ATTORNEY JOEL STROUD
JOEL F. STROUD, ATTORNEY, PLLC
PO Box 516 Chesterfield, SC 29709
stroudlaw@shtc.net
South Carolina Bar Number 73797

Tuesday, September 4, 2018

Letter to The Clerk of The Supreme Court Of South Carolina Regarding the Filing of a Notice of Appeal/Petition for Certiorari for Mr. Joey Lynn Clark. Case Number: 2016 – CP – 11 – 0509

Attention: Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Notice of Appeal: PCR Order of Dismissal
Joey Lynn Clark: Case Number: 2016 – CP – 11 – 0509
SCDC Number: 187595

Dear Mr. Shearouse:

My client, Mr. Joey Lynn Clark, seeks appellate review of the denial of his post – conviction relief hearing. This appeal is filed with the South Carolina Supreme Court because it is a petition for certiorari. Mr. Clark's evidentiary hearing was held on June 19 – 21, 2018 at the Spartanburg County Court House.

On August 29, 2018 the Order of Dismissal was filed at the Cherokee County Courthouse. The Order was signed by the Hon. Grace Gilchrist Knie. I am enclosing the notice of appeal, the proof of service, And the Order of Dismissal.

I have also sent correspondence to the Clerk of Court Cherokee County, South Carolina Office of Indigent Counsel/Appellate Division, and to the South Carolina Atty. Gen.'s Office advising of Mr. Clark's intent to appeal.

If you have any questions, please email.

Sincerely,

Joel Stroud

NOTICE OF APPEAL/PETITION FOR CERTIORARI IN A PCR CIVIL CASE

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas, PCR Hearing

The Hon. Grace Gilchrist Knie, Presiding Circuit Court Judge

Case No. 2016 – CP – 11 – 0509

Joey Lynn Clark, SCDC
Number: 187595

PCR Applicant,

v.

State of South Carolina,

Respondent/
Defendant.

NOTICE OF APPEAL/PETITION FOR CERTIORRARI

Joey Lynn Clark seeks appellate review of the PCR Order of Dismissal issued by the Presiding Judge, The Honorable Grace Gilchrist Knie, **dated August 24,** 2018 and **filed** on **August 29**, 2018 by the Cherokee County Clerk of Court. **See Enclosed Order of Dismissal and Proof of Service.**

Tuesday, September 4, 2018 Signature and Printed Name of the PCR Attorney

09-04-18 Joel Stroud

Joel Stroud, PCR Attorney for Joey Clark: SC Bar No. 73797 PO Box 516
Chesterfield, SC 29709
Anticipated Appellate Counsel of Record: Office of Indigent Counsel, Appellate Division SCCID PO Box 11433 Columbia, SC 29211-1433 Telephone: 803-734-1343

Other Counsel of Record: Megan Harrigan Jameson, Senior Assistant Deputy Attorney General Post-Conviction Relief Division S.C. Attorney General's Office

PROOF OF SERVICE OF A NOTICE OF APPEAL/PETITION FOR CERTIORARI IN A PCR CIVIL CASE
THE STATE OF SOUTH CAROLINA IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
COURT OF COMMON PLEAS PCR EVIDENTIARY HEARING

HON. GRACE GILCHRIST KNIE, PCR PRESIDING CIRCUIT COURT JUDGE

CASE NO. 2016 – CP – 11 – 0509

Joey Lynn Clark,

PCR Applicant,

v.

State of South Carolina, Defendant.

PROOF OF SERVICE OF A NOTICE OF APPEAL/PETITION FOR CERTIORARI BASED UPON AN ORDER OF DISMISSAL FROM A PCR EVIDENTIARY HEARING

The undersigned attorney hereby certifies that a true copy of the Notice of Appeal/Petition for Certiorari in the above-referenced case has been served upon opposing and anticipated counsel to the proper addressees, and to the Cherokee County Clerk of Court, by mailing the documents with postage prepaid on **September 04, 2018.**

09-04-18 Joel Stroud

Date Signed: Signature and Printed Name of: Joel Stroud, PCR Attorney for Joey Clark
SC Bar No. 73797 PO Box 516, Chesterfield, SC 29709

Anticipated Appellate Counsel of Record SCCID PO Box 11433 Columbia, SC 29211-1433

Other Counsel of Record: Megan Harrigan Jameson, Post-Conviction Relief Division
S.C. Attorney General's Office

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP1100509

Joey Lynn Clark #00187595		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 (Voluntary 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.

FILED IN OFFICE OF CLERK OF COURT CHEROKEE COUNTY, S.C.
2018 AUG 29 PM 2:28
BRANDY W. MCBEE

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)
N/A		

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.

S/ Grace Gilchrist Knie	2760	08/29/2018
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on 8/29/18, and a copy mailed first class or placed in the appropriate attorney's box on 8/29/18, to attorneys of record or to parties (when appearing pro se) as follows:

Joel Flake Stroud
PO Box 516
Chesterfield, SC 29709

Alan McCrory Wilson
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Brandy W. McBee

Court Reporter

Brandy W. McBee - 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.

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2018 AUG 29 PM 2:29
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Joey Clark, SCDC #187595	)	Case No.: 2016-CP-11-0509
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before this Court by way of an application for post-conviction relief filed on July 20, 2016, by retained counsel Joel F. Stroud on behalf of Joey Clark (Applicant). Respondent served its return on May 16, 2017, requesting an evidentiary hearing. An evidentiary hearing was held on June 19-21, 2018, before this Court at the Spartanburg County Courthouse. Applicant was present and was represented by counsel Stroud. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson and Assistant Attorney General Jordan Cox. At the hearing, testimony was taken from trial counsel H. Chase Harbin, Seventh Circuit Assistant Solicitors Kimberly L. Leskanic and Jennifer Jordan, private investigator Ted Landreth, DNA analyst Meghan E. Clements, soil classifier John H. Thorp.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. During its November 2013 term, the Cherokee County Grand Jury indicted Applicant for murder (2013-GS-11-1167) for the death of Winter Wingard.

H. Chase Harbin, Esquire, was appointed to represent Applicant. Assistant Solicitor's Kimberly L. Leskanic and Jennifer Jordan of the Seventh Circuit Solicitor's Office prosecuted the case. On March 17, 2014, Applicant proceeded to a jury trial in the Cherokee County Court of General Sessions before the Honorable Howard P. King, circuit court judge. On March 20, 2014, the jury found Applicant guilty as indicted. Judge King sentenced Applicant to imprisonment for forty-five years.

Applicant filed a timely notice of appeal. Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense—Office of Appellate Defense filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Applicant then filed his own *pro se* brief. On August 19, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Clark, Op. No. 2015-UP-433 (Ct. App. filed August 19, 2015). The remittitur was returned to the circuit court on September 9, 2015.

SUMMARY OF FACTS ADDUCCED AT TRIAL

On December 1, 2010, Winter Wingard lived in a doublewide trailer off of Songbird Lane in Cherokee County with her mother, Beverley Patrick. (ROA 124-28). Applicant, who was Wingard's former boyfriend, had previously lived with Wingard and Patrick, but had been asked to move out when the relationship ended a few months earlier. (ROA 126-28, 134). Despite being asked to move out, Applicant still frequented the home. (ROA 128-29). Wingard had begun dating Anna Mooney, a young woman who lived in Georgia, which upset Applicant greatly. (ROA 129-30). Applicant, Wingard, and Mooney all exchanged near constant text messages back and forth, with Applicant repeatedly trying to interfere in Mooney and Wingard's relationship—including falsely telling Mooney that Wingard had AIDS in the hope .Mooney and Wingard would break up (ROR 178-204).

Applicant and Patrick worked together at a construction company and had worked

together on December 1st. (ROA 124, 135-36). After work, Applicant and Patrick went to their friend's house to pick up a quart of moonshine and pizza before heading back to the trailer on Songbird Lane. (ROA 136-37, 162). When they arrived, Wingard was sick with bronchitis and had a fever of 104 degrees. (ROA 138-39). Wingard was upset that Applicant was imbibing in moonshine for fear of how he would behave while intoxicated. (ROA 138). After eating pizza and drinking approximately three shots of moonshine, Patrick left Wingard on the couch and went to bed around 10 p.m., expecting Applicant would not be spending the night. (ROA 138-40). Text messages from Applicant, Wingard, and Mooney revealed that the three were exchanged in a near constant texting argument throughout the evening. Wingard attempted to send a text message to Mooney at 2:14 a.m. that was interrupted, likely by her phone losing power or having the battery removed. (ROA 379-82). This was the last text message attempted from Wingard's phone. (ROA 379-82).

At approximately 4 a.m. the next morning (December 2nd), Patrick was awoken by her alarm and found Applicant standing at the foot of her bed, which was unusual because Applicant was usually not awake at that time. (ROA 140-42). Applicant told Patrick that Wingard, who was sick with a 104 degree fever, had left the house in the middle of the night in Patrick's car to get cigarettes but never returned home and that he suspected she had really left to visit Anna. (ROA 139, 141, 150). Patrick tried to call Wingard numerous times without success and eventually rode to work with Applicant. (ROA 142-43).

Patrick received several text messages from Applicant throughout the day, including a message that indicated Applicant left work early but would be back to pick Patrick up when she finished working. (ROA 143). Applicant later returned to pick up Patrick, and after visiting the house where Applicant was supposed to be living, both returned to the trailer on Songbird Lane. (ROA 143-44). Applicant was helping Patrick dispose of old tomato plants when he suddenly

announced that he noticed Patrick's car parked down the road at a neighbor's home. (ROA 145). Applicant and Patrick went to the vehicle and discovered Wingard's purse was in the front seat; however, Wingard's cell phone and keys were not in the vehicle. (ROA 145-46, 152). Patrick asked a neighbor when the car appeared there and the neighbor said it was there when he woke up that morning. (ROA 146). Another neighbor later reported he noticed Patrick's vehicle parked in this location when he returned from work around 2:20 a.m. on December 2nd (ROA 215-18). Patrick called 911 and law enforcement arrived shortly thereafter. (ROA 146, 163, 172-73).

A few hours earlier on December 2nd, James Wilkerson was driving on Mikes Creek Road when he saw what he thought was a blow up doll. (ROA 221-22). When he got closer, he discovered it was not a doll but Wingard's nude body. (ROA 222, 228). Wilkerson did not have cell phone service, so he left the scene to get assistance. (ROA 223) Wilkerson found Clarence Taylor, who went to the scene at Mikes Creek and confirmed what Wilkerson had reported—the discovery of Wingard's lifeless, nude body with sweatpants pulled around her ankles and her legs folded back. (ROA 228). Wingard's body and sweatpants were smeared with reddish colored soil inconsistent with the soil at Mikes Creek. (ROA 243-45, 252).

Taylor called 911 and waited for law enforcement to arrive. (ROA 229). Investigator Jimmy Henson of the Cherokee County Sherriff's Department arrived and began processing Wingard's body and the scene at Mikes Creek. He noticed the reddish soil on Wingard's body and clothing, as well as blood. (ROA 242-46). It appeared as though someone had dragged Wingard's body to its final resting place near a barbed wire fence. (ROA 242-52, 258). Wingard had been stabbed thirteen times. (ROA 13). Investigator Henson collected several various items for testing, including briars and tree limbs near Wingard's body. (ROA 253-56).

Investigator Henson and other law enforcement officers also processed the trailer at Songbird Lane. Investigator Henson noted the soil at Songbird Lane was reddish colored, much

like the soil smeared on Wingard's body and clothing. (ROA 292). Officers recovered Wingard's cell phone with the battery removed, the cell phone battery separate from the phone, and the keys and remote to Patrick's car in the vegetation surrounding the trailer. (ROA 292-94, 304, 308). Officers processed various areas of the trailer and found no signs of any struggle inside. (ROA 300-01).

Law enforcement also processed Patrick's car. (ROA 309). Fingerprints of reddish soil were found on the driver's side, passenger's side, and steering wheel. (ROA 311-12). The car was dusted for fingerprints; Applicant's print was identified on the rear quarter panel of the car. (ROA 318). Other fingerprints recovered did not match Applicant, Wingard, or Patrick. (ROA 327-28, 373, 498). Spatter of Wingard's blood was discovered on the passenger door and dashboard. (ROA 320-22).

Applicant was arrested on December 6th for an unrelated traffic violation. (ROA 398). While he was in the detention center, several inmates housed with Applicant reported to law enforcement that Applicant had made incriminating statements implicating himself in Wingard's murder. (ROA 404-14, 435-44). Many of these statements had internal inconsistencies and did not fully comport with the evidence and investigation underway. Regardless, Applicant was charged with Wingard's murder shortly thereafter. (ROA 404, 444).

An autopsy of Wingard's body revealed she died from blunt force trauma to the head that caused internal bleeding to the brain. (ROA 464-66). The pathologist who performed the autopsy opined the blunt force trauma to the left side of Wingard's head likely caused her to loose consciousness and she was later stabbed thirteen times in the neck area. (ROA 462,466-68). Petechiae was also noted in WIngard's eyes, indicating Wingard was strangled but this was not the cause of death. (ROA 463-64). The pathologist estimated Wingard died between 2 a.m. to 3 a.m. on December 2nd, but she could not conclusively determine a time of death or the location

where she was killed. (ROA 470-71)

Fibers recovered from the scene at Mikes Creek were later determined to be consistent with the fibers on Wolverine boots similar to those owned by Applicant. (ROA 500-510). Additionally, DNA analysis determined Applicant could not be excluded as a contributor to a DNA mixture recovered on a briar from Mikes Creek or a DNA mixture recovered from a tree limb at Mikes Creek. (ROA 561-63). Applicant was also a major DNA contributor to a DNA mixture recovered from an oral swab of Wingard's mouth, identified as semen. (ROA 566-69, 572-74).

ALLEGATIONS RAISED IN THE APPLICATION AND AT THE HEARING

In his application for post-conviction relief, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Counsel's cross examination of Detective Burgess "sabotaged any chance that [Applicant] had in getting a fair trial."
    b. Counsel's "closing argument reinforced the jury's impression that [Applicant] had confessed to the murder of [the victim]."
    c. Counsel failed to move to suppress or object to inmate statements being admitted into evidence.
    d. Allowed inadmissible hearsay statements to be admitted during the trial.
    e. "[Counsel's] failure to object left [Applicant's] direct appeal attorney no alternative other than to file an Anders brief because no issues were preserved for appellate review."
    f. Counsel failed to request a directed verdict.
    g. Counsel failed to object to State's improper closing argument.
    h. "[Counsel] failed to either request that the State test the fingernail clippings or request funding from the State to have the clippings DNA tested."
    i. Counsel "failed to either request that the State DNA test the cigar butts or request funding from the State to have the cigar butts tested."
    j. Counsel failed to call a DNA expert to testify.
    k. Counsel failed to develop trial strategy or adequately communicate to Applicant the theory of defense.
    l. Counsel "failed to request that Judge King add voluntary murder as a lesser included charge to the substantive law, as well as adding voluntary manslaughter, guilty or not guilty, to the verdict form."

m. Counsel failed to present any evidence of manslaughter/heat of passion.
n. Counsel offered improper advice to Applicant "about whether to accept or reject the State's voluntary murder plea offer."
o. Counsel mailed Applicant a letter advising him of the plea offer, but Applicant never received the letter and never discussed the plea offer with Counsel.
p. Counsel failed to request a pre-trial hearing to determine whether sufficient probable caused existed to arrest Applicant for murder.
q. Counsel failed to object to the jury charge that malice could be implied by the use of a deadly weapon.
r. Counsel failed to renew his request to withdraw after Judge Kelly refused his initial request to withdraw, even after receiving a threat of great bodily harm from Applicant.
s. Counsel failed to put on a defense in order to have the last closing argument.
t. Counsel failed to request a mistrial.
u. Counsel failed to object to the excessive use of graphic pictures that went beyond and were not necessary for the proof of the State's case.
v. Counsel failed to request a change of venue based on the highly publicized murder in Cherokee County.
w. Counsel failed to retain a "expert witness soil scientist" to compare and analyze the red dirt found on the victim's body.
x. Counsel failed to request sequestration of the State's witnesses.
y. Counsel failed to request a jury view of the crime scene.
z. Counsel failed to investigate or present mitigating evidence.
aa. Counsel failed to strike juror who Applicant claims was present during his polygraph examination.

2. Prosecutorial Misconduct
   a. "The Assistant Solicitor committed prosecutorial misconduct when she impermissibly bolstered and impermissibly vouched for the credibility of the crime scene investigators and again told the jury that [Applicant] confessed."
   b. "The State committed prosecutorial misconduct when it impermissibly allowed Detective Burgess to read the inmate statements into evidence.
   c. "The State also committed prosecutorial misconduct in its closing argument when it impermissibly referenced the statements of the inmates, as well as, impermissibly bolstering the credibility of the State's investigators and offering improper state of mind speculations regarding [Applicant's] reasons about why he would cooperate with the police investigators. [Assistant Solicitor] Leskanic offered no foundational support for these improper state of mind speculations."
   d. "The State committed prosecutorial misconduct when it failed to perform DNA testing of fingernail clippings found underneath the fingernails of the victim."
   e. "The State committed prosecutorial misconduct when it failed to perform DNA testing of cigar butts found in the yard at the victim's

house, even though neither [Applicant], nor the victim and residents of the house smoked cigars."

3. The trial transcript does not reflect the actual order of testimony of the State's witnesses.

Applicant proceeded forward on these allegations at the evidentiary hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant has alleged numerous instances of ineffective assistance of counsel against trial counsel, H. Chase Harbin (counsel) and related allegations of prosecutorial misconduct against the assistant solicitors who prosecuted him.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of

the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find

it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "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 not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. See Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010), and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." United States v. Timmreck, 441 U.S. 780, 784 (1979). An ineffective assistance of counsel 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. 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; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (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.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693. Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Each allegation is addressed fully below:

Allegations Pertaining to Opening the Door to the Introduction of the Jailhouse Witness Statements

Applicant alleges trial counsel was ineffective for opening the door to the admission of statements from numerous jailhouse witnesses during the examination of Cherokee County Sherriff's Department Detective Burgess. Applicant alleges counsel's questioning of Detective Burgess during cross-examination about the statements allowed the State to introduce these statements during its redirect-examination without calling the jailhouse witnesses, thereby depriving Applicant of the ability to cross-examine these witnesses about their credibility or problems with their statements. This Court finds this allegation must be denied and dismissed, as counsel made well-reasoned, strategic decision to open the door to the admission of these statements.

During the evidentiary hearing, counsel testified he made a deliberate strategic decision to open the door to these statements during the examination of Detective Burgess after thoroughly weighing the State's evidence, his investigation into all the witnesses (including the jailhouse witnesses), and his perception as to how the examination testimony of Detective Burgess was going before the jury. Counsel testified that prior to trial, he reviewed the witness statements with Applicant and Applicant similarly testified he had reviewed the statements with counsel. Counsel testified he and his investigator talked or attempted to talk to each jailhouse witness who had provided a statement implicating Applicant in Wingard's death. Counsel testified several of the jailhouse witnesses were local men who were known by law enforcement and one of the witnesses resided out of state. He testified based on his investigation, the out of state witness appeared like he would be a credible and beneficial witnesses for the State, and therefore, would not likely be helpful for the defense. He elaborated that this witness made threatening comments that Applicant should stop talking and he was not going to say anything beneficial to Applicant when testifying. Counsel testified one of the local witnesses was irate that counsel had tracked him down, demanded counsel leave his property, and indicated he would not be helpful to Applicant when testifying. Counsel testified only one witness indicated he might be helpful to Applicant's case and made comments referencing that law enforcement had planted the confessions with inmates. However, counsel testified this witness had credibility and hesitancy issues that did not make him an ideal witness for the defense. Counsel testified it would have been very hard and risky to prove that law enforcement had coached or helped fabricate the statements, particular when none of the rest of his investigation supported this theory of law enforcement collusion.

Additionally, counsel testified he listened intently to Detective Burgess's direct examination, which he described as not going well and Detective Burgess did not appear overly

credible before the jury. Counsel testified that at that point, he did a risk versus benefit analysis and determined he would intentionally and strategically question Detective Burgess about these statements to open the door to their admission so the State would seek to admit the statements without calling the informants. He testified this method of allowing the statements in through Detective Burgess deprived the State the opportunity to present these jailhouse informants as witnesses to offer additional information to corroborated or explain discrepancies between the statements, which was counsel's goal in opening the door. Counsel testified he specifically considered Applicant's constitutional rights, including his right to confront witnesses being presented against him, and any hearsay concerns when weighing his decision to open the door to these statements.

This Court finds counsel's testimony as to this allegation is credible, particularly in reference to his strategic reason for opening the door to the admission of the various statements through Detective Burgess. Moreover, this Court finds counsel made an objectively reasonable strategic decision to question Detective Burgess as to these statements and open the door to their admission after thoughtful consideration of the facts of the case, his full investigation (including of these particular witnesses), and observing Detective Burgess during direct examination. Therefore, this Court finds counsel's performance was not deficient. See Bowman v. State, 422 S.C. 19, 809 S.E.2d 232 (2018) (in a capital PCR action, the Supreme Court determined that it was reasonable trial strategy for counsel to open the door to otherwise inadmissible evidence, after counsel thoroughly weighed the benefits and risks and decided to proceed forward with the strategy of opening the door, and moreover, that the State's response once the door was opened was proportional and confined). Additionally, this Court notes that by introducing the statements through Detective Burgess rather than calling each witness individually, the State elected not to call these witnesses and therefore, was unable to rehabilitate the witnesses or afford them an

opportunity to clarify or correct discrepancies between the statements and the evidence presented, which was the intended goal of counsel's strategic decision. Counsel's performance was not deficient.

Moreover, this Court notes that Applicant cannot establish any requisite prejudice, as the substance of these statements would have clearly been introduced at trial through the individual witnesses had the statements not come in through Detective Burgess. The prosecutors testified these witnesses would have been called as witnesses during Applicant's trial and they would have attempted to clear up any discrepancies or inconsistencies when each witness was testifying. Therefore, Applicant is unable to establish any resulting prejudice from counsel's strategic decision to open the door to these statements through Detective Burgess. This Court finds Applicant cannot establish any constitutional ineffective as to this allegation, which must be denied and dismissed with prejudice.

To the extent that Applicant has also raised an allegation of prosecutorial misconduct for introducing these statements through Detective Burgess rather than calling each witness individually, this Court rejects Applicant's claims of prosecutorial misconduct. Once the door was opened pursuant to counsel's strategic decision, the State merely introduced the statements and did not seek to otherwise call the witnesses or present other extrinsic evidence pertaining to these statements. The State's response to the opening of the door was measured and reasonable and simply does not arise to the level of prosecutorial misconduct. See State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008) (recognizing that otherwise inadmissible evidence, including evidence that would typically violate the Confrontation Clause, can be admitted when the defense opens the door to such evidence). The State did nothing improper in introducing these statements through Detective Burgess once the door was opened by counsel's strategic decision. Moreover, these witnesses would have been called during the State's case and the

substance of their statements would have been presented to the jury. Therefore, this allegation must be denied and dismissed with prejudice.

Allegations pertaining to failure to call a soil expert or asking the jury to visit the crime scenes

Applicant alleges trial counsel was ineffective for failing to retain and present testimony from a soil expert to show the soil at Mikes Creek was reddish in color and not distinct from the soil at Songbird Lane. Applicant asserts various State's witnesses testified improperly that the soils were distinct, which the prosecutorial highlighted in her closing argument, and used this testimony to argue Applicant had gotten into an altercation with Wingard at Songbird Lane prior to dumping her body at Mikes Creek based on the red soil covering her body, clothing, and purse, as well as the reddish handprints on Patrick's car. Applicant argues counsel should have retained an expert to educate the jury as to the actual properties of the soil at each location.

In support of this allegation, Applicant presented testimony from John H. Thorp, a licensed South Carolina soil classifier who was admitted as an expert. Thorp testified he had visited the scene on Mikes Creek Road and the scene on Songbird Lane the day prior to his testimony (June 18, 2010), approximately seven-and-a-half years after the discovery of Wingard's body. He used technical terms to describe the soil at both locations, but ultimately agreed the soil at Songbird Lane was reddish in color. However, he disputed the characterizations of the soil at Mikes Creek as darker or fertile as it was described during Applicant's trial and noted he saw quite a bit of soil that was reddish hued at Mikes Creek. He testified that if he had been called as a witness at trial, he could have testified as to the particularities of the soil at each location. He testified as to various types of testing that also could have been conducted prior to trial to further classify the soil.

In response to this allegation, counsel testified he visited both scenes prior to Applicant's trial and the soil at Mikes Creek was substantially different in color than at Songbird Lane.

Additionally, both prosecutors testified they visited Mikes Creek and Songbird Lane and confirmed the soil was noticeably different at the two scenes, with the soil at Mikes Creek being darker and brown in color compared to the reddish soil at Songbird Lane. Additionally, Respondent introduced several photographs of both locations, admitted as Respondent's Exhibits No. 1-7, which allowed this Court to view the soil at both locations near the time of Wingard's death.

Counsel also testified he cross-examined numerous witnesses about how common red soil was throughout the upstate and that red soil was not unique to the Songbird Lane area, which many witnesses acquiesced in response to his questioning. Additionally, counsel testified he did not want to overly focus on the soil issue, as he say it as a red herring that was not pertinent to the ultimate issues of the case. He also testified Wingard's killer was already linked to the Songbird Lane location because Wingard's cellphone, keys, purse, and car were all recovered at Songbird Lane.

After reviewing the record, the testimony of the witnesses at the evidentiary hearing, and the photographs of Songbird Lane and Mikes Creek taken near the time of Wingard's death, this Court finds counsel was not ineffective for failing to call a soil expert during Applicant's trial. Initially, this Court notes the descriptions given by the various witnesses during Applicant's trial and the closing by the State properly reflect the conditions of the soil at the time of Wingard's murder in December of 2010 and there is a noticeable difference between the soils at both locations—the soil at Mikes Creek is darker in color than the red soil at Songbird Lane based on the pictures of the locations, admitted as Respondent's exhibits. Applicant's soil analyst merely stated the hyper-technical terms for the color of the soil now in June 2018, early seven-and-a-half years following Wingard's murder, but his testimony ultimately would not have had any impact on Applicant's case.

Additionally, the record establishes counsel repeatedly, both in cross-examination of witnesses and during his closing, highlighted to the jury that essentially all of Cherokee County and the surrounding areas of the upstate are covered in red soil, thereby challenging the State's theory that the red soil on Wingard's body, purse, clothing, and the car somehow established the initial altercation and blows came while Applicant and Wingard were at Songbird Lane. This Court agrees with counsel's assessment that as the killer was already linked to the Songbird Lane area by other means, the any focus on the soil would not have had any impact on the verdict and would have been a red herring. The Court finds counsel was not deficient for not calling a soil classification expert as a witness during Applicant's trial.

Additionally, this Court finds that Applicant cannot establish any resulting prejudice, as Wingard's killer was already linked to the Songbird Lane scene through other evidence presented at trial, such as the location of the vehicle at approximately 2:20 a.m. near the trailer and the discovery of Wingard's keys, cell phone, and cell phone battery in the vegetation surrounding the trailer. Calling an expert on soil classification would have had no impact in defeating this other evidence linking the killer to the Songbird Lane area. This Court finds Applicant cannot establish any prejudice from counsel's failure to call a soil classification expert.

Additionally, to the extent Applicant argued counsel was ineffective for failing to request the jury physical visit both scenes so they could obverse the color of the soil, this Court finds this allegation is without merit. As discussed above, the photographs introduced to the jury and available for the jury to view clearly show the color of the soil at both locations, making a trip to the scenes unnecessary. This allegation is denied and dismissed.

Allegations pertaining to failure to object or failure to move for a mistrial

Applicant alleges counsel was ineffective for failing to sufficiently object throughout his trial, noting the lack of objections contained in the record and surmising that this is likely why a

non-merit Anders brief was filed by appellate counsel. Additionally, Applicant alleges trial counsel should have moved for a mistrial. However, Applicant failed to state specifically what counsel should have objected to, and the mere speculation that counsel's performance was deficient based on a bare assertion that he did not object at trial is not enough to establish either deficiency or prejudice. Similarly, Applicant's reliance on appellate counsel's filing of an Anders brief as proof of ineffectiveness is insufficient to establish any deficiency or prejudice. Similarly, Applicant has failed to establish when or why counsel should have moved for a mistrial, or that one would have been granted. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegations pertaining to failure to object or failure to move for a directed verdict

Applicant alleges counsel was ineffective for failing to move for a directed verdict at the close of the State's case, arguing this is standard motion that should always be made by competent defense counsel at the close of the State's case in a criminal trial. When questioned about this allegation, counsel testified he did not move for a directed verdict because he did not have any good faith basis to move for a directed verdict because the State had presented substantial circumstantial evidence establishing Applicant's guilt.

The standard for denial of a directed verdict and sending the case to the jury is whether the State has presented any direct or substantial circumstantial evidence tending to prove the guilt of the defendant when viewing the evidence and all reasonable inferences in the light most favorable to the State. State v. Pearson, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016) (quoting State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). Trial counsel is not deficient for failing to move to a directed verdict when the State has presented any substantial evidence, either direct or circumstantial, which tends to prove the guilt of the defendant. See Brown v. State, 307 S.C. 465, 468, 415 S.E.2d 811, 812 (1992) (trial counsel's failure to move for a directed verdict

was not deficient performance which prejudiced petitioner, and the PCR judge correctly denied petitioners PCR application, where the State presented substantial evidence, either direct or circumstantial, which tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced).

This Court finds counsel was not ineffective for failing to move to a directed verdict, as the State had presented substantial circumstantial evidence Applicant killed Wingard. The record establishes Applicant was the last person to see Wingard and had been feuding with Wingard and her new girlfriend on December 1st and December 2nd, Applicant's semen was found in Wingard's mouth despite testimony from numerous witnesses that they two were no longer romantically involved, Applicant could not be excluded as a contributor to DNA mixtures found in numerous locations at Mikes Creek near Wingard's body, fibers from boots of the same type as Applicant's Wolverine boots were discovered near the body, and numerous witnesses provided statements that Applicant confessed to killing Wingard. Clearly there was substantial circumstantial evidence tending to prove the guilt of Applicant when viewing the evidence and all reasonable inferences in the light most favorable to the State. Therefore, this Court finds counsel was not deficient for failing to move for a directed verdict, and moreover, Applicant cannot establish ay prejudice because any directed verdict motion would have been denied by the trial court. Therefore, this allegation must be denied and dismissed with prejudice.

Allegations pertaining to failure to present evidence of heat of passion or mitigation, failure to move for a jury instruction on the lesser-included offense of voluntary manslaughter, and failure to object to the jury instruction based on <u>Belcher</u>

Applicant alleges trial counsel was ineffective for failing to present evidence of heat of passion or mitigation and for failure to request a jury instruction on the lesser-included offense of voluntary manslaughter. At the evidentiary hearing, Applicant failed to present any evidence that

there was a struggle or altercation between Applicant and Wingard that led to her death that could or should have been presented during his trial.

When questioned about this allegation, counsel testified he made a strategic decision not to present any evidence of a struggle for two reasons: first, Applicant told him that he did not kill Wingard, not that the killing was somehow justified; and second, that because his defense was that Applicant was not the killer, it would be incongruent to also present evidence that there was some sort of struggle or altercation between Applicant and Wingard that led to her death. Additionally, Counsel testified he discussed this with Applicant and both agreed as strategy not to request the lesser-included of voluntary manslaughter because they believed, after listening to all the evidence presented, that they jury might split the difference and convict him of voluntary manslaughter rather than acquit him of murder if the jury believed the State had not proven its case. Additionally, counsel testified because no evidence was presented as to heat of passion, Applicant would not have been entitled to a voluntary manslaughter instruction.

This Court finds counsel's testimony on this issue credible. Moreover, Applicant failed to introduce any evidence of heat of passion to this Court. This Court finds counsel was deficient for failing to present evidence of heat of passion or a struggle in mitigation, as he was not presented with any such evidence. Moreover, since no such evidence was presented, any request for a jury instruction on the lesser-included offense of voluntary manslaughter would have been denied. See Cook v. State, 415 S.C. 551, 556, 784 S.E.2d 665, 667 (2015) (internal citations omitted) ("The trial court must determine the law to be charged based on the evidence at trial. When the record contains no evidence to support it, a voluntary manslaughter jury charge should not be given.")

Applicant also argues counsel was ineffective for failing to object to the trial court's instruction that malice could be implied from the use of a deadly weapon pursuant to State v.

Belcher, 385 S.C. 597, 685 S.E. d 802 (2009) (holding the jury could not be instructed to infer malice from use of weapon if evidence was presented that would reduce, mitigate, excuse, or justify homicide). See ROA 680 ("Now, the law says that if one intentionally kills another one with a deadly weapon, the implication of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise the inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in this case, and you may give it such weight as you determine it should receive.") However, because no such evidence of mitigation was introduced, there is nothing objectionable about the court's implied malice from the use of a deadly weapon charge and Belcher was not violated.

Allegation pertaining to failure to properly present and advise Applicant of plea offers

In his application, Applicant alleged counsel was ineffective for failing to properly present and advise Applicant as to all plea offers made by the State. However, the uncontroverted testimony presented at the evidentiary hearing established Applicant did not want to plead guilty, but rather, wished to maintain his innocence and proceed to trial. Both Counsel and Applicant testified this, and both confirmed that counsel had properly conveyed plea offers and Applicant rejected these offers. At the conclusion of the hearing, Applicant conceded there was no basis for relief as to this allegation Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegations pertaining to the State's closing argument

Applicant alleges the prosecutor made several objectionable comments during her closing argument, which amounted to prosecutorial misconduct, and that counsel was ineffective for failing to object to these comments. The following passages from the State's closing argument were highlighted by Applicant as improper:

> "When Joey Clark was in jail he confessed to fellow inmates that he killed Winter Wingard. He confessed to people in the cell block with him that he killed her. "I stabbed her. She was butchered." (ROA 624 lines 19-22).
>
> "So investigators worked and worked and worked to find the truth. They didn't know who it was. They didn't even know who she was. This wasn't a plan to pin something on someone. This was an investigation to do their job and they did it very well and to find the truth." (ROA 626 lines 5-9).
>
> "Detective Henson did a fantastic job and Cherokee County should be glad to have he and Billy Anthony as their crime scene investigators. When Detective Henson went out to that body, not knowing anything about anything, he knew that when he was moving towards the body he bumped into briers and the tree limb. And he said if I did, the killer may have, and so he took those. And lo and behold 99 percent of the population would be excluded as possible contributors to DNA left on the briar and tree limb. You know who is not excluded out of 99 percent of the population? That man right there, the one that we know was the last one with her, the one that didn't want her leaving, the one whose dirty hand print, palm print is on that vehicle. His DNA is at the scene. The fibers from his boots are on the wire, and he confessed." (ROA 633 lines 1-15).
>
> "Common sense, who is going to put the keys in the backyard of 130? But you know what? You just killed somebody and things are probably going to get a little haywire in your mind, I would think. Oh, gosh, I got out of the car. I got these keys. Its pitch black. I got to get back to the house. Throw them out, and that's where they're found, because he had to get back, because he had to tell Beverley she went to cigarettes and tell her Anna Mooney about it." (ROA 633 line 22-634 line 4).

Applicant claims these passages amount to vouching for the credibility of the law enforcement officers or are not supported by the record.

"Solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom. Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (internal citations omitted). "A review of a solicitor's closing argument is based upon the standard of whether his

comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Von Dohlen v. State, 360 S.C. 598, 609–10, 602 S.E.2d 738, 744 (2004) (internal citations omitted).

After reviewing the above passages in conjunction with a thorough review of the record as a whole, including the entire closing argument, this Court finds the State's closing argument was proper. The State did not put its prestige behind the law enforcement witnesses but rather, reviewed the thorough investigation undertaken by law enforcement that established Applicant's guilt. Additionally, the argument was properly confined to the record and reasonable inferences from the record, did not vouch for the credibility of the witnesses, and was not calculated to arouse the passions or prejudices of the jury. Therefore, the allegations alleging prosecution misconduct related to these passages of the closing argument must be denied. Additionally, as the State's closing argument was proper, this Court finds counsel cannot be deficient for failing to object. Therefore, this allegation must be denied and dismissed with prejudice.

Allegations Pertaining to Failure to Have Various Items Tested

Applicant alleges the State committed prosecutorial misconduct for failing to perform DNA testing on fingernail clippings collected during Wingard's autopsy, a knife recovered from Applicant when arrested, and cigar tips and wrappers found at Songbird Lane. Applicant similarly alleges trial counsel was ineffective for failing to request these items be tested or for failing to have the items tested himself.

Initially, this Court notes Applicant did not perform DNA testing on any of these items, and therefore, it is speculative what evidence, either beneficial or harmful to Applicant's case,

could have been yielded from testing. Cf. Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014) (granting PCR where applicant introduced DNA test results indicating blood found on three pieces of glass recovered from the victim's glass patio door did not match applicant to support his allegation that counsel was ineffective for failing to conduct DNA testing on the glass). As Applicant has failed to have any items tested, any argument as to what the results would have been would be improper and speculative. Therefore, this Court finds Applicant cannot establish any resulting prejudice.

Moreover, the record establishes the knife was tested and once it was determined that there was no blood present on the knife, there was no need for further testing. Counsel testified he did not move for testing of the fingernail clippings because Applicant and Wingard lived together and he alleged they had recently engaged in sexual acts, and therefore, he expected to find Applicant's DNA on her body, including her fingernails. Therefore, he strategically did not move for DNA testing of fingernails because likely would have helped State if DNA was present. Therefore, this Court finds Applicant cannot establish any deficiency of counsel.

Additionally, this Court finds Applicants allegations that the state committed prosecutorial misconduct by not testing these items is without merit, as the State has no duty to perform DNA testing on every piece of evidence collected. The record reflects a large number of items were sent to SLED for testing, which was confirmed by the prosecutors and counsel. The State was not derelict in its testing of evidence collected. This allegation must be denied and dismissed with prejudice.

Allegations Pertaining to Failure to Call a DNA Expert

Applicant asserts counsel was ineffective for failing to present testimony from a DNA expert to counter the testimony presented by SLED DNA Analyst Catherine Leisy. In support of this allegation, Applicant presented testimony from DNA expert Meghan Clements, who testified

she had reviewed the underlying DNA data, the testimony of Analyst Leisy, and the notes from Dr. Demers (the DNA analyst counsel retained and consulted with, but ultimately did not call as a witness at trial). At the evidentiary hearing, Clements testified that if she had been called as an expert witness at Applicant's trial, she would have been able to provide beneficial testimony on a variety of topics, including: how DNA is transferred from person to person and place to place; how Applicant's DNA could have been transferred to various areas of Mikes Creek based on the semen in Wingard;s mouth; provide a better explanation to the jury as to what "small" meant when discussing DNA; provide hypotheticals as to how three people's DNA could be on a sample; and provide better explanation of the DNA statistics presented by the State, particularly as to the inability to exclude Applicant as a contributor to DNA mixtures. Applicant alleges that Dr. Demers, or another expert such as Clements, should have been presented at his trial and counsel's decision not to call an expert amounts to ineffective performance.

When questioned about this allegation, Counsel testified he moved for funds to hire and subsequently hired a DNA expert, Dr. Demers, with whom he spent hours communicating by phone and by email prior to trial. Counsel testified Dr. Demers reviewed all of the underlying DNA data, spoke with the SLED analyst on the phone, and then crafted specific questions for counsel to aid counsel in his cross-examination of the State's DNA expert. Counsel testified he was able to elicit very favorable testimony from the State's own expert, including regarding secondary transfer, the incredibly small amount of DNA on numerous items, possible third contributors, the need to amplify the DNA numerous and the pitfalls associated with such amplification, alternative theories as to how Applicant's DNA could have been at Mikes Creek without him being present, and the inability to test many items due to such small samples. The record establishes counsel was able to elicit this testimony on cross-examination. Counsel testified that following his cross-examination of Analyst Leisy, he called Dr. Demers and

reviewed the information he elicited from the State's DNA expert. He testified he and Dr. Demers agreed he had elicited beneficial testimony from the State's expert and there was no need to call Dr. Demers as a defense witness, particularly since he would be subject to cross-examination from the State. Counsel also testified it is always better when you can elicit favorable testimony from the State's own witness without having to call your own witness, and since he was able to do so here, he made a strategic decision not to present De. Demers.

This Court finds counsel's testimony credible as to this allegation. Counsel properly retained and consulted with a DNA expert numerous times who helped prepare and shape his cross-examination of the State's DNA expert. The record reveals counsel was able to elicit favorable testimony from the State's own expert, thereby negating the need to call a defense expert subject to cross-examination from the State. This Court finds counsel's decision not to call Dr. Demers was a reasonable strategic decision.

Additionally, this Court finds Applicant failed to meet his burden of establishing any prejudice, as the testimony from Clements was ultimately consistent with the testimony counsel was able to elicit from the State's DNA expert. The testimony from Clements would not have had any impact on the jury's verdict. Therefore, this allegation must be denied and dismissed with prejudice.

Allegations pertaining to counsel's failure to move to be relieved following threats

Applicant alleges counsel was ineffective for failing to move to be relieved after Applicant threatened him. However, at the evidentiary hearing, both counsel and Applicant testified they had a good working relationship. Counsel denied Applicant made any threats against him and Applicant failed to produce any credible evidence to support such threats. This Court finds Applicant has failed to meet his requisite burden of proof and this allegation must be denied.

Allegation pertaining to failure to move for a change of venue

Applicant asserts counsel should have moved for a change in venue due to pre-trial publicity in Cherokee County and his failure to do so amounts to constitutionally ineffective assistance of counsel. Applicant failed to present any evidence that he was unable to receive a fair trial in Cherokee County due to excessive publicity.

"[T]he right to a fair trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). A venireman must be indifferent as he stands unsworn and his verdict must be based upon the evidence developed at the trial. Id. at 722. However, there is no requirement that the jurors be totally ignorant of the facts and issues involved in a case, particularly in light of the "swift, widespread, and diverse methods of communication" existing in the modern world. Id. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." Id. at 723. Neither the United States Supreme Court nor this Court had ever adopted such an unrealistic or stringent standard that mere exposure to pre-trial publicity disqualifies potential jurors.

Rather, our Supreme Court has held that "[m]ere exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead, the revenant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilty of the defendant." State v. Evins, 373 S.C. 404, 414, 645 S.E.2d 904, 909-10 (2007) (quoting Sheppard v. State, 357 S.C. 646, 655, 594 S.E.2d 462, 468 (2004))). The moving party bears the burden of establishing actual juror prejudice as a result of such pre-trial publicity. State v. Manning, 329 S.C. 1, 8, 495 S.E.2d 191, 194 (1997). When a motion for a change in venue is made based on pre-trial publicity, the preferred practice is to postpone ruling

on the motion until the jury panel is voir dired to determine what prejudice, if any, exists. Id. (citing State v. Easler, 322 S.C. 333, 417 S.E.2d 745 (Ct. App. 1996), affirmed as modified, 327 S.C. 121, 489 S.E.2d 617 (1997)).

This Court finds Applicant has failed to establish a motion for a change of venue would have been granted had counsel so moved. Counsel testified there were no pretrial publicity concerns that caused him to believe Applicant could not be fairly tried by a jury of his peers in Cherokee County and that he had searched for news about the case to that he would be aware of any publicity concerns. Additionally, the trial court questioned potential jurors during jury selection, and again during each new day of the trial, and no juror indicted they were biased or predisposed to Applicant's case. Applicant has failed to present any evidence that the jurors were untruthful in their responses to the court's questioning or that he was otherwise deprived of his right to a fair trial in Cherokee County. Therefore, this Court finds Applicant has failed to meet his requisite burden of proof and this allegation must be denied.

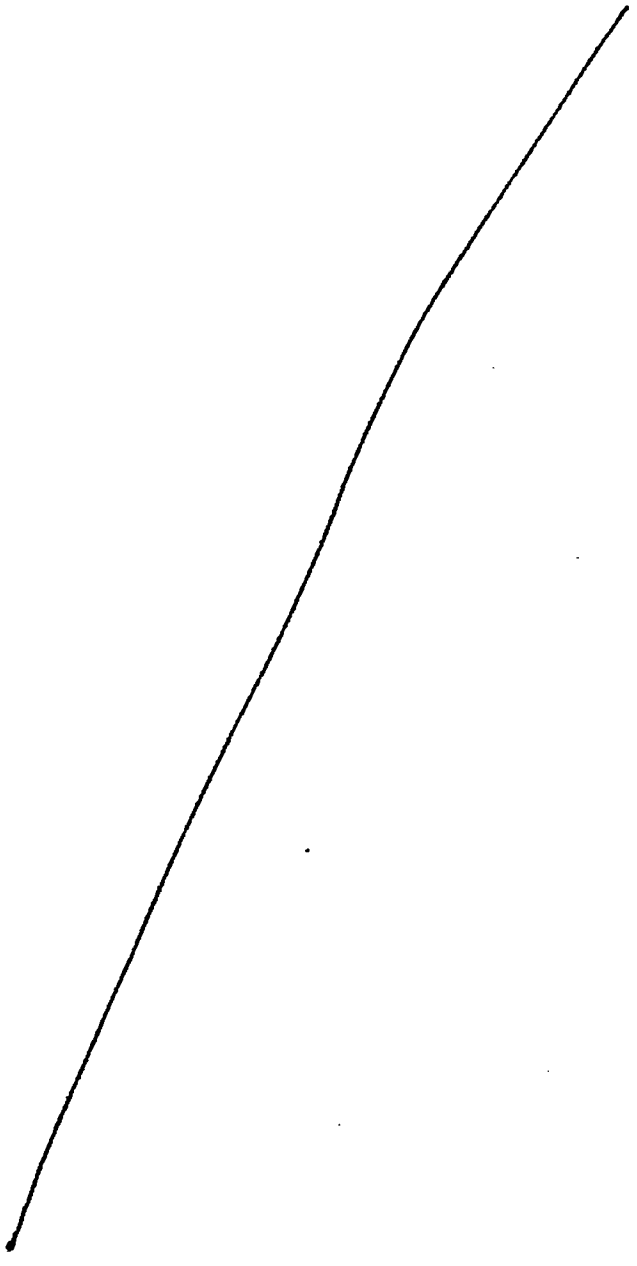
Allegation pertaining to failure to strike a juror present during Applicant's polygraph examination

In his application, Applicant alleged counsel was ineffective for failing to strike a juror who was present during his polygraph examination. However, Applicant failed to present any evidence to support this claim. Therefore, Applicant has failed to meet this requisite burden of proof. This Court finds this allegation must be denied and dismissed with prejudice.

Allegation pertaining to failure to object to the excessive use of graphic photographs

Applicant alleges counsel failed to object to the introduction of an excessive amount of graphic photographs that were introduced during trial. However, Applicant failed to point to any specific photographs that were introduced as prejudicial or otherwise present argument as to how he was prejudiced by the photographs introduced at trial.

Counsel and the prosecutors testified that hundreds, if not thousands, of pictures were taken, including of the crime scene, but that the State specifically selected only certain pictures necessary to prove their case and did not needlessly introduce excessively gruesome photographs. This Court finds this testimony credible and finds Applicant has failed to meet his requisite burden of establishing any ineffectiveness of counsel regarding the photographs introduced at trial. Therefore, this allegation must be denied and dismissed with prejudice.



CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 24th day of August, 2018.

G. S. Knie

GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

August 24, South Carolina

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.

2018 AUG 29 PM 2:41

BRANDY W. MCBEE

After 5 Days Return To:
Mrs. Brandy W. McBee
Clerk Of Court, Cherokee County
Post Office Drawer 2289
Gaffney, S.C. 29342

SC Attorney General's Office
ATTN: PCR Division
PO Box 11549
Columbia, SC 29211-1549

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C

2018 AUG 29 PM 2:41

BRANDY W. MCBEE

After 5 Days Return To:
Mrs. Brandy W. McBee
Clerk Of Court, Cherokee County
Post Office Drawer 2289
Gaffney, S.C. 29342

Joel F. Stroud
PO Box 516
Chesterfield, SC 29709

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL®

7018 0680 0000 9681 1472

RITY®
IL ★

LIVERY SPECIFIED*

KING™ INCLUDED*

INCLUDED*

ILABLE

TIONALLY,
RATION
UIRED.

EAL

UNITED STATES POSTAL SERVICE®

1006

29211

U.S. POSTAGE PAID
PM 2-Day
SOUTH ROYALTON, VT
05068
SEP 04, 18
AMOUNT
$12.90
R2305K131209-10

PRIORITY
★ MAIL ★

VISIT US AT USPS.COM®
ORDER FREE SUPPLIES ONLINE

FROM:

FROM: Attorney Joel Stroud
PO Box 516
Chesterfield, SC 29709

TO:
Daniel Shearouse, Clerk
SC Supreme Court
PO Box 11330
Columbia, SC 29211