she never saw such a bad child” and that she had given medication to the victim was both inaccurate and inadmissible hearsay. Counsel noted the supposed hearsay involved out-of-court statements made by Applicant and, thus, were not hearsay.

Notwithstanding Applicant’s failure to properly plead this allegation prior to the evidentiary hearing, the Court finds Counsel was correct—the testimony in question regarded Applicant’s own statements and, thus, did not constitute hearsay. The Court finds no deficiency on the part of counsel, nor prejudice therefrom, for “failing” to object where no valid basis for objection existed. Accordingly, Applicant’s request for relief by way of this allegation is **DENIED**.

### **B. Ineffective Assistance of Appellate Counsel**

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to



appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .”)).

Applicant must show that appellate counsel’s performance was deficient and that she was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

#### ***1. Failure to Sever Appeal***

Applicant alleges Appellate Counsel was ineffective for failing to sever her appeal from her co-defendant. “Where there is more than one appeal from the same order, judgement, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.” Rule 214, SCACR.

As indicated in its published opinion, the Court of Appeals consolidated Applicant’s appeal with that of her co-defendant pursuant to Rule 214. Palmer/Gorman, 408 S.C. at 222 n.1, 758 S.E.2d at 197 n.1. The appeals remained consolidated before the Supreme Court. Palmer/Gorman, 413 S.C. at 410, 776 S.E.2d at 558.

~~A.H.G.~~

At the evidentiary hearing, Applicant simply observed that she and her co-defendant were still tried together on appeal, but that Palmer's convictions were ultimately overturned. Appellate Counsel testified that separate briefs were drafted and submitted by separate attorneys within the Office of Appellate Defense for Applicant's and her co-defendant's appeals. Appellate Counsel testified oral arguments for Applicant and the co-defendant were scheduled separately, but for the same day, with the co-defendant's argument occurring first. Appellate Counsel recalled that on the day of oral arguments, then-Chief Justice John C. Few asked at the outset if she was present in the courtroom, which she confirmed, at which point the appeals were consolidated. Appellate Counsel was surprised, but was unaware of any grounds for objection and noted the decision was one wholly within the court's discretion. Appellate Counsel testified the consolidation had no impact on oral arguments—she still received her full time to argue before the Court.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The decision to consolidate was entirely within the discretion of the Court of Appeals and appears to have been well made. Appellate Counsel credibly testified the consolidation had no impact on Applicant's appeal—Applicant was not deprived of time to argue and no evidence exists in the record to show her arguments were not fairly considered by the Appellate Court. Accordingly, Applicant cannot meet her burden under Strickland, and her request for relief by way of this allegation is **DENIED**.

## ***2. Failure to Raise Issues***

Applicant alleges Appellate Counsel was deficient by failing to seek her acquittal due to lack of evidence. The Court will not belabor this allegation—the record indicates Applicant is very simply incorrect. Appellate Counsel's brief to the Court of Appeals unequivocally states:

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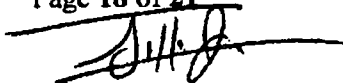
"As to Ground II, Appellant requests this Court direct a verdict of acquittal." Final Brief of Appellant at 31, State v. Gorman, App. Case No. 2011-203707. Appellate Counsel did this same in her brief to the Supreme Court: "Respondent/Petitioner respectfully requests this Court reverse the decision of the Court of Appeals and grant a directed verdict of acquittal in her favor[.]" Brief of Respondent/Petitioner at 18, State v. Gorman, App. Case No. 2014-001008. Applicant's allegation is factually without merit and her request for relief is therefore **DENIED**.

### *3. Conflict of Interest*

Applicant, during her testimony at the evidentiary hearing, raised for the first time an allegation that Appellate Counsel was deficient due to a conflict of interest. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an *actual* conflict of interest adversely affected his attorney's performance." Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (emphasis original). "However, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." Id. (citations omitted). An actual conflict of interest occurs "when a defense attorney places himself in a situation inherently conducive to divided loyalties." Id. (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)).

Applicant noted that both she and her co-defendant were represented by attorneys in the employ of the Office of Appellate Defense. Applicant recalled Appellate Counsel requested relief from the conflict of interest, which was denied by the Court of Appeals.

Appellate Counsel testified that while she represented Applicant, OAD colleague Robert M. Pachak, Esq. represented the co-defendant. Applicant testified the co-defendant's family was upset OAD would be handling both appeals and that, due to the facts of the case, Appellate

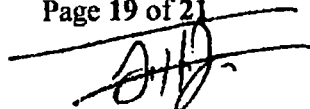


Counsel was concerned about the appearance of a conflict, despite OAD screen processes. Accordingly, Appellate Counsel requested outside counsel be appointed for Applicant. Appellate Counsel affirmed the Court of Appeals denied the motion in one page order. Appellate Counsel denied any coordination or collaboration with Pachak regarding Applicant's appeal, and noted screening processes within OAD.

The Court finds no actual conflict of interest existed. First, Appellate Counsel raised her concerns to the Court of Appeals and her motion for relief was there denied. This Court is bound to respect the ruling of the appellate court on the matter. Second, Appellate Counsel credibly testified there was no actual conflict, that she had nothing to do with co-defendant's appeal and that Pachak had nothing to do with Applicant's appeal. Applicant offered no evidence to show what, if any impact there was on her appeal as a result of OAD's screened representation of both her and her co-defendant. Accordingly, her request for relief by way of this allegation is **DENIED**.

### C. Prosecutorial Misconduct

Applicant alleges that the State failed to disclose evidence in its possession in violation of Brady v. Maryland, 373 U.S. 83 (1963). "Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment." Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993). "A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the

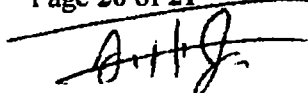
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defense, the result of the proceeding would have been different.” Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

At the evidentiary hearing, Applicant argued the State failed to turn over a copy of her interrogation tape, made late amendments to the indictments against her, and introduced hearsay at trial. Counsel testified he received everything in discovery and reviewed it. Solicitor testified she received motions pursuant to Rule 5, SCCrimP, and Brady, and turned over everything. Solicitor denied hiding anything.

The Court finds Applicant’s claims of prosecutorial misconduct entirely not credible. Both Counsel and Solicitor credibly testified everything was properly disclosed. The record before the Court, as well as the testimony at the evidentiary hearing, broadly indicate Counsel was familiar and prepared for the evidence against Applicant, including the recording of her interrogation by law enforcement. The allegations of late amendments do not constitute any form of misconduct, nor do the allegations the State admitted hearsay, which was already addressed in Section II.A.7 of this order. The Court finds no misconduct on the part of the prosecution and, accordingly, Applicant’s request for relief by way of this allegation is **DENIED.**

*[Conclusion and signature on following page]*

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### III. CONCLUSION

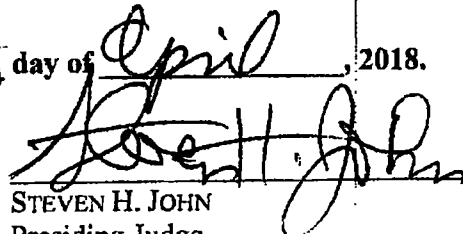
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5th day of April, 2018.

  
STEVEN H. JOHN  
Presiding Judge  
Fifteenth Judicial Circuit

Conway, South Carolina





ALAN WILSON  
ATTORNEY GENERAL

April 9, 2018

2018 APR 11 PM 12:58  
CLERK OF COURT  
HORRY COUNTY, SC

The Honorable Rence N. Elvis  
Clerk of Court, Horry County  
Post Office Box 677  
Conway, SC 29528-0677

Re: **Julia S. Gorman, #348815 v. State of South Carolina**  
**2015-CP-26-8539**

Dear Ms. Elvis:

Enclosed please find the original **Order of Dismissal** signed by the Honorable Steven H. John, in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRPC."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

If you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,

for Johnny Ellis James Jr.  
Assistant Attorney General

JEJ/mm

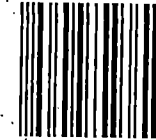
Enclosure

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