LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

June 19, 2018

RECEIVED

JUN 21 2018

S.C. SUPREME COURT

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

RE: Gene Tony Cooper, SCDC # 084279, vs. State of South Carolina
Appeal of Case No. 2013-CP-32-1929

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal. I was **appointed** to represent Mr. Cooper on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

Kristy Goldberg

CC: William Edgar Salter, III
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Gene Cooper, SCDC 84279
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

The Honorable Lisa Comer
Clerk of Court
205 East Main Street
Lexington , South Carolina 29072

1720 MAIN STREET • SUITE 303 • COLUMBIA, SOUTH CAROLINA 29201
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Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 21 2018

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2013-CP-32-1929

Gene Tony Cooper, SCDC # 084279, ... Appellant

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Dominique Cash hereby appeals from the Order of the Honorable J. Cordell Maddox, Jr. presiding Judge for the 11th Judicial Circuit, filed May 18 2018 and received by counsel for the Applicant on May 22, 2018 in the matter of Gene Tony Cooper v. State of South Carolina, Case No. 2013-CP-32-1929.

June 19, 2018

Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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v.

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PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on June 19, 2018 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, William Edgar Salter, III
Office of the Attorney General
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Columbia, South Carolina 29211

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Other Counsel of Record:
Assistant Attorney General, William Edgar Salter, III
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Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
Gene Tony Cooper, # 084279,	)	2013-CP-32-1929
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2018 MAY 18 PM 4:01
LISA M. COVER
CLERK OF COURT
LEXINGTON CO., SC

This matter is before the Court by way of a Post-Conviction Relief (PCR) Application filed on June 5, 2013, an Amended Application, and a November 29, 2017 Second Amended Application. The Court held an evidentiary hearing into the matter on December 11, 2017, at the Lexington County Courthouse. Applicant was present at the hearing and Kristy Goldberg, Esquire, represented him. Senior Assistant Attorney General William Edgar Salter, III, represented Respondent.

Lead trial counsel, David I. Bruck, was the only witness at the hearing. The Court had before it a copy of the Record on Appeal filed in connection with Applicant's appeal from his conviction and sentence; the records of the Lexington County Clerk of Court regarding Applicant's convictions; Applicant's South Carolina Department of Corrections (SCDC) records; and the pleadings in this action. The Court now denies relief and makes the following findings:

I. PROCEDURAL HISTORY

Applicant is presently confined in McCormick Correctional Institution, of the South Carolina Department of Corrections, as the result of his Lexington County conviction and sentence. The Lexington County Grand jury indicted him in January 1990 for murder,

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kidnapping, armed robbery, forgery (1990-GS-32-0083), and conspiracy to commit those offenses. (1990-GS-32-0084). ***R. pp. 1561-65***. The State sought the death penalty. Following a February 11-22, 1991 jury trial, Applicant was found guilty of murder, kidnapping, armed robbery, forgery and conspiracy to commit armed robbery. He received a sentence of death for murder. On direct appeal, the South Carolina Supreme Court reversed his murder conviction and vacated his death sentence, but affirmed his remaining convictions. *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994) (*Cooper I*), *overruled on other grounds*, *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001).

On September 4, 1995, Applicant filed a PCR Application as to the remaining charges. The PCR court granted relief, finding that his attorneys were ineffective in failing to properly advise Applicant of his right to address the guilt phase. Respondent appealed the PCR court's ruling. However, the South Carolina Supreme Court upheld the PCR judge's decision on August 12, 2002. It thereafter remanded the matter to Circuit Court. *Cooper v. Moore*, 351 S.C. 207, 569 S.E.2d 330 (2002) (*Cooper II*).

Applicant filed an Amended Demand for a Speedy Trial motion dated July 11, 2009. On August 18, 2003, the Honorable Marc H. Westbrook heard this motion. Applicant was represented by David I. Bruck, Esquire, and Robert Lominack, Esquire. Judge Westbrook took the matter under advisement. ***R. pp. 5-15***. The Honorable William P. Keesley held a second speedy trial hearing on February 15, 2005. Mr. Bruck represented Applicant. ***R. pp. 22-27***. Judge Keesley filed an Order for Speedy Trial on April 25, 2005, in which he directed the Eleventh Circuit Solicitor's Office to speak with the trial judge assigned to the case as well as "the Chief Judge for Administrative Purposes and select a firm date for the commencement of the trial, which shall begin in 2005." ***R. p. 29***.

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Applicant subsequently filed another motion for speedy trial and moved to dismiss the charges against him. The Eleventh Circuit Solicitor's Office filed a May 18, 2005 motion seeking to disqualify Applicant's trial counsel because of Mr. Bruck's improper contact with Southerland that resulted in a statement exculpating Applicant. The Solicitor's Office also moved to be recused because of a conflict of interest arising from the Office's employment of the original trial judge's law clerk. Judge Keesley held a hearing into these motions on July 12, 2005. Messrs. Bruck, Andrews and Duncan represented Applicant. Solicitor Myers represented the State. ***R. pp. 30-71.*** Judge Keesley filed an Order dated July 12, 2005, denying the motion to dismiss for failure to have a speedy trial, the request for bail and the motion to disqualify trial counsel. He granted the Solicitor's motion to be recused. ***R. pp. 76-79.***

The prosecution of the case was thereafter assigned to First Circuit Solicitor David Michael Pascoe, Jr. On December 29, 2005, Applicant filed a Notice of Motion and Renewed Motion to Dismiss All Charges for Lack of a Speedy Trial, Or in the Alternative for Release on Bail. ***R. pp. 81-85.*** In response, the State filed the "State's Response to Defendant's Motion for Speedy trial and/or Granting Bail" (***R. pp. 86-90***), and Applicant filed a reply to that pleading. ***R. pp. 91-100.*** The Honorable Daniel F. Pieper held a hearing on Applicant's motions February 8, 2006. Messrs. Bruck, Andrews and Duncan represented him at the hearing. Senior Assistant First Circuit Solicitor B. Harrison Bell represented the State. Judge Piper denied both of Applicant's motions in a lengthy Order dated April 21, 2006. ***R. pp. 328-344.***[1]

Applicant then received a jury trial before Judge Pieper on May 22 - June 1, 2006. Messrs. Bruck, Andrews and Duncan represented him. Mr. Bell and Assistant Fifth Circuit Solicitor Theodore Nichols Lupton represented the State. The jury convicted Applicant of each

[1] The First Circuit Solicitor's Office abandoned the State's intention to seek the death penalty.

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of the charged offenses. Judge Pieper sentenced him to life imprisonment for murder, twenty-five years for armed robbery and five years for the conspiracy count.[2]

Applicant timely served and filed a notice of appeal. Following briefing by the parties and oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentence. *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009) (*Cooper III*). On January 12, 201, the South Carolina Supreme Court granted a petition for writ of certiorari on Applicant's claim that he was denied his right to a speedy trial. However, the Court later filed a November 7, 2012 Order dismissing certiorari as improvidently granted. *State v. Cooper*, 400 S.C. 256, 734 S.E.2d 166 (2012) (*Cooper IV*). The Remittitur was issued on November 27, 2012.

Applicant then filed a Petition for Writ of Certiorari in the United States Supreme Court. The United States Supreme Court denied certiorari on May 13, 2013. *Cooper v. South Carolina*, 569 U.S. 976 (2013).

Applicant raised the following claims in his June 5, 2013 Application:

1. Ineffective Assistance of Counsel:

2. Due Process Violations of US Constitution, in that:

    a. "Sixth Amendment violation for speedy trial."

    b. "Fourteenth Amendment violation of due process of law."

    c. "Eighth Amendment violation for cruel and unusual punishment."

    d. "Article III, Section 3 violation for prosecution knowingly paying Robert Bo Southerland for is testimony, and Chief Justice Toal appointing Judge Pieper was a conflict of interest."

[2] Because of the murder sentence, Judge Pieper did not impose a sentence for kidnapping. *See* S.C. Code Ann. § 16-3-910 (Supp. 2008).

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The State filed its Return on December 9, 2013. On November 16, 2017, Applicant filed an Amended Application, with counsel's assistance. He raised the following claims in his Amended Application:

(a) Ineffective assistance of trial counsel for failing to request a continuance to ensure the attendance of witness Red Farmer as an in-person trial witness.

(b) Ineffective assistance of trial counsel for failing to request that the Court exclude testimonial evidence from Red Farmer.

(c) Ineffective assistance of trial counsel for failing to object and conceding to allowance of the Applicant's prior housebreaking and grand larceny convictions and introducing information regarding the Applicant's sentence on those prior convictions.

(d) Ineffective assistance of counsel for failure effectively challenge the testimony regarding the photo identification by Dana Harley.

(e) Ineffective assistance of counsel for failure to object to the speculative statement when witness Rick McDermott testified that the log was "too heavy for one person to lift alone," which the state was then allowed to address in closing argument over objection. Tr. 1103 and 1146.

(f) Ineffective assistance for failure to assist in having the Applicant submit his DNA for comparison to the available DNA evidence in this matter.

(g) Ineffective assistance of counsel for failure to object when the State argued facts not in evidence. Tr. 1204.

(h) Ineffective assistance of counsel for allowing the jurors to be aware of prior trial proceedings.

(i) Ineffective assistance of counsel for failure to call Applicant to the witness a second time to provide context and substance regarding his interview with Investigator Edward Hite as suggested by the Court. Tr. 1043.

(j) Ineffective assistance of counsel for failure to object when an out-of-court statement by the Applicant's mother was elicited for the truth of the matter and no hearsay objection was raised. Tr. 1061.

(k) Ineffective assistance for failure to effectively cross-examine Investigator Hite.

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(l) Ineffective assistance of counsel for failure to recuse himself from representation of the Defendant when he became interjected as a witness in the trial.

(m) The cumulative effect of trial counsel's errors constitutes ineffective assistance of counsel.

Applicant thereafter filed his Second Amended Application on November 29, 2017.

STATEMENT OF FACTS

The evidence presented at trial, viewed in the light most favorable to the State, proved that the Applicant Cooper kidnapped, robbed and murdered the victim (Kimberly Ann Quinn) as the result of a premeditated and sinister plot that originated with a state prison inmate and Cooper conspiring to rob Kim of an insurance settlement check from a car wreck. Cooper and Robert H. "Bo" Southerland carried out the crimes, with the aid and assistance of Brenda McLauren (Cooper's niece), even after they were aware that Kim did not have the insurance check. Cooper netted $ 149.00 for his maliciously brutal crimes. Although Southerland was the chief prosecution witness, much of his testimony was corroborated by other witnesses, including two who saw him and Cooper casing Kim's house on the day of the murder.[3]

Southerland testified that he had been convicted of murder, armed robbery, forgery and conspiracy to commit robbery in this case, and that Cooper was with him when these crimes were committed. Cooper "came by my trailer and woke me up Thursday morning about 8:30 and asked me if I'd help rob this gal, kill her." After he agreed, Cooper explained that "Red" Farmer had called and told him that she was getting an insurance check for $2800.00, and that "she wanted to buy half a pound of reefer." Southerland did not know either Farmer or Kim Quinn. ***Tr. pp. 413-14; 418.***

[3] As will be seen, only one witness identified both men. The other witness identified only Southerland.

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The men went down to where Cooper's niece, McLauren, was working "because he didn't know where [Kim] lived .... And when he walked in, she told him that Red wanted him to call ... him, so she gave him a phone number." Cooper called Farmer and had a conversation. Cooper went back into the store and McLauren wrote down the instructions where she lived. Next, the men went down to Platt Springs Road.[4] There was only one house fitting the description that McLauren had given, and it was "right across from some apartments." Southerland told Cooper that people would notice the car, so he pulled into the apartment complex, parked and waited for several minutes. ***Tr. pp. 418-20.***

Next, Cooper drove to NAPA Auto Parts right off Charleston Highway and used the phone to call her house. After he got an answering machine, he got back into the car, and they drove back and forth for a period before pulling into the parking lot of the apartment complex again. Cooper got out and told Southerland to go to a pay phone and call Kim. Southerland did as he was instructed. When Kim picked up the phone, he acted as if he had the wrong number by asking for someone else. Next, he drove back and picked up Cooper. He also told Cooper that she had answered the phone. ***Tr. pp. 420-22.***

Cooper got into the car and began driving up and down the road again. He then pulled back into the apartment complex and "sat there for a while." Next, he drove to a pay phone and called Kim. Again, he got the answering machine. It was before 3:00 p.m. Afterwards, Cooper drove to the apartment complex, backed the car into a space and they sat there. A blonde haired lady that lived across from where they were parked "[came] out and was looking at the car." ***Tr. pp. 422-23.***

[4] They were riding in Cooper's Mercury Cougar. (State's Ex. 17). Cooper was driving, even though Southerland admitted he had been driving this car for a couple of weeks. ***Tr. p. 419.***

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They left the apartments, and Cooper drove to the store where McLauren worked. Cooper instructed her to go to Kim's house, and see if she had the money and if she still wanted the marijuana. They followed McLauren to Kim's house in their car and stopped about a half block away. After they saw her pull up to the house, they realized that this was not the house they had previously been watching. McLauren came out roughly fifteen minutes later, and they followed her to the West Columbia Post Office. Cooper "blew up" when McLauren told him that Kim didn't have the money, that she wouldn't be getting the check until that Tuesday, and that the check she had was only for $240.00. Cooper told her that she lied to him. He then leaned into the car, and spoke to her. After that, he said, "Damn the money, I'm going to kill the bitch." ***Tr. pp. 423-26.***

This happened between 3:00 and 4:00 p.m. McLauren went home and Cooper took Southerland back to the South Congaree trailer park where he was living.[5] Cooper said that he would come pick him up at eight, and that they would go to a bar on Platt Springs Rd., near Kim's house, and drink some beer. Southerland went to Donnie Shumpert's house around 6:30 or 7:00 p.m., where he smoked marijuana[6] and he waited for Cooper, in a trailer belonging to Shumpert's nephew, located on the same property. When Cooper arrived, he was in his green truck. They then went to a "beer joint" off of Platt Springs Rd. and had a few beers. ***Tr. pp. 425-29.***

From there, they went to a store in "Triangle City," where Cooper used the telephone to call his wife at 9:00 p.m. As they passed Kim's house on their way to the store, a flatbed truck was sitting in the driveway. Farmer had told Cooper that Kim had a boyfriend and they figured

[5] Southerland knew a few people in the trailer park and he knew that Mr. Cooper, who is Applicant's father, lived on Greenwood Drive.

[6] Southerland had bought a half ounce of marijuana so that Kim could smoke it to see if she wanted to buy a half pound of it.

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that was him. After Cooper called his wife, they rode by Kim's house and saw that the truck was still there. So, they returned to the bar and shot a game of pool. ***Tr. pp. 429-30.***

When they later rode past Kim's house again, they saw a man saying goodbye to her. So, they "rode back down and turned around and come back, went to the club and we sat there just a bit. And we rode back down there and the truck was gone." ***Tr. pp. 429-30.*** After Cooper stopped at a store to buy a six pack of Budweiser, they went Kim's house and pulled into her driveway. It was after 10:00 p.m. Cooper got out, walked up to the door and went inside with Kim when she answered the door. A few minutes later, Cooper came to the screen door and motioned for Sutherland to come in the house. Southerland grabbed the six-pack and went into the house. Kim's daughter, Amanda, was sleeping in the front part of the house. ***Tr. pp. 430-31.***

Cooper told Kim that he heard that she wanted to buy some marijuana and that Southerland had some for her to sample. Southerland "rolled a joint" and smoked it with her, and she said it was good. She told him that she had been on morphine and felt bad, but that this calmed her down. Kim refused Cooper's offer of a beer. She said that she wanted a Coke and something to eat. So, Cooper offered to drive her while Southerland would babysit. Kim agreed and she left with Cooper. ***Tr. pp. 430-31.***

Southerland was finishing his third beer when Cooper came into the house, saying "we got to go, we got to go." When Southerland asked where Kim was, Cooper told him that she was at "the pond." Southerland knew that the pond to which Cooper was referring was a pond off Beckman Drive, in South Congaree, which they had visited a couple of times. After Cooper told Southerland where he had parked the truck (a short distance from Kim's house), Southerland went and sat in it. Cooper walked up about ten minutes later, carrying a black plastic bag. In response to Southerland's inquiry, he said a leather jacket was in it. As they headed to the pond,

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Southerland asked what Cooper was going to do, and Cooper said that "he was going to kill her." ***Tr. pp. 431-32.***

They arrived at the abandoned house near the pond, and Cooper got out with a pump shotgun that came from a trailer Cooper and Southerland had broken into a few weeks earlier.[7] Kim was tied to the door inside the house. Her hands were handcuffed behind her, with a stick run through it, and she was "tied in" with strips from a curtain that had apparently been hanging in the house. Cooper untied her. As soon as Cooper took a gag out of her mouth, she asked Southerland for help. However, he did not do anything because Cooper was armed and Southerland could not help her. Kim told Southerland that Cooper had beaten her with a stick, and after Cooper pulled her pants down and shined his flashlight, Southerland could see "the stripes on her bottom where he had beat her." Cooper told Kim that he wanted to know the names of the people for whom she worked, and whether they had drugs or money. ***Tr. pp. 432-34.***

Then, Cooper pulled her outside and told her that he was going to kill her. He shot her even though she begged for him not to kill her, and she fell over on her left side. Realizing that she was still breathing, Cooper said, "She ain't dead" and he shot her again in the neck. He shot her two more times, until all of the shells were gone. Afraid that authorities might recognize the handcuffs he had used had been stolen from C.C.I., Cooper got his ax from the gun rack of his truck and chopped off both of Kim's hands. ***Tr. pp. 434-35.***

Following Cooper's orders, Southerland chopped off her feet. Because her pants made this difficult, Cooper removed her pants and threw them in the pond. Cooper dragged her body closer to the pond and put limbs on it. At Cooper's direction, Southerland retrieved a chair from

[7] Southerland had fired off a round in this weapon at Donnie Shumpert's house on the previous night. *Tr. p. 433.*

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near the steps to the house and he set it on her. Cooper said "that's her seat in Hell." He then got a gas can from his truck, poured gas on her and lit it. As her body was burning, Cooper took the rings from her severed hand and threw them in the pond. He gathered her hands, her feet and the handcuffs, and Southerland picked up the gun, the ax and the gas can. Then, they left. ***Tr. pp. 435-36.***

Their next stop was the Congaree Creek Bridge on 302. Cooper had placed Kim's hands and feet in a plastic shopping bag and they threw them into the water along with the ax. After these grizzly events, Cooper drove to the Crown Store, bought two hot dogs and ate them. Finally, they went to Cooper's trailer and washed the clothes that they had been wearing. Southerland took a shower and slept on the couch. They buried the murder weapon the next morning in some woods near Cooper's trailer. ***Tr. pp. 437-38.***

Later, the men went to a bank in Cayce, where Cooper used Kim's state I.D. card and cashed the check he had stolen from her purse. They drove around for some time. Then, Cooper went to a car wash, where he washed and vacuumed the truck. Southerland went to Cooper's trailer later Saturday night, and he saw Cooper painting parts of the cab of the truck, a tool box and the rear window black. ***Tr. pp. 437; 439-40.***

On Sunday, Southerland was driving down 302 into West Columbia and he ran into Cooper near the residence of Cooper's father, where Cooper had picked up a camper that he kept there. Cooper told him that "they must have found the body because you could see the cars going down the dirt road." Southerland followed Cooper back to Pelion.[8] The camper had a T.V. and Cooper wanted to watch the news to see if there was any coverage about the murder. He also wanted to get a newspaper to see if it was in there as well. ***Tr. pp. 440-41.***

[8] Cooper told him that he could rent the camper for $50.00 a week. ***Tr. p. 441.***

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The remaining evidence offered by the prosecution, including testimony from a number of witnesses without any involvement in the murder, corroborated many aspects of Southerland's testimony. This evidence proved that Kim and her six-year-old daughter, Amanda, lived in a West Columbia, South Carolina home in October 1989. She was unemployed and received a monthly AFDC check of $149.00. The check was mailed so that she received it by October 1st. At the time of her murder, Kim's boyfriend, Eugene Carter, was incarcerated at C.C.I. Carter was friends with Philip "Red" Farmer, another inmate who was also friends with Cooper and Cooper's niece, Brenda McLauren. ***Tr. pp. 156-57; 165-68; 173-74; 371-72; 695-704.***[9]

Farmer was housed in Cell Block 3 (CB-3), from where he was able to make collect telephone calls. Also, Farmer worked in C.C.I.'s educational department, located in the Stoney Building, which gave him access to additional State telephones. On Tuesday, October 3, 1989, Carter told Farmer that Kim was supposed to be receiving an insurance check for $2,800.00, as settlement of a claim against an automobile insurance carrier.[10] The following day, October 4, Farmer received a visit from McLauren, (Cooper's niece and co-defendant), who routinely visited him. During this visit, Farmer instructed her to have Cooper contact him. Farmer called Cooper at his home around 7:30 p.m. ***Tr. pp. 704-09.***[11]

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[9] The trial judge ruled that Farmer was an unavailable witness. The State published his 1991 testimony on direct examination over objection. ***Tr. pp. 694-715.***

[10] Farmer testified that he, Kim, Gerald Legrand and two other people were engaged in an ongoing conspiracy to smuggle drugs into C.C.I. ***Tr. pp. 727-28.*** Legrand's testimony corroborated this. ***Tr. pp. 676-65; 688-90.***

Also, the parties stipulated that Kim had been involved in an accident in January 1989. She had settled a claim against the insurance carrier for $7,750.00. Of this amount, she was to receive $2,831.18. The rest was to cover her expenses. The money was not to be paid until October 10, 1989. ***Tr. pp. 370-71. See also Tr. pp. 174-75.***

[11] Mr. Blake Taylor, who was Director of S.C.D.C.'s Internal Affairs and Audits, testified that there were no records of local calls from the educational unit. However, McLauren's visit was logged in S.C.D.C. records. ***Tr. pp. 766-77***; State's Exhibit 41.

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Farmer told Cooper that Kim was "receiving an insurance check for $2,800.00. I also told him it would be a good opportunity to rob her." Cooper "... said he didn't see any problem with it." Also, Cooper "[t]old me that he didn't have any respect for the bitch." For his part in the robbery scheme, Farmer was supposed to receive $500.00. Following this conversation around 9:30 p.m., Cooper called Kim at her home. ***Tr. pp. 709-10.***

On the morning of Thursday October 5, 1989, Mr. Dana Harley was working as the maintenance man at Lynn Gate Apartments, across the street from Kim's residence. He identified Cooper and Southerland as occupants of a white Mercury Cougar. They drove into the complex's parking lot around 9:30 a.m., and they backed into a space from which they could easily watch Kim's house. They left after roughly fifteen minutes. They returned about forty-five minutes later, and the passenger, whom Hartley identified as Cooper, walked up to and sat on the steps of the apartment that Hartley was cleaning.[12] Again, Cooper was positioned so that he could watch Kim's house on Platt Springs Road. Ten or fifteen minutes later, the Cougar returned, picked up Cooper and left. ***Tr. pp. 214-21; 224-26; 231-36.***

Harley saw Cooper and Southerland pull back into the parking lot sometime "around 3:00 [p.m.] or so." Again, they backed into the same space and sat for a few minutes before leaving. Hartley got the license tag number of the Cougar (State's Ex. 17) on this occasion. The car left roughly around 3:30 p.m., but returned around 4:00 p.m. This last time, however, the car did not stop in the lot. ***Tr. pp. 222-27.***

The State also published the prior testimony of Mrs. Sharon Freeman Counts. She had testified in 1991 that she was a resident of Lynn Gate. She saw the car parked near her apartment

[12] Hartley paid attention to the men because they were suspicious. Also, he kept the apartment he was cleaning dark when they were present. While he watched Cooper through a peephole on the second visit, but otherwise watched both men through the apartment window. ***Tr. pp. 241-43.***

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between 2:30 and 3:30 p.m. on October 5, 1989. There were two white males in it, and she identified Southerland as the passenger. She thought this was suspicious, since "... the parking lot is always empty at that time." Her description of the passenger fit Southerland, and she testified that he had boldly stared at her. ***Tr. pp. 229-38; 248-58.***

On Friday, October 6th, both Harley and Mrs. Freeman told police what they had seen on the previous day and they described the two men (Cooper and Southerland). Mrs. Freeman's description of the two occupants was virtually identical to Harley's, and she selected Southerland as one of the men she had seen, from a photographic lineup. The only difference between her account and that given by Mr. Harley is that she stated Southerland was a passenger, whereas Mr. Harley remembered Cooper as the passenger. Harley selected both Cooper and Southerland out of a pre-trial photographic lineup, and he positively identified Cooper at trial. ***Tr. pp. 258-64.***

At roughly the same time that Cooper and Southerland were arriving near Kim's residence on the afternoon of October 5, Elizabeth Griffin - a good friend of Kim who drove Amanda and her own son to and from school - saw McLauren entering Kim's house as Ms. Griffin was leaving. Ms. Griffin last spoke to Kim around 11:00 p.m. on the 5th. Kim did not feel well, but was feeling better than she had earlier that evening. ***Tr. pp. 172-78; 186.***

Amanda testified that Kim was home, alone with her, when she went to sleep on Thursday night. Amanda had previously been in a fire and Kim was very protective of her. So, Amanda slept in the living room. Amanda later awoke to the sound of someone knocking at the door. Kim answered it. Two men came into the house although Kim did not want them to enter. "It was mean loud" and too loud for then-six year old Amanda to go back to sleep. "I had rolled over and someone told me to roll back over or they [were] going to do to me what they were doing to my mother." ***Tr. pp. 156-59.***

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Amanda awakened early the following morning, only to discover that her mother was missing. This was unusual for Kim, and the police were called. Neither friends nor law enforcement could find Kim on Friday, October 6th, and her $149.00 AFDC check was missing. Although her purse was found on the ground outside the house, her State I.D. card and all of the money was missing. Her rings, which she wore each day, were also missing, and there were some Budweiser beer cans in Kim's house. ***Tr. pp. 159-64; 166-69; 178-83; 188.***

The parties stipulated that someone other than Kim cashed Kim's AFDC check (State's Ex. 14) at a drive-through window of the Knox Abbott Drive branch of South Carolina National Bank around 9:17 a.m. Friday. The check was forged by someone who simulated Kim's signature and presented a South Carolina Department of Highways and Public Transportation identification card that had belonged to Kim. ***Tr. pp. 371-74.***

Meanwhile, Farmer had a conversation with Eugene Carter on Friday morning and apparently learned that Kim was missing. Farmer thereafter went to the education department and he received a telephone call from Cooper around 10:00 a.m.[13] Cooper told Farmer in a coded conversation "[t]hat my intelligence was wrong; that she did not have the twenty-eight hundred; that he completed the construction job that he was working on; ... that he had burned the excess material[;] and [that he] was real pleased with the job and didn't see any complication." Farmer explained this meant "[t]hat the robbery had been completed, ... that [Cooper] had killed Kim Quinn, ... [and] that he had burned the body." ***Tr. pp. 710-15.***

In October 1989, Teresa Shumpert Dunn was married to Donnie Shumpert. They lived in a mobile home on Glenwood Drive. Lee Chavis, Ms. Dunn's nephew, lived next door. Both witnesses knew Southerland and Cooper. Southerland would frequently stop by the Shumpert's

[13] There would not be any telephone record for a local call to this State telephone.

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residence and Cooper would come over to see him. ***Tr. pp. 653-56; 666-85.*** Chavis testified that they seemed to be "good friends." ***Tr. p. 669.*** Cooper appeared to be the leader between the two men, and Ms. Dunn testified that Southerland was not as friendly when Cooper was present. ***Tr. pp. 656-57.***

On the evening of Tuesday, October 3, 1989, Cooper and Southerland returned an air compressor that they had borrowed from Mr. Shumpert. They were in Cooper's green pickup truck. (State's Exhibit 30). Cooper also owned a Mercury Cougar (State's Exhibit 17), but he allowed Southerland to drive it. When Cooper and Southerland arrived on Tuesday evening, Southerland got out of the truck, pointed a shotgun in the air and fired it. Mr. Shumpert told him to put the weapon up because the children were outside, and Southerland put the shotgun back in Cooper's truck. Cooper and Southerland later left in the truck. ***Tr. pp. 657-59.***

On Thursday, October 5th, Southerland came over to Mr. Shumpert's shop, which was behind their residence. He asked what time it was and someone told him 10:30 p.m. He said that he had to go somewhere at 10:30. He walked out of the shop and Ms. Dunn did not see him again that night. The Cougar was parked in the yard after he left, and it was still parked at the Shumpert residence when Chavis left for work at 7:00 a.m., on Friday, October 6. ***Tr. pp. 659-61; 669-71.***

Authorities did not discover Kim on Friday or Saturday, October 7th. However, early Friday afternoon, Forest Ranger Mike Hutchins, with the South Carolina Forestry Commission, was dispatched to a fire in some woods near Beckham Road. This is also near the residence of Cooper's father. By the time he arrived, the fire was contained in a relatively small area and he did not further investigate, since there were no obvious signs of damage to an unoccupied building in the area. ***Tr. pp. 189-98.***

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Two boys discovered Kim's burned and mutilated body on Sunday, October 8th, and led their father to it. Their father then notified law enforcement. ***Tr. pp. 199-213.*** Her body was discovered in a condition very consistent with Cooper's statements to Farmer. Her brains had literally been blown out of her skull by a shotgun blast; a large amount of brain matter was discovered some distance away from her body; her hands and feet had been severed; and a fire, started by gasoline, had badly burned her body and the debris which had been piled on top of it. Again, Budweiser beer cans were found at the scene. Her jeans were found in the nearby pond. ***Tr. pp. 281-89; 343-45; 349-67; 388-90, 691.***

Divers from the Lexington County Sheriff's Department retrieved Kim's severed feet and her left hand from the Congaree Creek, near a bridge on Highway 302, in South Congaree. Also, Cooper's ax (State's Exhibit 22) was found near one of the feet. ***Tr. pp. 293-303.*** Even though the ax had been in the creek for several days, there were three separate spots which tested positive for human blood. ***Tr. pp. 381-82.*** When law enforcement examined Cooper's truck, they did not find any blood. However, the truck's cab had recently been painted black, including the floorboard, a tool box, the rear window and the area behind the seats. This made it difficult to accurately test for the presence of blood. Yet, samples of paint chips from the ax matched those taken from the cab. ***Tr. pp. 383-86; 399-411.***

Marsha Burroughs Crane testified that she was married to Cooper in October 1989. They lived in Pelion, South Carolina at the time. She testified that Cooper kept all of their vehicles clean and that he would wash them several times a week. ***Tr. p. 645.*** She last saw the ax that was introduced at trial when Southerland returned it on September 30th. ***Tr. p. 649.*** Cooper's parents lived on Greenwood Dr., in West Columbia. Their house was near the pond where Kim was murdered, and Ms. Crane had been there with Cooper. ***Tr. pp. 632-34.***

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Ms. Crane also knew Southerland. She described him as a "business acquaintance" of Cooper, but she admitted that she did not know what else the two men did together. Southerland came to their trailer on Wednesday October 4, 1989, around 9:00 p.m. She worked on Thursday night. ***Tr. pp. 649-51.***

On the Sunday after Kim's murder, October 8th, 1989, she and Cooper went to his parents' home and picked up Cooper's camper. Consistent with Southerland's account, she testified that they saw Southerland in "his" car on their way home. They pulled off of the road when he waived them down. After Cooper and Southerland exited their vehicles and had a conversation, the Coopers went home. ***Tr. pp. 634-36.*** Later Sunday evening, Cooper, Ms. Crane and her two boys went to the home of Cooper's sister in Wagner, South Carolina. Southerland and McLauren were also there. At some point, Cooper had a private conversation with his sister, McLauren (his niece) and Southerland. Ms. Crane did not hear the substance of that conversation. ***Tr. pp. 636-37.***

Finally, an autopsy by Dr. Joel Sexton -- who identified the body through medical records -- revealed that there had been three gunshot wounds. The wound to the head would have been immediately fatal and was listed as the cause of death. A wound to her back, near the shoulder blade, was fired before the head wound and caused extensive damage to about three-fourths of Kim's chest cavity. The remaining wound, to Kim's neck, would also have been fatal. Dr. Sexton opined that the post-mortem amputation of Kim's hands and feet were consistent with being caused by Cooper's ax. ***Tr. pp. 310-36.*** Dr. Sexton recovered buckshot, birdshot and wadding from the wounds. The buckshot was recovered from her neck, while the birdshot was found in the head wound. ***Tr. pp. 320-21.***

III. ALLEGATIONS

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Applicant alleges the following grounds for relief in his Second Amended Application:

a. Counsel was ineffective in failing to request a continuance to ensure the attendance of witness Red Farmer as an in-person trial witness;

b. Counsel was ineffective by unreasonably admitting impeachment evidence against Red Farmer which was more harmful to the Applicant's case than helpful;

c. Counsel was ineffective in conceding to allowance of the Applicant's prior housebreaking and grand larceny convictions and failing to object based upon the fact that they were overly prejudicial in that they are similar to the facts underlying the charges at issue in trial. Further, counsel was ineffective in that he unreasonably introduced information regarding the Applicant's sentence on those prior convictions including the fact that he had spent time in prison, all of which was unnecessarily prejudicial;

d. Counsel was ineffective in failing to obtain an instruction from the Court that witness Robert Southerland should not be allowed provide testimony introducing evidence regarding the Applicant's prior Armed Robbery convictions which were inadmissible and prejudicial;

e. Counsel was ineffective by failing to properly and effectively challenge the testimony regarding the photo identification by Dana Harley;

f. Counsel was ineffective in failing to object to the speculative testimony by Rick McDermott that the log was "too heavy for one person to lift alone," which the state was then allowed to address in closing argument over objection. Tr. 1103. And 1146;

g. Ineffective assistance for failure to assist in having the Applicant submit his DNA for comparison to the available DNA evidence in this matter;

h. Counsel was ineffective in failing to object when the State argued facts not in evidence. Tr. 1204, lines 4-6;

i. Counsel was ineffective in failing to call the Applicant as a rebuttal witness to provide context and substance regarding his interview with Investigator Edward Hite as suggested by the Court. Tr. 1043;

j. Ineffective assistance for failure to effectively prepare for the direct examination of the Applicant and the cross-examination of Investigator Hite;

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k. Ineffective assistance of counsel for failure to recuse himself from representation of the Defendant as he was a necessary witness in the trial; and

l. The cumulative effect of trial counsel's errors constitutes ineffective assistance of counsel.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe Mr. Bruck's lengthy testimony at the hearing, and to closely pass upon his credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Ineffective Assistance of Trial Counsel.

In a PCR action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must make a twofold showing. First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

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presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (Citation omitted).[14]

Even if the Applicant proves deficient performance, he must also prove that he was prejudiced by his attorneys' ineffectiveness because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To show prejudice, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Instead, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687).

Applying this standard to the claims raised by Applicant, the Court finds that he has not met his burden of proof.

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[14] The Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86 (2011), that:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; see also *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Richter, 562 U.S. at 105, 131 S.Ct. at 788.

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1. Counsel was not ineffective for failing to request a continuance to ensure the attendance of witness Phillip "Red" Farmer as a witness.

Applicant first claims (Ground a) that trial counsel was ineffective for not requesting a continuance to ensure the attendance of witness Phillip "Red" Farmer as a witness at trial. The Court finds that he has not proven either deficient performance or resulting prejudice under *Strickland.*

Mr. Bruck testified that he was lead counsel in the case, and that he was assisted by Stuart Andrews, Esquire, and Assistant Lexington County Public Defender John Earl "Jack" Duncan, Esquire. Mr. Bruck detailed his prior experience in criminal trial and appellate practice, at length.[15] He estimated that he had tried between fifteen and twenty capital trials and another ten noncapital trials. Also, he had tried other major felony cases while working in the Richland County Public Defender's Office. ***PCR Tr. pp. 42-45.***

Applicant's retrial differed from most typical cases because Mr. Bruck had represented Applicant for roughly fifteen years by the time of the 2006 retrial, including the direct appeal, the original PCR proceedings, and the PCR appeal in *Cooper II.* Further, counsel had transcripts of both Applicant's original trial and Southerland's trial, and counsel were aware of how the prosecution's witnesses had testified. ***PCR Tr. pp. 6-8; 45-46.***

While Mr. Bruck did not recall how many times he had met with Applicant, Applicant was cooperative with counsel and Mr. Bruck felt that they had met frequently enough for him and co-counsel to represent Applicant. Applicant has consistently denied involvement in Kim Quinn's murder. Additionally, counsel had thoroughly investigated Farmer's background and

[15] Among his many jobs, he was an Assistant Richland County Public Defender for over three years, eventually specializing in capital trials; he was the Richland County Public Defender for a year; he handled "the bulk of the South Carolina Office of Appellate Defense's death penalty appeals on a contract basis from 1980 through 1987 and was the Chief Attorney of that Office for three and one-half years; he has been the Federal Death Penalty Resource Counsel, since 1992; and he has taught a death penalty trial clinic at Washington and Lee Law School since 2004.

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had a witness who had taken a statement from him (***Tr. pp. 879-93; PCR Tr. pp. 12; 16-17***); counsel looked for some witnesses who were not called at trial; and counsel asked for some DNA analysis to be done, but this was not fruitful because the samples were too badly degraded. Counsel had an investigator to assist them in their efforts. ***PCR Tr. pp. 13; 46-49***. Applicant's defense at trial was that he was completely innocent. Therefore, counsel relied upon a "reasonable doubt" defense, and tried to expose the credibility problems with the prosecution's main witnesses. *See* ***PCR Tr. pp. 13; 49-50***.

The Court finds that counsel's investigation, both generally, and of Farmer, was more than constitutionally adequate. *See Strickland*, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments").

Further, whether Farmer was an unavailable witness and the State should therefore be permitted to publish his prior testimony from the 1991 trial was thoroughly litigated at trial. Counsel argued that the State's showing was "inadequate on its face;" that Farmer was "a classic unreliable witness," who ended up receiving a five year sentence in exchange for his testimony, when he was facing a life sentence; that the State had not requested a continuance to obtain Farmer's presence and had not taken timely and adequate measures to obtain Farmer's presence at trial; that the prior transcript of Farmer's testimony was not adequate to confront him, since Applicant had been unable to cross-examine Farmer about Farmer's subsequent criminal activity, which occurred after the 1991 trial; that Applicant was being denied the right to "face-to-face" confrontation; that Farmer had also given a statement to counsel's investigator to the effect that

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he would not testify at Applicant's retrial, and that his earlier testimony had resulted from physical coercion by police; that Applicant had since taken another statement from him; and that the State had not needed Farmer's testimony to convict Southerland. Ultimately, the trial judge ruled that Farmer was an unavailable witness[16] and that the State would be allowed to publish his prior sworn testimony. The trial judge gave trial counsel overnight to consider whether or not counsel wanted a continuance. ***Tr. pp. 73-125; 588-618.***

Counsel declined this offer. ***Tr. pp. 623-24; 627-28.*** However, counsel was allowed to present additional impeaching evidence. *See* ***Tr. pp. 744-65; 879-93.*** *See also* Ground (b), *infra.* The Court of Appeals affirmed the trial judge's ruling on direct appeal. *See Cooper III*, 386 S.C. at 218-21, 687 S.E.2d at 67-69.

Mr. Bruck's assessment was that Farmer was an important prosecution witness because he was only witness to provide direct evidence of Applicant's involvement in the conspiracy to rob the victim, and he was the person who put the conspiracy to rob the victim in motion. Yet, Mr. Bruck felt that there were problems with Farmer's credibility. Although Mr. Bruck could not remember every detail of his representation because the case was tried eleven years before the hearing, he testified that he denied the trial judge's offer for a continuance because Applicant "was asserting his right to a speedy trial ... and we had been fighting for a speedy trial for quite some time and finally we had the trial." It became a question of which Sixth Amendment right to assert: the right to a speedy trial or the right to confrontation. In short, Applicant and counsel were unwilling to let the trial be disrupted by a continuance. ***PCR Tr. pp. 10-12; 47-48; 50.*** He explained that:

> We felt that it was the State's responsibility to have the witnesses there and that they had not used reasonable efforts to obtain his testimony and that the prior

[16] See Rule 804(a)(5), SCRE.

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testimony was inadmissible and ... we hoped that if there was another conviction that the appellate courts would agree.

PCR Tr. pp. 11-12.

He also testified on cross-examination, after his memory was refreshed by the trial transcript (*see* ***Tr. 628, lines 2-16***), that he had been concerned with the potential of prejudice on jurors that might occur if a continuance was granted because a juror(s) might be exposed to publicity about the trial, or the juror(s) might forget certain facts. All of the reasons he stated were considered and the trial judge had allowed him to consider them overnight. ***PCR Tr. pp. 50-51.*** When Applicant's PCR attorney asked him whether he could have considered a gag order, he replied, "Well, yes, but ... we had been conducting a public trial so there would have been publicity that couldn't have been gagged." ***PCR Tr. p. 74.***

The Court finds that Applicant has not proven deficient performance. Rather, all that he has proven is that another attorney may have handled the decision of whether to delay the trial in order to obtain Farmer's physical presence at trial differently. The Supreme Court in *Strickland* admonished that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

The Court finds that counsel has years of criminal trial and appellate experience, and that he would have consulted with co-counsel on major strategic decisions. The Sixth Amendment does not provide a basis for disappointed clients to launch after-the-fact attacks on the objectively reasonable strategic decisions of their trial attorneys." *United States v. Dehlinger*, 740 F.3d 315, 325 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 98 (2014). *See also United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2011) ("[W]e generally entrust ... matters of trial strategy[ ] to the professional discretion of counsel") (internal citation and quotation marks omitted), *cert.*

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denied, 565 U.S. 1063 (2011); *Blake v. United States*, 723 F.3d 870, 879 (7th Cir. 2013) ("counsel's performance is to be evaluated in light of the discretion properly accorded an attorney to develop appropriate trial strategies according to the attorney's independent judgment, given the facts of the case, at least some of which may not be reflected in the trial record). Here, the Court finds that the decision not to request a continuance to secure Farmer's presence was objectively reasonable under *Strickland*, since Applicant had finally been given the trial he had requested in his four Speedy Trial motions and it was the State's burden to secure Farmer's presence or establish his unavailability despite of reasonable efforts to obtain his presence. While the trial judge overruled his objection to the State's efforts to have Farmer declared unavailable under Rule 804(a), SCRE, and the Court of Appeals affirmed that ruling, the Court finds that counsel could have reasonably concluded that there was merit to their objection.[17] Moreover, any continuance - even one lasting only five days or so, ***see PCR Tr. p. 74*** – would, quite obviously, further delay the resolution of the trial that Applicant strongly desired for almost four years.

The Court likewise finds that it was objectively reasonable for counsel to conclude that there was the possibility that one or more un-sequestered jurors might either be exposed to prejudicial publicity about the trial or forget some details of counsel's efforts to discredit the prosecution's circumstantial evidence. The Court finds that counsel reasonably assessed that a gag order would not be sufficient to prevent the possibility of jurors being exposed to prejudicial information about the case, since it had been a public trial.

[17] Counsel had vigorously asserted that the State had failed to make reasonable efforts to obtain Farmer's presence and that the trial judge should not allow it to introduce his prior testimony. Counsel also extensively and successfully argued that the 1991 cross-examination was inadequate to impeach his credibility because of events that occurred after the original trial. Once the trial judge had ruled that the State could publish Farmer's 1991 trial testimony was successfully convinced the trial judge that he should be permitted to present the post-1991 impeachment information to the jury. *See* Ground (b), *infra*.

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The Court further finds that Applicant has failed to prove that he was prejudiced by counsel's failure to secure Farmer's physical presence. A criminal defendant does not have the right to have jurors assess a witness' testimonial demeanor. Accord Rule 804(a), SCRE; *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness"), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004).[18] Also, counsel argued in closing that the State had the burden of presenting Farmer as a witness and that the failure to produce him suggested that there was a reason the State did not want jurors to view his demeanor. ***Tr. pp. 1157-58***. *See State v. Hammond*, 270 S.C. 347, 356, 242 S.E.2d 411, 415 (1978) ("it is always proper for an attorney in argument to the jury to point out the failure of a party to call a witness"); *State v. Bamberg*, 270 S.C. 77, 240 S.E.2d 639 (1977) (comment on a party's failure to produce a witness is permissible); *In re Gonzalez*, 409 S.C. 621, 631, 763 S.E.2d 210, 215 (2014) ("Generally, the [missing witness] rule is applied when the uncalled witness is an agent, employee, relation, or associate of the party failing to call him, or *within some degree of control of said party*") (emphasis in original); *Davis v. Sparks*, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959) ("a party is not to be prejudiced by his failure to call a witness who is equally available to the other party").

Moreover, counsel's cross-examination and the additional impeachment evidence that was introduced fully set forth enough information so that the jury could properly assess Farmer's credibility and counsel could demonstrate the supposed lack of it, which counsel did in his closing argument. ***Tr. pp. 1157-74***. *See Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (the

[18] A contrary rule would negate the reason for Rule 804(a) and is contrary to the United States Supreme Court's authority recognizing a limited exception to the confrontation requirement for the prior testimony of a witness who is unavailable at the defendant's trial. *See Roberts, supra*; *Barber v. Page*, 390 U.S. 719, 723-25 (1968); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *California v. Green*, 399 U.S. 149, 161-62, 165, 167 n. 16 (1968).

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Confrontation Clause is generally satisfied where the defense had a full and fair opportunity to expose a witness' "forgetfulness, confusion or evasion," thereby calling to the attention of the fact-finder reasons to discredit the witness's testimony); *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998) (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").[19]

While Farmer was an important witness for many of the reasons argued by the State in the lower court, the Court finds that he was not the State's main witness. Rather, Southerland was the primary witness because he gave graphic, detailed eyewitness testimony as to all of the offenses, including the conspiracy, kidnapping, armed robbery and, of greatest importance, the murder of Kim Quinn. Second, much of Farmer's testimony was cumulative to Southerland's, although he provided more details concerning the conspiracy to rob her. Third, many of the material points in Farmer's testimony were corroborated, either by Southerland's testimony or by the circumstantial evidence discussed at length in the "Statement of Facts." Finally, there was overwhelming evidence of Applicant's guilt, separate and apart from Farmer's testimony. Southerland put the murder weapon in Applicant's hands. He also established Applicant's intent to commit the murder and robbery even after he knew that he would get less than two hundred dollars for the crime. The macabre and gruesome facts to which Southerland testified – including the use of an ax to chop off her hands (by Cooper) and feet (by Southerland at Cooper's direction) demonstrate as much malice as one could possibly imagine. And, once he had finished the murder and disposed of the victim's hands and feet and his ax, he ate two hotdogs before

[19] It is virtually impossible to imagine how the trial judge could have been any more lenient in his rulings on what counsel could use to impeach Farmer's 1991 testimony.

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washing either himself or his clothing. The bottom line is that, in order to have found Applicant not guilty, the jury would have had to accept that virtually every single prosecution fact witness either lied or was mistaken. Therefore, Applicant has not shown either deficient performance or prejudice under *See Strickland*, 466 U.S. at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

2. Counsel was not ineffective for allowing jurors to hear prejudicial evidence presented as part of counsel's efforts to impeach the credibility of Red Farmer's 1991 testimony.

As discussed, the trial judge ruled that counsel could impeach Farmer's 1991 testimony with additional evidence that arose after the 1991 trial. For instance, counsel published to the jury that several arrest warrants were issued in Aiken County but that Farmer was never prosecuted on those charges, and a bench warrant was issued when he failed to show. One warrant was destroyed but one was still pending at the time of trial. ***Tr. p. 744-45***. Counsel also published Farmer's two Texas convictions from 2001 for manufacturing methamphetamine and possession of methamphetamine, for which he received two life sentences. ***Tr. p. 745***. Additionally, counsel was permitted to publish portions of Farmer's testimony at his Texas sentencing hearing (***Tr. pp. 746-54***), and a statement that Farmer had given to Kimberly Turner on May 5, 2006. ***Tr. pp. 879-88***.

In Ground (b), Applicant alleges that counsel was ineffective for allowing jurors to hear prejudicial evidence from the Texas sentencing proceeding and from the statement that he gave to Ms. Turner. The Court finds that he has not proven either that counsel's performance was deficient or that counsel's presentation of this evidence was prejudicial under *Strickland*.

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Mr. Bruck testified that the defense had prepared their case as if Farmer would testify in person at the 2006 trial. "... [W]e'd investigated his life since 1989 and gathered a fair amount of ... documentary evidence, about his very colorful history since then, which ... we thought shed a great deal of adverse light on his credibility, including a different version of his own involvement in the crime that he gave during his own sentencing hearing in a Texas criminal trial where he ultimately received a life sentence for drug trafficking, and so ... he had told a different version of this crime under oath, and we had that." Also, counsel had circumstantial evidence that Farmer had been an informant for the Aiken County Sheriff's Department because he was allowed to stay out on bond for three years following his arrest, and he had fled the jurisdiction while out on bond for charges there. This all occurred after Farmer had received a very light sentence for his involvement in Kimberly Quinn's murder. ***PCR Tr. p. 12; 52.***

Mr. Bruck explained Farmer's motive to lie as follows:

> Well, he would have been culpable for the murder if -- if he had helped to set it up, no matter who actually committed it, and so his motive -- I mean, what I argued to the jury at the second trial was that ... he had an obvious motive to cooperate with the State in order to get leniency, and he got an extraordinarily lenient deal, but he also had a motive not to -- well, we argued that there was a second person that wasn't Tony Cooper with Southerland who committed this crime and that he had a motive to -- not to name that person because that person could flip back on him, and also he appeared to have a motive or a reason for a grudge against Tony Cooper having to do with a history of drug trafficking at CCI and that Cooper, after he had gotten out, had run afoul of this drug trafficking ring or whatever by refusing to lend them money or words to that effect.

App. pp. 18-19. See also Tr. pp. 1146; 1154; 1157-74 (counsel's closing argument).

When questioned about why counsel published the Texas sentencing transcript when Farmer still blamed Applicant for the murder, mentioned that Applicant was on parole after serving seventeen years in prison and had been in a maximum security prison (*see **Tr. p. 753-54***), Mr. Bruck explained that:

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> ... [Farmer] is omitting his own culpability. Basically makes it sound like he had just overheard this whole transaction and that he had only plead guilty -- that he wasn't guilty of anything, that he'd only pled guilty because it had absolutely no effect. And, in fact, said something about just to satisfy me, they gave him a charge which made it sound as though this was sort of part of his cover or something. I mean, it was just a – it was a very distorted and dishonest account of his own prior testimony, which actually involved his being the prime mover in this crime and then having gotten an extraordinarily sweet deal in exchange for his testimony.

PCR Tr. pp. 13-15. See also ***PCR Tr. p. 16***.

Mr. Bruck conceded that the only benefit to Applicant for the jury to hear these details about his past was that Farmer's account at the Texas sentencing impeached Farmer's 1991 trial testimony. ***PCR Tr. p. 16***. Also, Mr. Bruck would have weighed the prejudice to Applicant from jurors learning this adverse information against the necessity for offering further evidence to impeach Farmer's testimony before he presented this evidence to the jury. Mr. Bruck testified that he must have thought that the benefit to Applicant's case by offering this evidence outweighed any prejudice because he offered the evidence, and that he "would imagine" that this was a matter he would have discussed with co-counsel. ***PCR Tr. pp. 52-53***.

Applicant likewise questioned Mr. Bruck about the decision to present evidence of Ms. Turner's May 2006 interview of Farmer, since it showed that he still claimed that Applicant had murdered the victim. *See* ***Tr. pp. 884-85***. Mr. Bruck testified that he had asked an attorney who was his acquaintance to interview Farmer. Ms. Turner was present for the interview. He conceded that the statement to which Ms. Turner testified was not "fundamentally different from Farmer's earlier statements. Mr. Bruck also conceded that, in hindsight, he thought that presenting Ms. Turner was a mistake because "I think we lost more than we gained by calling her." He added, "There were things that we got from her that we wanted, but I think on balance it probably set us back." ***PCR Tr. pp. 16-19; 53-54***.

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On cross-examination, he conceded that presenting Ms. Turner was "a mixed bag," and that he would not have presented her testimony if he had thought at that it was a mistake to do so at the time of Applicant's trial. After his memory was refreshed, Mr. Bruck recalled that Farmer had claimed in the statement to Ms. Turner that someone had helped him put a spin on his trial testimony and that it made Applicant look bad. The obvious inference from that statement was that law enforcement or the prosecution had helped him. ***PCR Tr. pp. 53-54. See also Tr. p. 886, lines 13-17.*** Mr. Bruck did not remember whether or not he and co-counsel considered simply publishing the cross-examination of Farmer from 1991, but emphasized that "we found a lot of additional impeachment" and "thought that without that [Farmer's] testimony would be unchallenged." ***PCR Tr. p. 19.***

Again, the Court finds that Applicant has not proven that counsel's performance was deficient. "Defense counsel are allowed a considerable breadth of discretion in choosing their trial strategies." *Fleming v. Kemp*, 748 F.2d 1435, 1451 (11th Cir. 1984). An attack on the effectiveness of counsel's cross-examination of a witness is a matter generally entrusted to the professional discretion of counsel. *See Strickland*, 466 U.S. at 690 (where a defendant focuses on counsel's "strategic choices made after thorough investigation of law and facts," such choices "are virtually unchallengeable"); *United States v. Nersesian*, 824 F.2d 1294, 1321 (2nd Cir. 1987) ("Decisions whether to engage in cross-examination and if so to what extent and in what manner, are ... strategic in nature" and will not support an ineffective assistance claim"); *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D. Kan. 1991), *aff'd*, 992 F.2d 1077 (10th Cir. 1993) (The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo v. Maryland* standard was not intended to promote judicial second-guessing on questions of

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strategy as basic as handling of a witness). The Court finds that counsel's decision to present the additional impeachment evidence from Farmer's Texas sentencing proceeding and from the May 6, 2006, interview was objectively reasonable, even though it exposed the jury to prejudicial information about Applicant that it might not have otherwise heard.

The Court finds that the prosecution's theory of the case was such that information concerning Applicant's prior incarceration was inescapable, even if some of the details mentioned by Farmer were not. *See* Grounds (c) and (d), *infra*. Also, Farmer was an important prosecution witness and, as counsel noted at the 2006 retrial, the South Carolina Supreme Court had concluded on direct appeal that the trial judge erroneously restricted Applicant's cross-examination of Farmer regarding his drug smuggling activities, even though it found the error harmless. *Cooper I*, 312 S.C. at 92, 439 S.E.2d at 277.

The Court further finds that in assessing the reasonableness of counsel's decision of how to best impeach Farmer's testimony, all of the impeaching evidence must be considered collectively, rather than parsed. When so viewed, it is clear that counsel's performance was reasonable. It was based upon a constitutionally adequate investigation. *See Strickland*, 466 U.S. at 690-91 Also, the defense's impeachment evidence portrayed Farmer as a con artist and a liar who consistently minimized his own culpability in the offenses with which he was charged,[20] was a drug trafficker who frequently cooperated with – or at least feigned cooperation with - law enforcement when he thought that it was to his benefit, consistently shifted blame to others when it was possible for him to do so, and lied about his past. Also, Farmer told Ms. Turner that someone had helped him put a spin on his prior testimony to make Applicant look guilty but claimed that he would testify truthfully if called in 2006. Based upon the additional impeachment

[20] For instance, Farmer's Texas sentencing testimony minimized his involvement both in the murder and in the Texas drug charges for he was convicted and was to be sentenced. *See Tr. p. 753-58.*

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evidence that was presented, counsel adroitly pointed to these reasons, the fact he had not been physically present for trial, and other reasons for the jury not to believe Farmer's 1991 testimony. ***Tr. pp. 1157-74.***

Again, the fact that another attorney may have handled the impeachment of Farmer differently does not show that counsel, who had extensive criminal trial and appellate experience, was deficient in the manner he chose to impeach this witness. *Strickland*, 466 U.S. at 689 ("[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"). Likewise, counsel's hindsight assessment of the decision to present Ms. Turner does not show deficient performance. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

Nor has Applicant proven that he was prejudiced by counsel's decision to present the additional impeachment evidence. Although Framer consistently identified Applicant as the person who murdered the victim, each of his subsequent statements about the conspiracy and murder was inconsistent with his 1991 testimony in some of the details provided, and all of his statements minimized his role. Thus, the statements impeached the credibility of his 1991 testimony.[21] Also, a clear inference from Farmer's claim to Ms. Turner that someone helped him put a "spin" on his 1991 testimony is that he wanted her to believe that law enforcement had done this but if Applicant called him as a witness, he would testify truthfully. Additionally, the

[21] Further, counsel could not cherry-pick portions of these statements. Once counsel decided to use a portion of Farmer's Texas sentencing testimony or the statement to which Ms. Turner testified, the State had the right to introduce the entire statement under Rule 106, SCRE. See also *State v. Patterson*, 367 S.C. 219, 227-28, 625 S.E.2d 239, 243 (Ct. App. 2006).

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trial judge instructed jurors that they could not consider any of Applicant's prior legal proceedings in their deliberations (***Tr. p. 1221, line 2-13***) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility. ***Tr. p. 1242, lines 13-25***. Because Applicant testified at trial, the Court finds that these instructions prevented jurors from considering any past misconduct by him on the question of his guilt or innocence. Further, as more fully discussed in connection with Ground (c), no limiting instruction was required for evidence of Applicant's prior incarceration because this evidence was admissible as part of the *res gestae* of the charged crimes. See *State v. Johnson*, 306 S.C. 119, 127, 410 S.E.2d 547, 552 (1991) (where the evidence of prior murder formed part of the *res gestae* and was directly related to murder for which defendant was being tried, the failure to give a limiting instruction did not constitute reversible error); *State v. Nix*, 288 S.C. 492, 497-98, 343 S.E.2d 627, 630 (Ct.App.1986) (a limiting instruction is unnecessary when evidence of the other crime is admissible on the main issue or the evidence is admitted to show motive or intent and the prior bad acts may have been committed in furtherance of such motive or intent).

Moreover and as previously found in connection with Ground (a), Farmer was an important witness. However, Southerland was the primary witness. Southerland gave graphic, detailed eyewitness testimony as to all of the offenses, including the conspiracy, kidnapping, armed robbery and, of greatest importance, the murder of the victim. Also, much of Farmer's testimony was cumulative to Southerland's, although he provided more details concerning the conspiracy to rob her. And, many of the material points in Farmer's testimony were corroborated, either by Southerland's testimony or by the circumstantial evidence discussed at length in the "Statement of Facts." Finally, there was overwhelming evidence of Applicant's guilt, separate and apart from Farmer's testimony, as discussed. Again in order to have found

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Applicant not guilty, the jury would have had to accept that virtually every single prosecution fact witness either lied or was mistaken. Therefore, Applicant has not shown either deficient performance or prejudice under *Strickland.*

3. Counsel was not ineffective in the manner in which he handled the admission of Applicant's prior convictions for housebreaking and grand larceny, or for introducing evidence of Applicant's sentence on those prior convictions.

In Ground (c), Applicant asserts that counsel was ineffective for conceding that Applicant could be impeached with his prior convictions for housebreaking and grand larceny when he should have made the objection that they were overly prejudicial because they are similar to the facts underlying the charges for which he was on trial. He further asserts that counsel was ineffective in that counsel unreasonably introduced information regarding the Applicant's sentence on those prior convictions including the fact that Applicant had spent time in prison, which he asserts was unnecessarily prejudicial. The Court disagrees and finds that Applicant has not proven either deficient performance or prejudice from the manner in which counsel handled the admissibility of his prior convictions and sentence.

In his opening statement, Mr. Bruck told jurors that:

> One of the things lawyers often object to is anything that shows about the prior record of their client, they don't want the jury to know about that. Well, y'all need to know everything and we are not going to object to the warrants and the things in Tony Cooper's background that are relevant to your job. So, we're not going to object. And we want you to know and we'll tell you right now that when Bo [Southerland] was a career criminal in his early 30's, he committed a long series of crimes and he had along with him a 17-year-old kid named Tony Cooper. And they both went to prison together. And they both got out in 1988. And thereafter, Tony married and had an instant family of four children, his wife's children, working as a contractor doing roofing and different types of jobs like that trying to get a new start in life.
>
> But he had his buddy. Bo [Southerland]. He allowed Bo [Southerland] to have his car, which was a Cougar, I think, a 1979 I believe. There will be pictures of it in evidence. And so Bo [Southerland] was driving the car that was registered to

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> Tony Cooper. And they were together a lot. They had known each other in prison and they still knew each other and they did some work together.
>
> And that is where this involvement of Tony Cooper really begins because on the day before Kimberly Quinn was abducted in the middle of the night, someone saw the Cougar with Bo [Southerland] in it.

Tr. p. 147, line 20 – p. 148, line 25.

Before Applicant testified at trial, the trial judge addressed the admissibility of Applicant's prior convictions *in camera*. In response to the trial judge's statement that he thought that the parties had reached an agreement about which of his previous convictions could be used for impeachment purposes, trial counsel argued that his entire record was too remote. The State then indicated that it intended to impeach Applicant with his armed robbery convictions from February and March 1977, as well as his September 1977 convictions for housebreaking and larceny. Counsel maintained that these convictions were too remote under Rule 609(b), SCRE, because more than ten years had passed between the convictions and his testimony. ***Tr. pp. 700-01***. The State argued that counsel's opening statement had waived any objection. The State also argued that Applicant was not released from custody on the prior convictions until 1988, and that the "they're close in time to the date" of the October 1989 offenses for which Applicant was being retried. ***Tr. pp. 782-84***. Counsel argued that he had not waived an objection to introduction of the offenses and he asserted that the similarity of the armed robberies to the present charges made their use more prejudicial. Yet, he admitted that the same argument did not apply to the convictions for housebreaking and larceny. ***Tr. pp. 784-85***.

The trial judge was concerned about the introduction of the armed robbery convictions, and he ruled that they were inadmissible. However, he ruled that the convictions for housebreaking and larceny were admissible. ***Tr. p. 785***. Counsel elicited evidence of the 1977 convictions at issue on direct examination of Applicant. ***Tr. p. 938, lines 13-20***. The State did not

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mention the convictions on its cross-examination of Applicant (***Tr. pp. 1004-15***), and neither prosecutor referenced them in closing argument. ***Tr. pp. 1099-1106; 1198-1238.***

Mr. Bruck explained at the PCR hearing that he had conceded in opening statement that Applicant had previously been incarcerated with Southland because he knew that Southland would testify and "it was so preposterous to me that Bo Southerland had been intimidated into clearing Tony Cooper while they were both on death row given the actual relationship between them and that Southerland was an older and more experienced criminal and ... a very tough guy and so I wanted the jury to have the background for that." Also, in light of the State's theory of how the crimes originated, it was impossible to keep out evidence of the prior incarceration ***PCR Tr. p. 55***. Mr. Bruck further testified that he believed that "If you think something's coming in anyway, you might as well be the first to tell the jury about it and ... put it in the proper context if you can, so I assume that's what I was trying to do." ***PCR Tr. p. 56***. Also, his decision to introduce the housebreaking and grand larceny convictions on direct examination of his client was consistent with this reasoning. ***PCR Tr. pp. 57-58***. He admitted that he had never thought about whether the State's case could have been tried so that the jury only aware that Applicant and Southerland were associates who knew each other and who both knew individuals in prison. However, he observed that he was unsure that the trial judge would have required the prosecution to edit its case to fit such a scenario. ***PCR Tr. pp. 24-25***.

Mr. Bruck testified that he had argued that the prior convictions for armed robbery were inadmissible because were too similar to the charges for which Applicant was being tried and were therefore prejudicial. *See* Rule 609(a), SCRE; *Green v. State*, 338 S.C. 428, 433–34, 527 S.E.2d 98, 101 (2000) (stating the five factors that a trial judge should consider before allowing impeachment with similar prior conviction(s)). He did not did not make the same argument with

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respect to the housebreaking and larceny convictions. Although he testified on direct examination that he believed the State's evidence would have supported a charge of burglary, he candidly admitted on cross-examination that Applicant had not been arrested or indicted for burglary. So, that charge was not before the jury. And, he was unable to name any South Carolina appellate decision that would have supported an objection that prior convictions should be excluded on the basis urged by Applicant[22]: *i.e.*, because the convictions are similar to facts presented by the prosecution that might support an indictment for a similar offense but where there is no indictment for the offense. ***PCR Tr. pp. 19-25; 56-57.***

The Court finds that Applicant has failed to prove that counsel's performance was deficient. The Court finds that counsel reasonably understood that evidence of Applicant's prior incarceration under Rule 404(b), SCRE, to establish identity and other exceptions. It is also admissible because it was part of the *res gestae* of the crimes for which he was on trial because it "furnishe[d] part of the context of the crime" and was necessary to a "full presentation" of the case. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent"); *State v. Wiles*, 383 S.C. 151, 158–59, 679 S.E.2d 172, 176 (2009) (evidence of petitioner's escape from prison a week before incident where he was charged with assault and battery with intent to kill (ABIK), failure to stop for a blue light, and failure to stop for blue light was logically relevant to show motive for fleeing from police on the failure to stop for a blue light charge and his intent on the ABIK charge. "Finally, this evidence was also admissible under the *res gestae* theory"); *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366,

[22] See counsel's argument in support of this claim. ***PCR Tr. p. 77-78.***

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370-71 (1996). *See also State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980); *United States v. Kimball*, 73 F.3d 269, 272 (10th Cir. 1995) (evidence of defendant's recent release from prison, including evidence that his inmate number was found on coffee pot in motel room along with tablet containing imprint of robbery demand note and that his clothing worn at time of his release from prison was identical to clothing of robber, was admissible as part of *res gestae* in bank robbery prosecution); *United States v. Champion*, 813 F.2d 1154, 172-73 (11th Cir. 1987).

Because the evidence of Applicant's prior incarceration was admissible, the Court finds that counsel's decision to address it in opening in an effort to put this evidence "in proper context" was reasonable under *Strickland*. *See Wheeler v. Simpson*, 852 F.3d 509, 515 (6th Cir.), *reh'g denied* (Apr. 12, 2017), *cert. denied*, 138 S.Ct. 357 (2017) (state court's rejection of claim that trial counsel was ineffective for introducing testimony that he had received furloughs during his previous incarceration was not contrary to or an unreasonable application of Supreme Court precedent, where introduction of this evidence was a strategic attempt to show that petitioner had previously been such a model prisoner that he received two furloughs); *Campbell v. Bradshaw*, 674 F.3d 578, 588 (6th Cir. 2012) (trial counsel was not ineffective for introducing petitioner's entire incarceration record during the penalty phase of trial because it was "part of a strategic effort to be candid with the jury about Campbell's past in an effort to gain credibility and, ultimately, obtain a life sentence for Campbell"); *State v. Groves*, 2014-Ohio-4337, ¶ 14, 2014 WL 4823883, *4 (Oh. Ct.App. 2014) ("It is clear from our review of the record that trial counsel made an apparent strategic decision in eliciting such testimony from Ms. Warren. This court must presume counsel's conduct falls within the wide range of reasonable professional assistance and is the product of sound trial strategy"). By following this strategy, counsel lessened the

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impact of this evidence that would be introduced in the State's case-in-chief because he was able to place Applicant's relationship in proper context from the defense's perspective and to present Applicant as someone who was not going to hide anything from his jury. This gave counsel and Applicant more credibility with the jury.

Similarly, the Court finds that counsel's decision to elicit the housebreaking and larceny convictions on direct examination was reasonable under *Strickland*, since he knew that the trial judge had ruled that Applicant could be impeached with these convictions. Again, this presented Applicant as someone who was not going to hide anything from his jury, and it gave counsel and Applicant more credibility with the jury. *E.g.*, *Ohler v. United States*, 529 U.S. 753, 757-58 (2000) (recognizing that "[a] defendant has a ... choice to make if she decides to testify, notwithstanding a prior conviction. The defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor's possible elicitation of the conviction on cross-examination"); *Taylor v. State*, 258 S.C. 369, 377, 188 S.E.2d 850, 854 (1972) (finding that "[t]he voluntary elicitation of the information that appellant had a record was obviously intended to soften the impact of what was certain to follow. The specification [of ineffective assistance of counsel] is hypocritical"); *Rodriguez v. State*, 129 S.W.3d 551, 558–59 (Tex.App. 2003, pet. ref'd) (eliciting testimony from a defendant about his own prior convictions can be a sound trial strategy, provided that those prior convictions are admissible).

The Court also finds that counsel was not deficient for failing to argue that the housebreaking and larceny convictions should have been excluded because they are similar to the crime of burglary, a crime for which Applicant was never arrested or indicted. The Court rejects Applicant's claim that counsel should have argued that these convictions should have

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been excluded because the facts here could have possibly supported a burglary indictment. The Court is unaware of any appellate court authority from South Carolina that would have supported such an argument at the time of Applicant's 2006 trial, or at present. It is a fundamental tenet in the evaluation of ineffective assistance of counsel claims that there must be a contemporary assessment of counsel's performance: *i.e.*, counsel's acts are to be judged as of the time counsel was required to act. *Strickland*, 466 U.S. at 690. As a result, counsel is not ineffective in failing to anticipate a change in the law that may or may not occur. *See Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial") (citing *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993)); *Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553 (1994); *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995); *United States v. McNamara*, 74 F.3d 514, 515-17 (4th Cir. 1996) (counsel cannot be considered ineffective for failing to anticipate changes in law). Also, counsel is not ineffective for not anticipating how a state appellate court will rule on a novel question of law. *E.g.*, *Richardson v. Branker*, 668 F.3d 128, 141-43 (4th Cir. 2012).

The Court further finds that Applicant has not proven that he was prejudiced by counsel's performance. First, counsel's decision to acknowledge the existence of Applicant's prior incarceration in his opening statement and to present evidence of Applicant's prior convictions on direct examination, allowed counsel to put these matters in what he reasonably viewed as a proper context. It also allowed him to portray Applicant as someone who was not going to hide anything from is jury, and it gave counsel and Applicant more credibility with the jury. Second, this evidence was going to be presented by the prosecution if counsel had not done so. Third, the trial judge instructed jurors that they could not consider any of Applicant's prior legal

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proceedings in their deliberations (***Tr. p. 1221, line 2-13***) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility. ***Tr. p. 1242, lines 13-25***.[23] "[It is] the almost invariable assumption of the law that jurors follow their instructions," *United States v. Olano*, 507 U.S. 725, 740 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); *see also Strickland*, 466 U.S. at 694 ("a court should presume ... that the judge or jury acted according to law"). The Court finds that these instructions precluded the consideration of his previous incarceration or his prior convictions on the question of his guilt or innocence, even though no limiting instruction was necessary with respect to evidence of Applicant's prior incarceration because it was properly admitted as part of the *res gestae* of the charged offenses. See *Johnson*, 306 S.C. at 127, 410 S.E.2d at 552; *Nix*, 288 S.C. at 497-98, 343 S.E.2d at 630. Fourth, Applicant has not presented the Court with any appellate court authority from South Carolina that would have supported such an argument at the time of Applicant's 2006 trial. Finally, there cannot be any conceivable prejudice resulting to Applicant because any conceivable prejudice from counsel's argument and introduction of the prior convictions by trial counsel pales in comparison to the State's evidence of the grisly murder and other crimes in this case. *See* Statement of Facts, *supra*. The prosecution's evidence showed that this was a premeditated robbery, which Applicant quickly escalated to murder when made aware that he would receive less than $200.00 for the crimes. He carried out the crimes and post-mortem efforts to conceal the victim's identity in a brutally macabre fashion and, once he had finished the murder and disposed of the victim's hands and feet and his ax, he ate two hotdogs before washing either himself or his clothing. Again, in order to have found Applicant not guilty, the

[23] These instructions were given as a result of counsel's request. *See Tr. pp. 908-10.*

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jury would have had to accept that virtually every single prosecution fact witness either lied or was mistaken. *See Strickland*, 466 U.S. at 696. Therefore, Applicant is not entitled to relief.

4. Counsel was not ineffective in failing to obtain an *in limine* instruction from the trial judge that Southerland should not be allowed to provide testimony referring to Applicant's prior armed robbery convictions.

Applicant claims in Ground (d) that counsel was ineffective in failing to obtain an *in limine* instruction from the trial judge that Southerland should not be allowed provide testimony referring to Applicant's prior armed robbery convictions. See ***PCR Tr. pp. 78-79***. The Court does not need to address *Strickland*'s performance prong, since the Court finds that he has failed to prove Sixth Amendment prejudice.

The trial transcript reflects that Southerland was often evasive and argumentative on Mr. Bruck's cross-examination of him. *E.g.*, ***Tr. pp. 447-471; 473-546***. At one point when Mr. Bruck was questioning him about his prior armed robbery convictions, the following exchange occurred:

> Q So if the records show that you were convicted and got an 18 year sentence, the records must be wrong?
>
> A I caught, let's see, 15 -- 15, 18 and 18, Dorchester, Berkeley and Clarendon County, 15, 18, and 18. That's all the --
>
> Q All armed robberies?
>
> A Yes, sir.
>
> Q You were committed and convicted of three separate armed robberies in three separate counties?
>
> A Yes, sir. Your client, Tony Cooper, was my codefendant.
>
> Q Excuse me, I'm asking about your record, if you don't mind.
>
> A Yes, sir. Well, I'm explaining to you who my codefendant was.
>
> MR. BELL: Your Honor, he's allowed to explain his answer.

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THE COURT: No. He's asking a question about his record.
Go ahead.

Tr. p. 495, lines 13-25.

Mr. Bruck testified that he was aware that Applicant and Southerland were co-defendants in the armed robberies for which Applicant had been previously convicted, and that he had anticipated Southerland would be a difficult witness before Southerland testified. In an unresponsive answer to counsel's question, Southerland "blurted out unresponsively" that Applicant was his co-defendant in the armed robberies. Mr. Bruck did not think of making a motion *in limine* to prohibit Southerland from mentioning Applicant's convictions or requesting a curative instruction because he did not foresee that Southerland would "volunteer that information unresponsively to a question" even though "I probably should have foreseen that." ***PCR Tr. pp. 21-22; 58-59***. However, he agreed that Southerland was constantly evasive on cross-examination and had repeatedly attempted to interject Applicant's involvement in the murder, as opposed to answering the questions being asked of him by Mr. Bruck. Also, Mr. Bruck later used this evasiveness in closing argument as one of the reason jurors should find that Southerland was not credible. ***PCR Tr. p. 59***.

In *Strickland*, the Court explained, "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. It is unnecessary for this Court to address whether counsel's performance was deficient as to this allegation because it is clear that there was absolutely no

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resulting prejudice.[24] The remarks by Southerland were unresponsive to the question posed and it is clear the trial judge found that his response was not proper. Also, the trial judge instructions that jurors could not consider any of Applicant's prior legal proceedings in their deliberations (***Tr. p. 1221, line 2-13***) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility (***Tr. p. 1242, lines 13-25***) precluded jurors from considering this remark on the question of Applicant's guilt or innocence. *Olano*, 507 U.S. at 740; *see also Strickland*, 466 U.S. at 694.

Further, counsel thoroughly cross-examined Southerland concerning the details of the crimes to which he had testified on direct examination; his activities in the days immediately before and after the murder; his claim that he had only used the phone at the Cooper residence once; his claim that he had never spoken to Red Farmer; the various different statements that he had made about the murder;[25] that his picture is in the photographic lineup introduced as State's Ex. 2; his claim that he had given a statement accepting full responsibility for the murder because Applicant had communicated a threat to him through three death row inmates, who had since been executed and could not be cross-examined; his claim that Applicant had told him what to say in that statement; that when his attorneys got a restraining order prohibiting Mr. Bruck from having further contact with him, he wrote Judge Keesley, stated he did not agree with his attorneys, and attempted to have Judge Keesley deny his attorneys' request; that he had given a similar statement to *The State* newspaper and repeated a similar story to "[a]nybody and everybody;" that he had given similar statements to death row inmate Norman Starnes and to two

[24] The Court does not find that counsel's performance was deficient, only that the clear absence of any possible prejudice makes it unnecessary to address that prong.

[25] For instance, he admittedly lied to SLED when questioned about the crime on October 10, 1989, when he told officers he was at the apartment complex on the afternoon before the murder but did not know anything about the murder. ***Tr. pp. 449-52; 491.*** Also, he gave two statements to Mr. Bruck following his 1992 death sentence, and he did not want his own attorney to know that he had done so. He took full responsibility for the murder in these statements and exonerated Applicant ***Tr. pp. 462-72; 475-84.***

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women who were church volunteers at the prison, Ms. Betts Davis and Ms. Naida Knotts; that he had continued to claim full responsibility for the crimes until 2006; that he had spent over thirty years in prison; his remaining criminal history in addition to the armed robbery convictions; that the State had dropped the death penalty in exchange for his testimony against Applicant; and, counsel even cross-examined him about his claim that he had cried after the murder, the fact no one witnessed this and that the only other time he acknowledged crying was when his mother died.

Additionally, counsel introduced the two statements that Southerland had given to counsel as Defendant's Exs. 1 and 2 and he published these to the jury. Counsel also presented Starnes, Ms. Bessie "Betts" Davis, and Ms. Knotts as witnesses. They testified about the admissions that Southerland had made to each of them and that there was no apparent tension between Southerland and Applicant. ***Tr. pp. 790-99*** (Starnes); ***Tr. pp. 802-11*** (Ms. Davis); ***Tr. pp. 815-24*** (Ms. Knotts). Counsel later used this impeaching information in his closing argument to assail Southerland's credibility. *See* ***Tr. pp. 1121-33; 1139-56.*** Included in counsel's attack on Southerland's credibility were the following comments about his evasiveness on cross-examination:

> And unlike Mr. Farmer, who you have yet to lay eyes on, Mr. Sutherland at least shuffled in here with that expression that none of you will probably ever forget and you got to see how he dodged and weaved and played games with me. He was willing to answer the State's questions, but when it came for cross-examination, forget it.

Tr. p. 1122, lines 11-17.

In light of the trial judge's limiting instructions, counsel's thorough impeachment of Southerland's credibility and the overwhelming evidence of guilt, the Court finds that there was no prejudice from counsel's failure to either request an *in limine* instruction before Southerland

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testified or a curative instruction after he made the unresponsive comment that Applicant was his co-defendant in the armed robberies.

5. Applicant has expressly abandoned grounds (e), (g) and (i) at the hearing.

Applicant abandoned Grounds (e) and (g) at the outset of his PCR hearing. ***PCR Tr. p. 5.*** He abandoned Ground (i) at the conclusion of the hearing. ***PCR Tr. p. 80.***

6. Counsel was not ineffective for failing to object to Agent Rick McDermott's testimony regarding the weight of the log found on the victim's body.

SLED Agent Rick McDermott went to the crime scene on Sunday, October 8, 1989, along with other SLED Agents and he saw the victim's body with debris stacked on it. He immediately asked for the crime scene unit to be sent to the scene. ***Tr. pp. 340-41.*** One piece of debris that he saw on the body was a log. ***Tr. pp. 342-43.*** In Ground (f), Applicant alleges that counsel was ineffective for not objecting to the following exchange as speculative:

> **Q** And how big a log would you say that you observed?
>
> **A** It was a pretty good size log, pretty good size log, but I couldn't speculate as far as how big it was, but it was a pretty good size log. I think one person couldn't move it.

Tr. p. 343, lines 7-12.

Applicant claims that counsel's failure to object was prejudicial because Agent McDermott's testimony was the only physical evidence at the scene that suggested the involvement of two people in the murder and because the State relied on this testimony in closing (*see* ***Tr. p. 1103***) as proof that two people were involved in the murder. See ***PCR Tr. pp. 25-26; 79-80.***

On direct examination, Mr. Bruck did not recall why he did not object and conceded that the testimony was objectionable. However, he pointed out that he dealt with this testimony on cross-examination by pointing out that there was no foundation for Agent McDermott's assertion

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as to the weight. ***PCR Tr. pp. 25-27.*** On cross-examination, he conceded that the State had merely asked McDermott what McDermott had factually observed, and he noted that he had established on cross-examination (***Tr. p. 346, line 24 – p. 347, line 11***) that Agent McDermott did not lift the log and did not know how much it weighed.[26] Mr. Bruck also addressed this testimony in closing argument. ***PCR Tr. pp. 61-63.*** His closing referred to SLED Lt. Springs' testimony that the log was "rotted" (***Tr. p. 356, lines 3-4***) and suggested that:

> We all know a rotten log can be eight feet long, but it hardly weighs anything because it's mostly air inside. It's been eaten out by termites or whatever. That was the famous log that would have required two people. It sounds very much like everything on this scene is consistent with one person.

Tr. p. 1147, lines 7-19.

The Court finds that counsel's performance was not deficient. First, the fact another attorney may have attempted to argue that the testimony was speculative does not establish deficient performance. *See Strickland*, 466 U.S. at 689. Secondly, the Court disagrees with Applicant's description of the testimony as speculative. Rather, the witness was merely being asked to state his factual observation of the log's size. There is no suggestion that the witness did not observe the log. As such, there was no basis for counsel to successfully argue that the answer to that question was speculative. *See In re Thomas S.*, 402 S.C. 373, 379, 741 S.E.2d 27, 30 (2013) ("a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training") (citing Rules 602 and 701, SCRE); *State v. Williams*, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996) ("The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of

[26] The record reflects that Mr. Bruck also elicited that Agent McDermott did not even touch the log or see anyone else lift it. ***Tr. p. 347, lines 1-7.***

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the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge").

Moreover, counsel attacked every weakness in Agent McDermott's testimony on cross-examination and through closing argument. He pointed out that Agent McDermott neither touched the log nor saw anyone lift it, and he contrasted it with Lt. Springs's testimony that the log was "rotted," which counsel used to support the conclusion the log would not have been so heavy that it required two people to lift it. As a result, the Court finds that counsel's failure to object did not constitute deficient performance.

The Court further finds that Applicant has not proven any prejudice resulting from counsel's failure to object. Because counsel's cross-examination and argument fully exposed the weaknesses in McDermott's testimony, such that the jury could readily assess the weight it felt his testimony deserved, Applicant cannot show any prejudice from its introduction. Also, even a successful objection would not have impacted the credibility of either Southerland or Farmer, the two principle witnesses against Applicant. Their testimony provided overwhelming, direct and detailed evidence of Applicant's guilt of the murder, kidnaping, armed robbery, and conspiracy. Accordingly, there cannot be any prejudice from counsel's failure to object. *See Strickland*, 466 U.S. at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

7. Counsel was not ineffective for failing to object to the State's closing argument.

Applicant's Ground (h) is that counsel was ineffective for failing to object to the following comments in the State's closing argument because the State was arguing facts that were not in evidence:

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> There's nobody else there, according to the defendant's wife. She said that it was me, Tony and the kids. And she never testified, she was asked about three phones, if you remember, I think the defense asked her about the three phones, she never said anything about the phone being out in the middle of the yard for everybody in the world. She said that Bo usually came by to use the phone and would never let him in. She didn't like that. Why would he have to come inside rather than if there's a phone out in the middle?

Tr. 1203, line 21 – p. 1204, line 6.

The Court finds that Applicant has failed to prove either deficient performance or prejudice from counsel's failure to object to these remarks because these extremely brief comments did not deprive him of a fair trial.

Mr. Bruck testified that the Solicitor remarks were made because there was a dispute as to whether Applicant or Southerland had answered the phone when Farmer called. The defense contended that Southerland answered it, and that he had conspired with Farmer and someone other than Applicant to rob the victim. Mr. Bruck did not remember whether Ms. Crane testified consistent with the State's comments but said that he should have objected if she did not. ***PCR Tr. pp. 27-28.***

A review of the trial transcript reflects that Applicant's wife, Marsha Crane, did not testify that she would never let Southerland into her residence to use the phone. She testified that it was common for other people whom the Coopers knew to use their phone, including Southerland and Brenda McLauren (Applicant's niece who first passed information from Framer to Applicant about the victim's insurance settlement). She also testified that it was possible that Southerland used the Cooper's phone on the night of October 4, 1989. ***Tr. pp. 640-43; 649-50.*** With the exception of Applicant's claim that the family kept one phone outside of the residence, Ms. Crane's testimony that Southerland could have used the phone at her house on October 4th is consistent with Applicant's trial testimony. *See* ***Tr. pp. 948-49; 964-67. PCR Tr. p. 63.*** Yet, she

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did testify that there were three phones in her residence and she did not claim that one of these was kept outside.

The record also reflects that Southerland testified on cross-examination that he never used the telephone at the Cooper residence because "Tony Cooper wasn't going to let me make no long distance phone calls from his house." He quickly corrected himself and stated that he had made a telephone call from the Cooper residence after Ms. Crane had left the residence. ***Tr. pp. 487-89.***

Closing arguments "must be confined to evidence in the record and reasonable inferences therefrom, although failure to do so will not automatically result in reversal." *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-44, 647-48 (1974)). The standard in *Donnelly* is a very high standard for a defendant to meet. " '[I]t is not enough that the remarks were undesirable or even universally condemned.' " *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *See also Parker v. Matthews*, 567 U.S. 37, 47 (2012). "In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." *United States v. Young*, 470 U.S. 1, 12 (1985).[27]

Here, the Court finds that Applicant has not proven that the challenged comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Tubbs*, 333 S.C. at 321, 509 S.E.2d at 818; *Donnelly*, 416 U.S. at 643-44. Applicant contends

[27] As the Supreme Court explained in *United States v. Robinson*, 485 U.S. 25, 33 n. 5 (1988): "[i]n *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor's personal opinion as to the defendant's guilt were improper, but we held that, in context, those statements did not necessitate reversal." Rather, in both cases, the Court held that the accused must prove that the remarks deprived him of due process. *Robinson*, 485 U.S. at 33 n. 5.

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that the remarks were prejudicial because "[i]t directly impeached or went against [Applicant's] trial testimony." ***PCR Tr. p. 80.*** However, the comment was very brief and made in the course of a very lengthy closing argument. Further, and regardless of Ms. Crane's testimony, the testimony from Farmer and Southerland supports the conclusion that Applicant is the one with whom Farmer spoke. And, the Court finds that the challenged comment was nothing more than an innocent misstatement. *See Donnelly*, 416 U.S. at 647 (reviewing courts "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning"). Also, trial counsel presented argument to the contrary. *See* ***Tr. pp. 1177-78.*** *See also Young*, 470 U.S. at 12. Further, the trial judge instructed jurors before the parties' closing arguments that:

> At this point in the case, it's your opportunity to hear the closing statements or closing arguments of counsel. This is an opportunity for counsel to summarize the evidence from their respective points of view, to put the pieces of the puzzle together so to speak. Please remember these closing arguments are not to be considered as evidence.

Tr. p. 1092, lines 5-12.

Because jurors are presumed to follow the trial judge's instructions, *Olano*, 507 U.S. at 740; *see also Strickland*, 466 U.S. at 694, this admonition precluded jurors from considering the closing arguments as evidence. Finally and as discussed throughout this Order, there was overwhelming evidence of guilt, such that Applicant could not have been prejudiced in any manner by the challenged remarks. *See Strickland*, 466 U.S. at 696.

8. Counsel was not ineffective for failing to "effectively prepare for the direct examination of Applicant and the cross-examination of Investigator Eddie Hite.

The Court finds that Applicant is not entitled to relief on his claim (Ground (j)) that counsel was ineffective for not effectively preparing for the direct examination of Applicant and the cross-examination of Investigator Eddie Hite.

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Applicant testified to an alibi at trial. He testified that he went to his mother's house around 10:00 a.m. on Thursday, October 5th and finished cleaning her yard of debris caused by Hurricane Hugo. After he cleaned the yard and hauled away the trash, he returned to his mother's shortly after 12:00 p.m. and worked on a camper that his father was giving to him. He worked on the camper until 5:00 p.m. Then, he went home and saw his wife before she left for work. ***Tr. pp. 971-80.***

He stayed at his residence for several hours and did not leave until roughly 11:00 p.m. After he unsuccessfully tried to call his wife but the long distance call to Irmo did not go through, he drove his truck to the intersection of Hwy. 106 and Hwy. 302 because there were several phones there and a call to Irmo would not be long distance. ***Tr. pp. 981-84.*** As he neared that intersection, his truck began to overheat. So, he decided to drive to his parents' house because he was in a rural area, their house was closer than his residence in Pelion, and he knew that his father was frequently awake at all hours of the night. ***Tr. pp. 985-87.***

Once he reached their residence, he looked under the hood of his truck to see what was wrong, and discovered that a rubber hose had a leak in it. He added water and patched the hole with thick tape. By the time he finished, his father had come outside, and they talked. Applicant told his father that he had to return to Pelion. His father then followed him to his residence and they arrived there after midnight. His father turned around and drove home, and Applicant went to bed.[28] ***Tr. pp. 987-93.***

Of particular relevance to the present claim, Applicant denied on cross-examination that he had gone to Donnie Shumpert's residence that night. He also denied that he had been "riding around drinking beer" that night because he does not ride around drinking beer. ***Tr. pp. 1012-13.***

[28] He did not attempt to call his wife again because it was so late.

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Following his testimony, the State called Mr. Eddie Hite as a reply witness. Counsel requested a hearing on the voluntariness of the statement that Mr. Hite and Sheriff Metts had taken from Applicant because the defense had anticipated that the State would simply publish Mr. Hite's testimony from Applicant's 1991 trial to impeach alibi testimony from Applicant's mother, and that Hite would not be a live witness. The State agreed that it had originally planned to publish Mr. Hite's prior testimony, but it changed its strategy in light of Applicant's testimony. The State also noted that it had previously served a copy off the statement on the defense. ***Tr. pp. 1028-30.***

The trial judge then heard Mr. Hite's prior testimony about the circumstances surrounding the taking of the statement *in camera*. ***Tr. pp. 1031-38.*** The trial judge found that Mr. Hite's testimony concerning the statement was generally admissible. ***Tr. p. 1048.*** However, based upon counsel's arguments (***Tr. pp. 1038-39***), the trial judge excluded Applicant's response to the question of whether he had ever seen Southerland with a shotgun. Applicant's response was that he could not answer that question because it would bury him. ***Tr. pp. 1034, lines 3-9.*** Implicitly, the trial judge also accepted counsel's position that Applicant's statement was an invocation of his right to remain silent and excluded it. ***Tr. pp. 1039-40.*** The trial judge even ruled that the *Miranda*[29] form was inadmissible because it contained information that Applicant had specifically requested to see Sheriff Metts before he would speak with law enforcement. ***Tr. p. 1046, lines 7-9.***

At the conclusion of the *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, the trial judge granted counsel permission to question Mr. Hite about whether he was fired or forced to resign because of his role in the taping of Mr. Duncan's conversation with the defendant, without their

[29] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

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knowledge, by members of the Lexington County Sheriff Department's in *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). Mr. Hite testified that he was neither fired nor forced to resign. Rather, he resigned from the Sheriff's Department "the moment I took the position of the Chief Deputy Coroner of Lexington County." ***Tr. pp. 1049-50***. This occurred in March 1997 and it was after the taping in *Quattlebaum* but before the taping became public knowledge. He admitted that he was one of the officers who had witnessed the taping as it had occurred. ***Tr. pp. 1050-51***.

Someone had brought Mr. Hite into the room while the taping was occurring, and he immediately "got my Lieutenant and [Deputy Solicitor] Fran Humphries." He then alerted them to the taping. ***Tr. pp. 1051-52***. He admitted that he had testified at a preliminary hearing in *Quattlebaum* that the defendant had been taped. However, he explained, as he had in the *Quattlebaum* trial, that he had been referring to the statement he had taken from the defendant. And, he answered the question that he thought was being asked of him. ***Tr. pp. 1052-53***. Following this in camera testimony, Mr. Bruck stated, "That takes care of that matter." He explained that he would not examine Mr. Hite about his role in *Quattlebaum*, unless different facts were presented because "we have to take what we're told." ***Tr. pp. 1053-54***.

Mr. Hite testified before the jury that when Applicant had been interviewed on the afternoon of October 12, 1989, he said that "he was out driving around in his pick-up truck drinking beer, said he got home at, approximately ... 11:00 p.m." ***Tr. p. 1059, lines 22-25***. He also said that he had been to Donnie Shumpert's shop that night and that he had "stopped at Don's Place on Highway 302 near Pelion." Although he said that he had stopped by his parents' house that night to check on his mobile home, he did not claim that he had spent most of the day there. ***Tr. p. 1060, lines 2-15***.

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Although Mr. Bruck testified at the PCR hearing that he had met with Applicant enough times to prepare for the trial (***PCR Tr. p. 46***), he claimed that he had forgotten about Applicant's inconsistent alibi in his October 12th statement. He explained that the statement had not been used in the first trial and that it "just got a little lost in the shuffle in our trial preparation and when the State pulled that out to impeach Tony and then proved it later, I'd just forgotten about it, ... so we were surprised by that." He did not address this statement with Applicant pretrial, and felt that it was a problem for Applicant's case. He added, "I can't say what impact it had on the jury, but it was not helpful that a law enforcement officer recounted an alibi that Tony had given that was not the same as the alibi that he testified to." ***PCR Tr. pp. 29-30; 63-64.***

Additionally, Mr. Bruck was aware that Mr. Hite was involved in the *Quattlebaum* case, but he was unaware that Mr. Hite had written a lengthy incident report that omitted the taping. He had attempted to demonstrate the inaccuracy of the recordation of Applicant's statement and the inaccuracy of Hite's notes of that statement on his cross-examination of Hite. He did not examine Mr. Hite about the inaccuracy of the incident report prepared in *Quattlebaum* because he did not "notice the fact that Hite had specifically been tagged with having filed ... an incomplete or materially incomplete incident report." He would have attempted to cross-examine Mr. Hite about that report if he had recalled it. He candidly admitted that he did not know whether such cross-examination would have been permitted. ***PCR Tr. pp. 30-33.***

Mr. Bruck admitted on cross-examination that there had been no need for him to prepare to cross-examine Mr. Hite until the State announced that it was calling him as a reply witness, since the parties had previously agreed that Mr. Hite's 1991 testimony would be published to the jury and Mr. Hite did not testify about Applicant's statement in 1991. Also, Applicant wanted to testify and counsel agreed with his decision because "I thought that the jury needed to hear Tony

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denying this as he had denied it for so many years. He hadn't testified at the first trial and that had not been a successful strategy and it just seemed like a better approach." Counsel admitted that he had known about Mr. Hite's role in this case, and that the State had provided the October 12th statement to him. Counsel also conceded that he had convinced the trial judge to exclude the *Miranda* form and Applicant's response that he could not answer whether he had ever seen Southerland with a shotgun. Mr. Bruck also conceded that he could not impeach Mr. Hite's denial of being fired or forced to resign because of involvement in *Quattlebaum*. ***PCR Tr. pp. 64-67.***

Applicant has failed to prove deficient performance. First, the Court agrees with counsel's assessment that it was unnecessary for counsel to prepare for cross-examination of Mr. Hite pretrial because the State had indicated that it would publish Mr. Hite's 1991 testimony, instead of calling him as a witness. This only changed after Applicant testified to an alibi. Because the State had not previously indicated that Mr. Hite would testify and because he did not testify to the contrary alibi in his 1991 testimony, the Court finds that it was reasonable for counsel to focus on other matters in pretrial preparation. *See Strickland*, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). Further, Applicant wanted to testify and counsel agreed with his decision because counsel felt that it was important for the jury to hear Applicant "denying this as he had denied it for so many years," and because Applicant's first trial, in which he did not testify, resulted in his conviction on the charges against him. The Court finds that these stated reasons for recommending that Applicant testify were objectively reasonable under *Strickland*.

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Additionally, the Court finds that it was necessary for Applicant to testify in order to receive an alibi instruction, since he was the only person who could testify about his whereabouts the entire night of October 5th. His mother's testimony from 1991 was published to the jury. She testified, in pertinent part, that Applicant came by her house around 10:00 a.m. on October 5th and was there until 11:30 a.m. He returned around 12:30 p.m. and worked on a "motor home" his father was giving him. He did not leave again until 5:00 or 5:30 p.m. Her husband came home at 4:00 p.m. and should have seen Applicant there. ***Tr. pp. 895-99.***

His father testified that Applicant was at the house when he got home around 4:00 p.m., but Applicant did not eat supper with him and he did not know where Applicant was at the time. He did not see Applicant again until roughly 11:15 or 11:20 p.m. He confirmed Applicant's subsequent testimony about problems with the truck overheating and that he followed Applicant to Applicant's residence in Pelion. The timeframes he gave were consistent with those to which Applicant testified. ***Tr. pp. 923-28.***

In order to receive an alibi instruction, there must be facts from which it may be concluded that it was physically impossible for the accused to have committed the offense. See *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) ("[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all"); *see also Walker v. State*, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012); *State v. Robbins*, 75 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission"). Because his neither of parents

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could account for his whereabouts from the late afternoon until roughly 11:15 p.m. on the night of October 5th, Applicant would not have been entitled to an alibi charge if he had not testified.

The Court finds that counsel was not deficient in failing to better prepare Applicant's direct examination. Underlying this claim is the implication that Applicant could have changed his testimony on direct, so as to avoid having to answer the prosecution's question of him that was predicated on his October 12th statement. However, the United States Supreme Court has clearly stated that "no right whatever-constitutional or otherwise" to testify falsely or to "use false evidence." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). *See also Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury"). Also, counsel and Applicant were both aware that the alibi to which he would and did testify was contradicted by Southerland's eyewitness testimony and the admissions Farmer testified that Applicant had made to him. Nevertheless, Applicant testified and counsel agreed with his decision to do so.

The Court further finds that counsel's cross-examination of Mr. Hite was more than constitutionally adequate. *See Nersesian*, 824 F.2d at 1321 ("Decisions whether to engage in cross-examination and if so to what extent and in what manner, are ... strategic in nature" and will not support an ineffective assistance claim"); *Yarrington*, 779 F.Supp. at 1308 (The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel). Counsel's cross-examination elicited that Mr. Hite only had a vague recollection of the interview and did not remember the details of it. ***Tr. p. 1052, lines 10-13***. Rather, he had just looked back on how he testified in 1991 and he was merely telling the jury what he had said at that time. ***Tr. p. 1052, lines 14-19***. Counsel also established that Mr. Hite was testifying in 1991

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from his notes that he had made even earlier, he did not have those notes with him at the 2006 trial; and he argued in closing that a clerk could have read his testimony because he did not add anything. ***Tr. p. 1052, lines 20-25; p. 1182, 11-23***. He likewise argued to the jury that Applicant had asked to be interviewed by the Sheriff, which does not sound like a guilty man. ***Tr. p. 1181, lines 3-15***. Further, counsel successfully convinced the trial judge to exclude the most damaging statement Applicant made in the statement: *i.e.*, that he could not answer the question of whether he had ever seen Southerland with a shotgun because it would bury him. Accordingly, the Court finds that Applicant failed to prove deficient performance. *See, e.g., State v. Roberts*, 49 N.C. App. 52, 58, 270 S.E.2d 559, 562 (1980) (counsel's efforts to negate the effect of the State's rebuttal witness through cross-examination did not amount to ineffective assistance of counsel); *State v. Hicks*, 2003-Ohio-4968, ¶ 28, 2003 WL 22149614, * 5 (Oh. Ct.App. 2003) (Defense counsel's decisions in assault trial to call alibi witness who was rebutted and to not request continuance when presented with state's rebuttal witness did not amount to deficient performance and, thus, did not constitute ineffective assistance of counsel; record did not indicate that continuance was necessary, counsel thoroughly cross-examined rebuttal witness, and counsel's decision to call alibi witness was matter of trial strategy) (unpublished). *Cf. State v. Harris*, 540 So.2d 1226, 1230 (La.App. 1989), *writ. denied*, 550 So.2d 626 (La.1989) ("Effective assistance of counsel does not ... mandate errorless counsel or counsel which might be judged ineffective only in hindsight").

Further, Applicant has not proven that he was prejudiced by counsel's performance. As discussed, Applicant could not have received an alibi instruction without his testimony. Also, both counsel and Applicant were aware that Applicant's alibi testimony was inconsistent with the testimony of Southerland and Farmer. Applicant did not testify at the PCR hearing. As a

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result, he did not offer evidence as to how counsel could have better prepared him for his testimony, so as to avoid additional impeachment with the October 12th statement. Thus, he cannot meet his burden of proving that he was prejudiced by counsel's failure to adequately prepare him for his testimony. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing *Pauling v. State*, 31 S.C. 606, 503 S.E.2d 468 (1998); *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540.

Applicant's chief complaint regarding counsel's handling of Mr. Hite is that counsel did not cross-examine him about his preparation of the incident report in *Quattlebaum*. Specifically, he points to the Supreme Court's decision in *In re Myers*, 355 S.C. 1, 5, 584 S.E.2d 357, 359 (2003), where the Court stated ,"On June 2, 1995, Detective Hite submitted his eleven-page Investigative Report about the murder for which Quattlebaum was charged. The highly detailed report failed to include an account of the eavesdropped confidential conversation, nor did the report disclose that the conversation was recorded on videotape." However, Applicant did not present Mr. Hite as a witness at the PCR hearing. As a result, the Court is left to speculate as to whether he would admit that he intentionally prepared an inaccurate incident report, or whether he would deny it and offer an explanation for inaccuracies in the report.[30] Thus, he has not established prejudice based upon counsel's failure to engage in this line of examination. *See Bannister*, 333 S.C. at 303, 509 S.E.2d at 809; *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540.

Moreover, the Court finds that Hite's preparation of the incident report in *Quattlebaum* was a collateral matter and was not relevant to any trial issue in this case.

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[30] If Hite denied it, counsel could not impeach him with extrinsic evidence. *State v. Outlaw*, 307 S.C. 177, 414 S.E.2d 147 (1992); comments to Rule 608, SCRE; *Fryar v. Curtis*, 485 F.3d 179, 184 (1st Cir. 2007) ("A matter is considered collateral if the matter itself is not relevant in the litigation to establish a fact of consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness. Stated another way, extrinsic evidence to disprove a fact testified to by a witness is admissible when it satisfies the Rule 403 balancing test and is not barred by any other rule of evidence.").

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> Under Rule 608(b), SCRE, specific instances of a witness's misconduct may be inquired into on cross-examination if probative of the witness's character for truthfulness or untruthfulness. The inquiry under Rule 608(b) is limited to those specific instances of misconduct which are clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement. *State v. Kelsey,* 331 S.C. 50, 75, 502 S.E.2d 63, 75 (1998) (citing Weinstein's Federal Evidence, Character and Conduct of Witness § 608.12(4)(a–b) (1998)).

Quattlebaum, 338 S.C. at 450, 527 S.E.2d at 109.

The Court finds that the preparation of the incident report in *Quattlebaum* is not admissible under Rule 608(b), SCRE because it is not a specific instance of misconduct that is "clearly probative of truthfulness or untruthfulness." Indeed, as Respondent pointed out at the PCR hearing, the Court in *Quattlebaum* affirmed the trial judge's ruling that the defendant could not impeach law enforcement witnesses with their participation in the videotaping of his conversation with his attorney. *Id.* Further, the preparation of the incident report in *Quattlebaum* is not admissible under Rule 608(c), SCRE and that even if it was admissible under Rule 608, it would be inadmissible under Rule 403, SCRE, because this is purely a collateral matter that might confuse jurors. *See* 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6096 ("The danger of allowing impeachment via a collateral matter is that when the fact to be impeached is not material, "the trier of fact may become confused by the attention directed at an unimportant fact. As a result, the trier of fact may attach undue importance to extraneous matters").

Moreover, counsel's cross-examination of Mr. Hite more than adequately exposed the problems with his credibility. See *Fensterer*, 474 U.S. 15, 22 (1985) (the Confrontation Clause is generally satisfied where the defense had a full and fair opportunity to expose a witness' "forgetfulness, confusion or evasion," thereby calling to the attention of the fact-finder reasons to discredit the witness's testimony); *Mills*, 161 F.3d at 1288 (defendant's Sixth Amendment right

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to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable"). Finally, the Court finds that there is no prejudice in light of the overwhelming evidence of guilt.

9. Counsel was not ineffective for not recusing himself from representation of Applicant because he was not a necessary witness.

The Court finds that Applicant is not entitled to relief on his claim that counsel was ineffective for failing to recuse himself from representation of Applicant because Applicant has failed to prove that Mr. Bruck was a necessary witness at trial.

At trial, Southerland admitted that Mr. Bruck had told him that he needed to speak with his lawyers before giving a statement and that Mr. Bruck had warned him not to give a statement. ***Tr. pp. 462-63***. Otherwise, he was flippant and evasive when Mr. Bruck questioned him about the details of the statement. For instance, he claimed that Mr. Bruck had him change his original statement because Mr. Bruck did not "want Tony Cooper's name involved with Red telling him about any money." *See* ***Tr. p. 465, line 5 – p. 468, line 25***. *See also* ***Tr. pp. 469-71***. Later, counsel elicited that, for years, Southerland would ask him, either in person or on the phone, when they were going to court because he wanted to give a statement on Applicant's behalf. Mr. Bruck, however, would tell him that Mr. Bruck could not speak to him. ***Tr. pp. 504-507***.

On redirect examination, the State first established that Mr. Bruck did not have any problems talking to when taking the statement but thereafter told Southerland that he could not speak. ***Tr. pp. 546-47***. Mr. Bruck objected and the trial judge heard the objection outside of the jury's presence. ***Tr. p. 547***. Mr. Bruck explained that:

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> ... [T]he reason I did not speak with Mr. Sutherland thereafter concerns the ethical rule against contacting a represented party. And, in fact, a grievance was filed against me for contacting Mr. Sutherland, or at least for agreeing to talk to Mr. Sutherland when he contacted me in the first instance. Although no disciplinary action was ultimately taken, I did receive a letter of caution about this whole episode. That's the reason.
>
> *****
>
> I made a mistake. I didn't make it twice and that's why I told him that I couldn't talk to him anymore. And it's very unfair to create the impression that I was avoiding him for reasons like I didn't want to hear what he had to say, which is exactly the purpose of this line of redirect. So I object to that. I think it's irrelevant and prejudicial under 403.

Tr. 548.

After the trial judge listened to the State's argument (***Tr. p. 549***), Mr. Bruck further explained that when he was trying to have Southerland testify at Applicant's 1997 PCR hearing, Southerland's attorneys obtained an injunction prohibiting Mr. Bruck from having further contact with Southerland. ***Tr. pp. 550-51***. Ultimately, the trial judge told counsel that he could instruct jurors that court rules prohibit attorneys from speaking to an individual represented by counsel without the other attorney's consent. Trial agreed that this solution was acceptable. ***Tr. pp. 552-53.***

Following the State's redirect of Southerland, the trial judge instructed jurors that "Ladies and gentlemen, as a matter of law, under our court rules, an attorney cannot speak with an individual represented by counsel without consent of that counsel." ***Tr. pp. 557-58.***

Mr. Bruck testified that he did not have a relationship with Southerland. However, at the time he took the statements from Southerland, he and several other attorneys who represented death row inmates "were really allowed sort of the run of the place. On a day when he was visiting clients, a correctional officer told him that Southerland wanted to speak to him. "I don't remember if I went up to his cell door then ... communicated through the officer, but [I

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determined that [Southerland] was bound and determined to talk to me about Tony, that he wanted to clear Tony, and he didn't want his own lawyers to know anything about this." At the time, Southerland was appealing his own convictions and death sentence stemming from Kim Quinn's murder. Mr. Bruck ultimately took the statement introduced at trial as Defendant's Ex. 2. ***Tr. pp. 33-34.***[31] Mr. Bruck testified that he memorialized the statement by taking notes as he spoke with Southerland, and later typing the statement from those notes. He thereafter had Southerland sign it. ***PCR Tr. p. 35.***

Mr. Bruck acknowledged that Southerland had repeatedly accused him of telling Southerland to omit information from his statement, and that he was the only person witness to Southerland's statement. ***PCR Tr. pp. 36-37; 39.*** He added that:

> I think I should have foreseen that something like that would happen. I was a little taken in by [Southerland]. He was so persuasive when he initially went down this road and he stuck to it for many, many years and then at the last minute did a one-eighty and said that none of this was true and he had been forced to do it by a group of people, including Tony Cooper and three other inmates who very conveniently had all been executed, so I couldn't interview any of them. He picked his coconspirators carefully.

PCR Tr. p. 38.

On direct examination he testified that he did not specifically recall why he did not recuse himself and become a witness and he deferred to the trial transcript. ***PCR Tr. pp. 39-40.*** On cross-examination, however, he testified that he discussed important strategic matters, and that this would have included whether or not he should have recused himself. ***PCR Tr. p. 47.*** He also reluctantly agreed that although the better practice is to have another person to witness the statement other than the attorney, lawyers are often put in situations where they take a person's statement even though the lawyer is the only person who witnessed that statement. ***PCR Tr. pp.***

[31] Defendant's Ex. 1 was the first page of that statement.

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71-72. And, he was unaware of any matters that he felt necessitated him testifying to further impeach Southerland's testimony. He would have testified had he been aware of any. Finally, he conceded that he had tried to impeach Southerland's testimony at length and that he had devoted a significant portion of his closing argument to pointing to reasons for jurors not to believe Southerland's version of events. ***PCR Tr. pp. 72-73***.

As an initial matter the Court finds that the two-pronged test set forth in *Strickland* applies as opposed to the test established for dealing with conflicts of interest based upon a conflict of interest arising out of an attorney's multiple representation of more than one defendant or party, either simultaneously or in succession, in the same or related matters. *See Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978). The North Carolina Supreme Court addressed a similar claim in *State v. Phillips*, 365 N.C. 103, 711 S.E.2d 122 (2011). In *Phillips*, the defendant argued that his attorney was ineffective for not withdrawing and testifying when the attorney realized that a trial witness previously made statements to the attorney that the witness did not recall making while testifying at trial. *Id.* at 116-17, 711 S.E.2d at 134. The defendant in *Phillips* argued that the *Sullivan* test applied based in part on Rule 3.7(a) of the North Carolina Rules of Professional Conduct, which is identical to Rule 3.7(a), of Rule 407, SCACR, and provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." See *Phillips*, 365 N.C. at 121, 711 S.E.2d at 137.

The North Carolina Supreme Court in *Phillips* rejected the defendant's argument and applied *Strickland* to the defendant's claim. *Phillips*, 365 N.C. at 121-22, 711 S.E.2d at 137. In so doing, the Court stated that:

> We find that *Strickland* provides the correct basis for our analysis. The Supreme Court observed in *Holloway* that defense counsel is in the best position to

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> determine whether a conflict exists. 435 U.S. at 485–86, 98 S.Ct. at 1179, 55 L.Ed.2d at 435. Attorney Cunningham apparently concluded no conflict existed, and defendant does not identify any conflicting interest of attorney Cunningham created by or arising from attorney Cunningham's continuing representation of defendant. Rather, defendant argues that his lead defense attorney violated Rule 3.7(a) of the North Carolina Rules of Professional Conduct[] ....
>
> *****
>
> The applicability of the *Sullivan* line of cases has been carefully cabined by the United States Supreme Court. "The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* ... is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176, 122 S.Ct. at 1246, 152 L.Ed.2d at 307. Here, unlike the circumstances posited in *Holloway* where counsel has been effectively silenced and any resulting harm difficult to measure, defendant has identified the single matter to which attorney Cunningham could have testified had he withdrawn as counsel. Because the facts do not make it impractical to determine whether defendant suffered prejudice, we conclude that *Strickland*'s framework is adequate to analyze defendant's issue.

Phillips, 365 N.C. at 121, 711 S.E.2d at 137. *See also State v. Cunningham*, 2013 UT App 277, ¶¶ 19-25, 316 P.3d 963, 968–69 (Utah Ct.App. 2013).[32]

Applying the *Strickland* standard to the facts here, the Court finds that Applicant has failed to prove deficient performance. This is not a situation where counsel's failure to withdraw resulted in impeaching evidence not being presented to Applicant's jury. To the contrary,

[32] The Court recognizes that a conflict of interest can arise where an attorney learns of exculpatory information that transforms the advocate into a material witness for his client. *See, e.g.*, Comments to Rule 3.7(a) of Rule 407, SCACR ("Combining the roles of advocate and witness can... involve a conflict of interest between the lawyer and client."). However, the Court finds that the framework for evaluating joint or dual representation conflict-of-interest claims should not be expanded to apply where a defendant claims there was ineffective assistance of counsel based upon a conflict of interest owing to his attorney's failure to withdraw and testify when the attorney is privy to possible exculpatory information. *See Phillips*, 365 N.C. at 121, 711 S.E.2d at 137. *See also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911-13 (2017) (holding that when a defendant raises a violation of the right to a public trial, which is itself a structural error, through a claim of ineffective assistance of counsel, prejudice on the ineffective assistance claim is not shown automatically; rather, the burden is on the defendant to show a reasonable probability of a different outcome in his or her case).

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counsel introduced the statement that he had taken from Southerland as Defendant's Ex. 2. Also, the Court finds that counsel discussed the decision of whether or not he should withdraw from representation of Applicant with his co-counsel before continuing with his representation. Although the trial judge stated that his ruling did not foreclose the possibility of counsel testifying, this Court finds credible Mr. Bruck's testimony that he was unaware of any matters that he felt necessitated him testifying to further impeach Southerland's testimony, and that he would have testified had he been aware of any. Based upon this testimony, the Court finds that there was no further impeaching evidence that counsel had to offer the jury. The Court further finds that Applicant did not present any evidence as to how a decision by counsel to testify could have further counsel. Under these circumstances, the Court finds that this is merely a conclusory allegation that does not warrant relief. *See Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980) ("[m]ere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation"); *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337, 339 (1986) ("Allegations which are conclusory are not grounds for post conviction relief, nor do they require the court to grant an evidentiary hearing"); *Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) ("Unsupported conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing"), *abrogated on other grounds*, *Trest v. Cain*, 522 U.S. 87 (1997).

The Court further finds that Applicant has not proven any prejudice from counsel's failure to withdraw from representing him so that counsel could testify to impeach Southerland. As discussed, Applicant has not proffered any impeaching evidence that was not before to the jury that counsel's testimony could have presented, much less proven that there is a reasonable probability of a different result but for counsel's failure to testify. Second, as the discussion of Ground (d) makes clear, counsel thoroughly impeached Southerland's credibility through

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lengthy cross-examination and closing argument. This cross-examination and argument enabled Applicant's jury to properly assess Southerland's credibility and counsel could demonstrate the supposed lack of it. *See Fensterer*, 474 U.S. at 22 (the Confrontation Clause is generally satisfied where the defense had a full and fair opportunity to expose a witness' "forgetfulness, confusion or evasion," thereby calling to the attention of the fact-finder reasons to discredit the witness's testimony); *Mills*, 161 F.3d at 1288 (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable"). Finally, there cannot be any prejudice in light of the overwhelming evidence of guilt.

10. The alleged "cumulative effect of trial counsel's errors."

Finally, the Court finds that Applicant is not entitled to relief based upon the supposed "cumulative effect of trial counsel's errors." The Court finds that a cumulative error or cumulative prejudice analysis is improper under *Strickland* because it would obviate the necessity of demonstrating that an applicant was actually prejudiced by any specific error. *Contra Strickland*, 466 U.S. at 687; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application").

Also, the South Carolina Supreme Court has declined to hold that separate and unrelated ineffectiveness claims can be aggregated, so as to find that counsel's representation was prejudicial under *Strickland*, when there is no Sixth Amendment prejudice on any individual claim. *See Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) (expressly declining to address the novel question of whether a PCR applicant is entitled to relief based

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upon the supposed cumulative effect of trial counsel's alleged errors); *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (same); *Lorenzen v. State*, 376 S.C. 521, 527, 657 S.E.2d 771, 775 (2008) (finding that PCR judge erred by relying upon *Nance v. Frederick,* 358 S.C. 480, 596 S.E.2d 62 (2004) and concluding that "[w]hile no individual failure alone would be a ground for granting this PCR, the cumulative neglect is severe"). This Court finds that such an analysis is not constitutionally required and should not be employed.

"The Supreme Court has not held that distinct constitutional claims can be cumulated to grant [collateral] relief." *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). This Court finds that several decisions of federal circuit courts of appeals rejecting a cumulate error or cumulative prejudice analysis are legally correct. *See id.*; *United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994); *Meuller v. Angelone*, 181 F.3d 557, 586 n. 22 (4th Cir. 1999); *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998) ("Having just determined that none of counsel's actions could be considered constitutional error, ... it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under *Strickland*").

To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in *Strickland* and would permit an inmate to circumvent his burden of proof. *See Strickland*, 466 U.S. at 687 ("Unless a defendant makes both showings [- *i.e.*, both deficient performance and prejudice –] it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable"). *See also Cronic*, 466 U.S. 648, 658 (1984) ("... the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged

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counsel must serve and file a notice of appeal on his behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 15 day of May, 2018.

J. CORDELL MADDOX, JR.
Presiding Circuit Court Judge

6/15/18, South Carolina

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER

Gene Tony Cooper #084279 Jr		State of South Carolina	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	5/18/2018 Date

For Clerk of Court Office Use Only

This judgment was entered on **18th May 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **18th May 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

Kristy Grafton Goldberg 1720 Main Street, Suite 303 Columbia, SC 29201

Kelly Oppenheimer Rembert C. Dennis Building PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW
1720 MAIN STREET, SUITE 303
COLUMBIA, SOUTH CAROLINA 29201

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