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September 5, 2018

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

Re: *Sammie Lee Gerrick v. State of South Carolina*
Case Number 2016-CP-06-00111

Dear Ms. McElveen:

Enclosed please find Mr. Gerrick's Notice of Appeal in the post-conviction relief case, along with a certificate of service. Also enclosed are the orders of the Honorable R. Scott Sprouse that are being appealed.

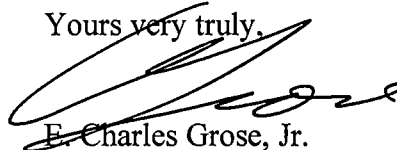
Also enclosed, please find a copy of my correspondence of this date ordering the transcript of the PCR evidentiary hearing.

Please note that I will be representing Mr. Gerrick on this appeal.

Thank you for your attention to this matter. Please let me know if you have any questions or if I can provide additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Sammie Gerrick (via US Mail)
Julie A. Coleman, Esquire (via email and US Mail)
Clerk of Court, Barnwell County

RECEIVED
SEP 10 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

Case No. 2016-CP-06-00111

Sammie Lee Gerrick, ... Petitioner,

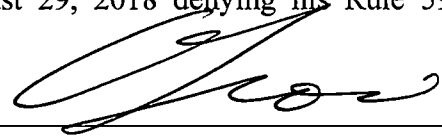
v.

State of South Carolina, ... Respondent.

Notice of Appeal

Sammie Lee Gerrick appeals the order of the Honorable R. Scott Sprouse, dated, July 27, 2018, dismissing his application for post-conviction relief. This appeal is taken from the order of Judge Sprouse filed on August 29, 2018 denying his Rule 59(e), SCRCP motion.

By



E. Charles Grose, Jr.
S.C. Bar Number 66063
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(864) 538-4466
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Email: charles@groselawfirm.com

Attorney for Jennifer McSharry

September 5, 2018
Greenwood, South Carolina

Other Counsel of Record:

Julie A. Coleman, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

Case No. 2016-CP-06-00111

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Julie A. Coleman, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

September 5, 2018



E. Charles Grose, Jr.
The Grose Law Firm, LLC.
404 Main Street
Greenwood, SC 29646
(864) 538-4466

RECEIVED

SEP 10 2018

S.C. SUPREME COURT

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0600111**

Sammie Lee Gerrick		South Carolina State of	
---------------------------	--	--------------------------------	--

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ 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: **Order Denying Defendant's Motion for Reconsideration.**

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.

S/J R Scott Sprouse
Circuit Court Judge

2752
Judge Code

8/29/2018
Date

For Clerk of Court Office Use Only

This judgment was entered on **August 29, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **August 30, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose Jr. 404 Main Street Greenwood, SC 29646

Julie Amanda Coleman PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Carter

Court Reporter

Constance B. Carter - Deputy 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.

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Sammie Lee Gerrick,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Case No.: 2016-CP-06-00111

ORDER DENYING DEFENDANT'S MOTION
FOR RECONSIDERATION

REONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

FILED FOR RECORD
2018 AUG 29 PM 1:08

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Defendants's Motion, pursuant to Rule 59, SCRCP,¹ is DENIED.

AND, IT IS SO ORDERED.


R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
August 29, 2018

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0600111Rec
8/6/18
mon

Sammie Lee Gerrick		South Carolina State of	
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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.

3/1/A. Scott Sprouse
Circuit Court Judge

2752
Judge Code

8/3/2018
Date

For Clerk of Court Office Use Only

This judgment was entered on **August 3, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **August 3, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose Jr. 404 Main Street Greenwood, SC 29646

Julie Amanda Coleman PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Carter

Court Reporter

Constance B. Carter - Deputy 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.

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Sammie Lee Gerrick, #165940,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

C/A No. 2016-CP-06-0111

ORDER OF DISMISSAL

FILED FOR RECORD
2018 AUG -3 AM 11:24
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed by Sammie Lee Gerrick (Applicant) on March 15, 2016. Respondent made its return on September 30, 2016. Applicant submitted an amended application on May 3, 2018. An evidentiary hearing into the matter was convened on Wednesday, May 9, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and represented by E. Charles Grose, Jr., Esquire. Assistant Attorneys General Julie A. Coleman and Caroline Scrantom appeared on behalf of Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant also presented testimony from Charlene Gerrick, Daniel Williams, Esquire (Trial Counsel), and Dr. Janice Ross. This Court had before it the records of the Barnwell County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the record on appeal, Applicant's direct appeal records, and the pleadings.

Following the hearing, both parties submitted post-hearing briefs at the instruction of the undersigned. Both parties were also permitted to file a response to the opposing brief. After carefully considering the arguments presented, this Court finds the application for post-conviction relief should be denied.

RSS

I. THE ALLEGATIONS BEFORE THIS COURT

By and through PCR counsel and pursuant to Rule 71.1, SCRCP, Applicant served an amended application on May 3, 2018, containing the following allegations which were exclusively pursued at the evidentiary hearing before this Court:

1. Ineffective Assistance of Counsel

- a. Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.
- b. Failing to investigate and present available evidence explaining the "root."
- c. Failing to object to the trial judge's opening comments and final instruction on the law, instructing the jurors to find the "true facts," including but not limited to the opening instruction, "[A]t the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict;" and the final instructions to the jurors, "It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;" "That is your sole responsibility, your sole duty to determine what the true facts are in this case;" and "You're here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I've given it to you."
- d. Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.
- e. Failing to make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the juror's minds as to deny Mr. Gerrick due process.
- f. Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witnessed intimidation.
- g. Failing to object to improper victim impact evidence that was not relevant and which were intended to arouse sympathy, passion, and prejudice in the juror's minds.
- h. Failing to object to testimony that violated the confrontation clauses of the state and federal constitutions.
- i. Failing to object to impermissible character testimony that violated Rule 404, SCRE.
- j. [no allegation "j"]

- k. Failing to object to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.
- l. Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.
- m. Failing to object to statements by the prosecutor during closing argument which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof.
- n. Failing to object to inflammatory statements by the prosecutor which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and were so defamatory to Mr. Gerrick that it denied him due process.
- o. Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in the case, which Denied Mr. Gerrick's right to a fair and impartial grand jury presentment.
- p. Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.
- q. Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal.
- r. The cumulative effect of trial counsel's errors requires a new trial.

II. STANDARD OF REVIEW

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different." *Smalls v. State*,

422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)).

At all times during the proceeding, the applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with “a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate that “‘counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.’” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and arguments presented in their entirety. This Court has before it the pro se PCR application and subsequent filings by the parties to the PCR action, as well as the Barnwell County Clerk of Court records pertaining to Applicant's indictment and sentencing, Applicant's South Carolina Department of Corrections records, the appellate filings and opinion affirming Applicant's conviction and sentence, and a complete transcript of the General Sessions proceedings. This Court has further heard the testimony and argument presented at the PCR hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and has weighed their testimony accordingly.

At the outset, this Court finds that Applicant proceeded at the evidentiary hearing on the totality of the claims as presented in the Amended Applicant for PCR served May 3, 2018. Also at the evidentiary hearing, Applicant expressly withdrew claim (h), that trial counsel was ineffective for failing to object to testimony that violated the confrontation clauses of the state and federal constitutions. This Court finds claim (h) and all claims from the pro se petition not duplicated in the amended application waived and abandoned. S.C. Code Ann. § 17-27-90.

As to the remaining claims, the undersigned makes the following findings of fact and conclusions of law in accord with S.C. Code Ann. § 17-27-80:

Procedural History

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment by the Barnwell County Clerk of Court. He is serving a life sentence without the possibility of parole.

During its November 2013 term, the Barnwell County Grand Jury indicted Applicant for the murder of Tyrone Donaldson. Daniel W. Williams, Esquire, represented Applicant at a jury trial which began November 18, 2013, before the Honorable Doyet A. Early, III in Barnwell County. Assistant Deputy Attorney General S. Creighton Waters and Assistant Attorney General Jason Anders prosecuted the case, which lasted four days. The jury convicted Applicant of murder and he was sentenced to life imprisonment.

Appellant appealed his conviction and sentence. Lara Caudy, Esquire, with the South Carolina Commission on Indigent Defense, perfected the appeal. By and through the Attorney General's Office, the State made its brief in response. Without oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. *State v. Gerrick*, Op. No. 2016-UP-092 (S.C. Ct. App. filed Feb. 24, 2016) (unpublished). The court issued the Remittitur on March 25, 2016.

Facts Presented at Trial

This Court presents the following summary of facts from Applicant's underlying jury trial as an overview of the evidence presented against him. This Court considered the evidence presented at trial in its determination that Applicant has failed to meet his burden of proving prejudice on any of his allegations addressed below. The evidence includes, but is not limited to, the following:

Tyrone Donaldson was last seen by family and friends on July 21, 2011. At that time, Donaldson lived with his sister-in-law, Kelsea Hallingquest, who last saw him when he left their home that morning. (Tr. p. 255, ll. 8-22). John Rice, a friend of Applicant, called Donaldson sometime that morning. Rice called on Applicant's behalf to tell Donaldson that Applicant

needed bail money. (Tr. p. 214, ll. 8-25). Donaldson's friend Maurice Williams also received a phone call from Applicant, again asking for bail money. (Tr. p. 179, ll. 4-9).

Williams and Donaldson met at the bank the morning of July 21, deciding they would bail Applicant out of jail for a total of \$6600 in exchange for a promise by Applicant that he would pay them back on the same day. (Tr. p. 179, l. 19 – p. 181, l. 4). Williams gave Donaldson his half of the bail money then went back to work. (Tr. p. 182, l. 11 – p. 184, l. 17).

Donaldson bailed Applicant out of jail, and they called Williams to let him know. (Tr. p. 184, l. 20 – p. 185, l. 11). Applicant expressed appreciation, stating he would "bless" them. (Tr. p. 185, ll. 7-15). The bailout occurred between 11:00 AM and noon that day. (Tr. p. 215, ll. 22-25). According to county jail employees, Applicant was free of scratches or bruising upon his release, although a ceiling lightbulb did bust and fall into his cell at some point during Applicant's detention. (Tr. p. 216, l. 1 – p. 218, l. 20; p. 487, l. 3 – p. 488, l. 25).

Early that afternoon, Williams and Donaldson touched base again, and Donaldson told him he intended to drop Applicant off, go home, and then go pick Applicant back up so Applicant could reimburse the \$6600 as promised. (Tr. p. 185, l. 19 – p. 186, l. 14). Between 1:00 and 2:00 PM, Donaldson did return home, picked up a shotgun, and left. (Tr. p. 256, ll. 4-25). Donaldson was also seen by Applicant's girlfriend's son dropping Applicant off at his girlfriend's home. Donaldson returned to pick Applicant up less than an hour later. (Tr. p. 230, ll. 12-24). When Donaldson got to Applicant's location, Applicant placed two shovels from the barn behind his house into the bed of his own pickup truck, and they two men left in separate vehicles. (Tr. p. 230, l. 24 – p. 231, l. 9). Donaldson followed behind Applicant's truck. (Tr. p. 231, ll. 9-11).

Donaldson and Gerrick were next seen at 2:54 PM, which was determined from the timestamp on security camera footage at the Enterprise Bank on Main Street in Blackville. (Tr. p. 537, ll. 17-34). Security footage shows a Honda Accord following a Burgundy pickup truck out of the bank parking lot. (Tr. p. 542, l. 1 – p. 543, l. 16). At 3:15 PM at a local gas station/Subway, Shaneka DeLoach, a relative of Donaldson's and someone who knows Applicant from the community, witnessed Applicant standing outside of Donaldson's driver's side window speaking to Donaldson and "moving his hands." (Tr. p. 234, l. 11 – p. 236, l. 17). "He could have been looking mean." (Tr. p. 236, l. 23). DeLoach, who was across the street in another parking lot, could identify Donaldson's white Honda and Applicant in a burgundy Dodge truck. (Tr. p. 236, ll. 1-7).

Sometime between 3:00 and 4:00 that same afternoon, Applicant's friend Joe Thomas saw Applicant speed past his house in a gray and burgundy truck; there was another car behind him. (Tr. p. 574, l. 4 – p. 575, l. 11). Thomas called Applicant's cell phone, and Applicant replied he was busy. (Tr. p. 574, l. 5 – p. 575, l. 18). Applicant was headed north; a rural area demarcated by Sunshine Road sits about a mile north of Thomas' house. (Tr. p. 576, ll. 4-16).

No one saw Donaldson later that evening and into the night. His girlfriend, Kim Smith, received a final text message from him around 1:30 that afternoon, but when she called his cell later that evening she received no answer. (Tr. p. 165, ll. 2-21; p. 167, l. 2 – p. 168, l. 3). Williams, who was looking to be reimbursed for his bail contribution when he finished with work for the day, could not get Donaldson to answer his phone. (Tr. p. 186, ll. 15-22). Some text messages sent to Donaldson expressing worry were not received; phone records would later show that his cell phone was turned off or was outside of a service area for at least 72 hours. (Tr. p. 476, l. 18 – p. 478, l. 19). After a night passed without contact, Donaldson's mother contacted

the police department because no one had heard from Donaldson since he was last seen with Applicant. (Tr. p. 254, ll. 17-25). Blackville Police Department Chief John Holston began a missing person's case on Donaldson the following day. (Tr. p. 265, ll. 5-13).

On the same night that no one could get in touch with Donaldson, mutual friends did see and speak with Applicant. After work, Williams, Applicant's neighbor, met Applicant outside. Applicant explained to him that he and Donaldson dug up a safe containing \$90,000 to \$100,000, "loaded that little Honda down with money," and Donaldson drove off with all of it. (Tr. p. 189, l. 2 – p. 190, l. 20). The next day, Williams saw Applicant again and noticed "scratch marks on his chest." (Tr. p. 200, ll. 19-25).

The next day, Williams, Hallingquest, and a third mutual friend Jamaal Berry each received a text message from an unknown phone number, 347-8647. (Tr. p. 196, ll. 9-13; Tr. p. 247, ll. 9-16). Williams' and Berry's read "help me this Tyrone am hurt Kim ex got me help please." (Tr. p. 195, ll. 4-17; Tr. p. 246, l. 18 – p. 247, l. 1). Hallingquest's text stated "help me sister-in-law Kim ex-husband got me am hurt." (Tr. p. 258, l. 10). Each recipient noticed oddities about the text message, in addition to its receipt from an unknown number. The sender incorrectly spelled "I'm" in this manner: "am." (Tr. p. 197, ll. 18-19). Additionally, Donaldson never called Hallingquest his "sister-in-law," he referred to her as either Kelsea or simply as his sister. (Tr., p. 258, ll. 11-20). Williams knew Applicant would spell "I'm" as "am" on a regular basis, and had many comparisons from past messages in his own phone. (Tr. p. 197, l. 20 – p. 198, l. 21; Tr. p. 199, ll. 17-23; Tr. p. 200, ll. 3-12). When Berry called Applicant to ask if he sent the text message, Applicant's response was along the lines of "it wasn't me, maybe this will take some heat off me." (Tr. p. 248, l. 22 – p. 249, l. 14). When Applicant provided law

enforcement with a handwritten statement, he spelled "I'm" as "am."¹ (Tr. p. 318, ll. 2-9). The texts came from a trac phone. (Tr. p. 611, ll. 3-18). Applicant later asked others if they had heard from Donaldson, or what they might have heard about Donaldson's disappearance. (Tr. p. 194, ll. 3-15; Tr. p. 565, l. 18 – p. 566, l. 25).

Also occurring one day after the disappearance, Lana Joyner, a friend of Donaldson and Hallingquest, took a detour home from work, spotted Donaldson's white Honda parked at the China Express in Orangeburg, and called Hallingquest to tell her. (Tr. p. 498, l. 23 – p. 500, l. 10). Applicant's wife Charlene testified at trial as to how the Honda appeared at the Orangeburg China Express. Between nine and ten on the night Donaldson went missing, Applicant asked Charlene to drive him to retrieve a white Honda Civic "off a paved road, back up in the woods," and Charlene obliged. (Tr. p. 303, l. 10 – p. 304, l. 24). Applicant had the key to the Honda Civic and drove it over to Orangeburg, parking it at the China Express. (Tr. p. 305, l. 8 – p. 306, l. 25). Charlene followed behind and then drove Applicant home. (Tr. p. 307, ll. 4-21). According to Charlene, they arrived home late that night, and recalled that Applicant did not stay with her for long. (Tr. p. 308, l. 23 – p. 309, l. 4). Gerrick was seen back at his girlfriend's house later that night by her son. (Tr. p. 231, ll. 12-13). He said Applicant was sitting outside on the steps between ten and midnight and "looked like he was facing – like he had a lot on his mind." (Tr. p. 231, ll. 14-24; Tr. p. 233, ll. 1-3).

Several days later on August 3, Charlene took law enforcement to the place in the woods where Applicant recovered Donaldson's car. (Tr. p. 310, ll. 2-9). The spot was located off of Sunshine Road, where there is another "little dirt road called One Way." (Tr. p. 327, ll. 8-16).

¹ Evidence at trial established that Applicant utilized other phonetic spellings, such as spelling "right" r-a-t ("rat") and using "no" where "know" was the appropriate form in context. (Tr. p. 318, line 10 – Tr. p. 319, line 11).

They made a left onto One Way, driving past where "there's an open field. And then it goes into a heavy wooded area." (Tr. p. 327, ll. 14-19). Based upon this information, law enforcement assembled a search in that area beginning August 4. (Tr. p. 328, ll. 3-10). One officer eventually came across a disturbance underfoot, "and when he poked his [search] stick into the ground . . . an odor came up." (Tr. p. 329, ll. 7-13). SLED was contacted and a crime scene technician later recovered the body of a black male later identified by a right forearm tattoo as Tyrone Donaldson. (Tr. p. 329, l. 23 – p. 331, l. 25; Tr. p. 443, ll. 12-20).

Upon recovery, Donaldson's body "was face down and the knees were bent as if put into the ground on the stomach with the legs bent up." (Tr. p. 415, ll. 15-17). Donaldson had been buried in a two-foot grave. (Tr. p. 417, ll. 1-4). Also apparent were bindings which had once bound Donaldson's knees and ankles; "his arms were underneath his chest." (Tr. p. 415, ll. 14-22). "There was a piece of root that actually went through his arms. And it was connected on both ends so his arm had gone through and around the root." (Tr. p. 416, ll. 2-5). SLED agents also found burned charcoal in the soil, a fired shotgun shell, an unfired shotgun shell, a logging chain, a cigar butt, gloves, and "a white appliance top that looked like it had burned charcoal around in it." (Tr. p. 416, ll. 9-10; Tr. p. 420, l. 25 – p. 421, l. 8).

At the gravesite, investigators found green netting, which they initially believed to be trash. (Tr. p. 411, ll. 15-18). Investigators also collected green netting and fishing lures at Applicant's Blackville residence, "similar to what [they] had seen at the body." (Tr. p. 427, ll. 16-20; Tr. p. 429, l. 25 – p. 430, l. 2). Trial testimony from Applicant's girlfriend's son showed that green netting was also present approximately a year prior to Donaldson's disappearance as part of some sod laid at Applicant's girlfriend's home. (Tr. p. 231, l. 25 – p. 232, l. 10).

Forensic Pathologist Dr. Janice Ross conducted an autopsy on Donaldson's body the day after its discovery. (Tr. p. 438, ll. 6-25). The body, "very much covered with dirt," had decomposed in a moderate-to-severe, or "fairly advanced" fashion due to it being buried for ten to twelve days in July. (Tr. p. 439, ll. 5-21). Dr. Ross discovered neither fractures nor bullets, and could not clearly identify any bruising or other soft-tissue injury due to the extent of the body's decomposition. (Tr. p. 440, ll. 2-20). Ross found no visible particles of dirt in the throat or nostrils. (Tr. p. 451, ll. 13-17). In addition to the ligatures or bindings, Dr. Ross did identify "some defects in the back of the left forearm. They were splits in the skin consistent with a laceration." (Tr. p. 441, ll. 1-7). Dr. Ross identified these forearm lacerations as defensive wounds, such as the scratches that may be obtained by shielding oneself from harm with his or her arms. (Tr. p. 447, l. 22 – p. 448, l. 22). In conclusion, Dr. Ross determined based upon "[t]he fact that he was buried underneath dirt, and without evidence of shooting or fractured skull, for instance from a beating, it is most likely that there was some kind of asphyxiation," strangulation, and a homicide. (Tr. p. 445, ll. 1-11). Such a homicide, given the circumstances and burial scenario, could result "either from being strangled with some sort of soft item" or "result from somebody being incapacitated and then buried." (Tr. p. 445, ll. 9-18).

On August 5, law enforcement executed search warrants for Applicant's Dodge pickup truck as well as for places he was known to reside. (Tr. p. 332, ll. 10-14; p. 343, l. 23 – p. 344, l. 1). Applicant was in custody at that time. (Tr. p. 392, l. 19 – p. 393, l. 5). Law enforcement found in the center console of Gerrick's truck a "brown package, like a brown piece of paper bag It was just taped up. Once you open it, it had some dust, weed, twigs, and a penny in it." (Tr. p. 344, ll. 2-10). It was taped up like a capsule. (Tr. p. 344, ll. 18-20). Law enforcement opened the capsule to find the handwritten words:

Set me Sammie Gerrick free from murder and revoke bond.

Jack Early set me free now.

Jack Early set me free now.

Jack Early set me free now.

Sammie Gerrick, Sr.

Sammie Gerrick, Sr.

Sammie Gerrick, Sr.

So shall it be.

So shall it be.

So shall it be.

Amen.

Amen.

Amen.

(Tr. p. 346, ll. 4-18).

On the other side there was a selection resembling Psalm 130:

Out of the depths[sic], have I cried unto thee, O Lord. Lord hear my viouce[sic]:
ut[sic] think ears, be attentive to the voice of my supplications, if that Lord
shouldest mark iniquities O Lord, who shall stand? But there is forgiveness with
thee that there inaqest[sic] be feared. I wait for the Lord, my sould doth wait, and
in his word do I hope my soul waiteth for the Lord more than they that watch for
the morning I saw, more than they that watch for the morning. Let Israel hope in
the Lord. For with the Lord there is mercy. And with him is plenteous[sic]
redemptions. And he shall redeem Israel from all his inguities[sic].

(Tr. p. 347, ll. 7-15).

Also found in the center console was a small canister labeled "Law Stay Away." (Tr. p.
425, l. 16 – p. 426, l. 13).

Law enforcement did not process Applicant's vehicle for prints because it had been
washed and because Donaldson and Applicant "had knowledge of each other" such that law
enforcement characterized it "not a big deal" if Donaldson's fingerprints were found in
Applicant's vehicle. (Tr. p. 427, ll. 2-12). But Lieutenant Schultz with the Orangeburg
Department of Public Safety recovered five of Applicant's fingerprints from the front right
passenger door of Donaldson's white Honda Civic. (Tr. p. 525, ll. 1-10; Tr. p. 532, ll. 1-8).

Further DNA testing inside the Honda Civic showed no contributions from either Applicant or Charlene Gerrick. (Tr. p. 507, l. 17 – p. 510, l. 3).

Over the course of the investigation into Donaldson's disappearance, Applicant made a series of voluntary statements to law enforcement. They were introduced in segments at trial. (Court's Exhibit 2). He made his first statement on July 22, the day after commencement of the missing persons investigation. (Tr. p. 266, l. 16). Blackville Police Chief John Holston first spoke with Applicant because Donaldson was last seen in his company. (Tr. p. 266, ll. 18-21). Applicant told Chief Holston that Donaldson bailed him out of jail on July 21, they went to Enterprise Bank together sometime afterwards so that Applicant could cash a check, and then they went to the BP station in Blackville. Applicant said they remained at the BP and Junior Food Mart convenience store for a while talking and were not together any time thereafter. (Tr. p. 266, l. 25 – p. 267, l. 9).

After law enforcement got the tip about Donaldson's Honda Civic from the China Express in Orangeburg, Chief Holston again spoke with Applicant. (Tr. p. 267, ll. 10-20). Chief Holston wanted to know whether Applicant knew about Donaldson's ATM card. (Tr. p. 268, ll. 1-2). Chief Holston included SLED Lieutenant Shaun Harley in this second interview, which began late into the night on July 22 and bled into early the next morning. (Tr. p. 314, ll. 13-24). Applicant went into the details of his initial arrest,² his attempts to contact Donaldson for bail money, and Donaldson ultimately bailing him out. (Tr. p. 269, l. 1 – p. 270, l. 20). Applicant's statement included more minutia about his July 21 contact with Donaldson: Donaldson drove him home from jail, Applicant went inside and cleaned up, then Donaldson and Applicant went

² The chain of events arose from Applicant's Bamberg County incarceration following a wholly separate child support issue. Once Applicant received that sentence, he attempted to escape the courthouse and was apprehended in the Piggly Wiggly parking lot. (Tr. p. 269, ll. 1-11).

to Enterprise Bank so Applicant could cash a check for \$104, then Applicant "went to JRs Mart driving [his] 1998 Dodge pickup to put \$30 worth of gas in [his] truck while Tyrone was still driving the white Honda Civic." (Tr. p. 270, l. 21 – p. 271 l. 6). Applicant referenced his use of Donaldson's ATM card. (Tr. p. 271, ll. 22-24). Then, according to Applicant, each told the other they were going home. (Tr. p. 271, ll. 7-9). During this interview, Chief Holston "did notice that there w[ere] some scratches across . . . Applicant's arms and across his chest." (Tr. p. 272, ll. 13-15). Holston photographed the marks. (Tr. p. 273, ll. 2-13).

Applicant gave a third statement to Lieutenant Harley at the Barnwell County Sheriff's Office during an interview with Harley and SLED agent John Burnett. (Tr. p. 320, l. 3 – p. 321, l. 18). In this statement, Applicant went into details on how he got in touch with Williams about needing bail money, and then went on to explain how he and Donaldson jointly received \$18,000 from a backhoe. Applicant did not want to tell Williams about that money because "he didn't think that [he] need to bring that up." (Tr. p. 322, p. 14 – p. 323, l. 3). Applicant expounded upon financial calculations he made with Donaldson regarding repayment for bail and admits in that statement: "So I received the [ATM] card from there and went to the bank." (Tr. p. 323, ll. 4-16; Court's Exhibit 2). Applicant stated he was given Donaldson's ATM card because they shared joint ownership of the backhoe funds. (Tr. p. 323, l. 20 – p. 324, l. 23).

On July 25, SLED agent John Burnett interviewed Applicant again. (Tr. p. 394, ll. 19-23). Applicant stated he had the economic means to get out of jail but was not allowed to make the requisite calls to arrange his bond, and eventually the bail arrangement with Donaldson worked out ten days after Applicant's initial incarceration. (Tr. p. 400, l. 20 – p. 401, l. 1). Applicant said he had tardy bills totaling somewhere between \$1500 and \$1800, that he fronted Donaldson some money at an earlier time, and he had no reason for meeting Donaldson post-

bailout at Enterprise Bank. (Tr. p. 401, l. 2 – p. 402, l. 9; Tr. p. 403, ll. 10-17). Agent Burnett also noticed scratches “visible to the eye” on Applicant’s arms and chest “consistent with having been exposed to the outdoors.” (Tr. p. 402, ll. 10-17).

Also, one week after Donaldson’s disappearance, Applicant called Chief Holston’s cell phone. (Tr. p. 274, ll. 8-12). When Holston picked up the phone, Gerrick said “Tyrone’s not dead. . . . Black’s got Tyrone and they want \$25,000 in cash for him” (Tr. p. 274, ll. 13-19). Applicant requested “backup” to get Donaldson back, explained that Donaldson must be “over around Springfield” where “Black was from.” (Tr. p. 274, ll. 20-23). Chief Holston told Applicant that if he could send him more information and proof of life, they would “go from there.” (Tr. p. 275, ll. 1-7). Applicant sent no additional information. (Tr. p. 279, ll. 12-18).

After law enforcement recovered Donaldson’s body, they had Applicant transported from the Charleston County Detention Center³ to Barnwell County for a fifth interview. (Tr. p. 333, ll. 1-21). Applicant started providing answers to information presented to him by law enforcement at this time. Applicant said he went to the BP station to visit with Donaldson, then visited his father’s house in Bamberg County, and then walked from there to his wife’s house. (Tr. p. 350, ll. 16-24). This time, Applicant for the first time said that he went to Orangeburg, but did not mention the Honda Civic. (Tr. p. 350, l. 25 – p. 351, l. 3). Applicant was arrested for Donaldson’s murder. (Tr. p. 358, ll. 21-25).

A few hours after arrest, Applicant requested to speak with law enforcement again. (Tr. p. 359, ll. 8-18). Applicant imparted upon the officers that he wanted to tell the whole story truthfully, opening with “I’m going to put it all out there.” (Tr. p. 361, l. 24 – p. 362, l. 3). Applicant then told the events in a different light, stating that he and Donaldson planned a drug

³ Applicant’s Charleston County incarceration stemmed from a bond violation. (Tr. p. 351, ll. 11-14).

transaction while riding back from jail. Donaldson was supposed to purchase a kilo of cocaine from Andrew Hightower, O'Shane Dixon and "Big Joe." (Tr. p. 362, ll. 4-12). Applicant previously mentioned a Big Joe to Lieutenant Harley, (p. 358, ll. 5-11), but Big Joe was identified slightly differently this time. (Tr. p. 362, l. 21 – p. 363, l. 3; Tr. p. 600, ll. 14-21). All Applicant knew about Big Joe was that he was from Georgia and drove a Denali. (Tr. p. 362, l. 13 – p. 363, l. 3). Applicant talked about a drug deal set to occur after he and Donaldson departed from the BP and Junior Food Mart, wherein Donaldson was supposed to give Applicant some of the proceeds, even though Applicant owed Donaldson \$3300 in bail money. (Tr. p. 363, ll. 7-23). Andre Hightower then instructed Applicant to move Donaldson's car in exchange for \$400, and Applicant admitted to driving the Honda to Orangeburg. (Tr. p. 364, l. 2 – p. 368, l. 24).

During the same interview, Applicant first maintained that he never traveled to the "wooded areas on that one-way dirt road where the car was located and the body was discovered." But Applicant changed his story after Lieutenant Harley told him homeowners on the road saw his truck. (Tr. p. 369, l. 14 – p. 371, l. 8). In a follow-up August 18 interview with SLED agent Jeff Croft, Applicant "began to explain how his truck could have possibly been found or seen in the area." (Tr. p. 599, ll. 9-21). Now placing himself at the crime scene, Applicant declared that the drug deal involving a kilo of cocaine became fumbled and Applicant looked on while Big Joe, Andre Hightower and O'Shane Dixon began to beat Donaldson. (Tr. p. 599, l. 22 – p. 601, l. 24). The weapon was a pipe or a gun. (Tr. p. 604, ll. 10-13).

On yet another occasion in October 2011, Applicant sent a letter to SLED requesting a further interview during which "he stated that he had somebody that could vouch for his innocence." (Tr. p. 372, l. 5 – p. 373, l. 25). Another inmate at Lieber, Early Glover, wrote a

statement on Applicant's behalf because Applicant told him he "was in a bind." (Tr. p. 374, ll. 3-12; Tr. p. 583, ll. 1-25). Applicant promised Glover he would pay him \$1000 to copy a statement Applicant scripted and passed through the jail cells, and Applicant practiced writing the statement to Applicant's satisfaction, signing Glover's name at the bottom. (Tr. p. 584, l. 3 - p. 587, l. 5). The statement dealt with Donaldson, who "was supposed to be the main man," meeting two other men in the woods, when an argument ensued involving Applicant, and whereupon Applicant was told to stay in the car. (Tr. p. 587, ll. 6-24). "None of it never[sic] happened" in reality. (Tr. p. 588, l. 1).

Upon further investigation, zero evidence corroborated other individuals in Donaldson's disappearance. (Tr. p. 376, l. 2 - p. 377, l. 2). Donaldson had no community reputation for or connection with drugs. (Tr. p. 376, ll. 11-22). In regards to the drug deal narrative, Andre Hightower testified at trial that he hardly knew Applicant and had never heard about a Big Joe. (Tr. p. 558, l. 12 - p. 559, l. 16). He also did not know O'Shane Dixon. (Tr. p. 561, l. 25 - p. 562, l. 1). Hightower was in Greenville with his girlfriend and her son on July 21. (Tr. p. 558, l. 21 - p. 559, l. 9), and he stayed in Greenville for about two days. (Tr. p. 563, ll. 2-9). O'Shane Dixon, fishing buddies with Applicant, also testified. (Tr. p. 564, ll. 13-21). Dixon was at home watching his children all day on July 21, heard about Donaldson's disappearance that evening, and began receiving phone calls from Applicant that night onward asking about what Dixon may have heard about it. (Tr. p. 565, l. 18 - p. 566, l. 25). Applicant also called off their fishing trip on July 22 without reason. (Tr. p. 567, ll. 1-21).

Also, just as Applicant and Donaldson went to the Enterprise Bank ATM on the day of Donaldson's disappearance, Applicant returned to that same ATM alone at 8:00 that same night in his burgundy Dodge Ram and used Donaldson's ATM card. (Tr. p. 545, l. 6 - p. 546, l. 25).

p. 555, ll. 15 – 20). Donaldson's card was also used on July 22 at 7:50 PM at Bamberg Auto Parts, at 8:00 PM at the Palm Pantry in Bamberg, twice more at the in-store ATM at the Palm Pantry, and that morning at the Bank and Trust on North Main Street in Bamberg. (Tr. p. 552, l. 1 – p. 554, l. 23). Donaldson's same account was used to pay bills for SCANA Energy around midnight on July 22. (Tr. p. 555, ll. 2-14).

Finally, cell phone records evidence that Donaldson's cell phone permanently left the grid at the same time as Applicant's, but Donaldson's phone never regained service. (Tr. p. 461, l. 4 – p. 470; Tr. p. 476, l. 18 – p. 478, l. 19; Tr. p. 705, l. 24 – p. 706, l. 9). The last four phone calls ^{that} ~~the~~ Donaldson made were to Applicant. (Tr. p. 469, l. 15 – p. 470, l. 1; Tr. p. 612, l. 24 – p. 614, l. 21; Tr. p. 705, ll. 3-11). After that last phone call, made from the Blackville area, Applicant's phone escaped from the phone grid for two hours. (Tr. p. 461, l. 4 – p. 470; Tr. p. 705, ll. 12-25). Other records show that the mysterious "help me am hurt" text messages derived from a trac phone pinging from the same location as Applicant's phone at the time the texts were sent. (Tr. p. 611, ll. 3-18; Tr. p. 719, l. 13 – p. 720, l. 11).

Testimony Presented at the PCR Evidentiary Hearing

In addition to his own testimony, Applicant presented three witnesses at the evidentiary hearing. Charlene Gerrick offered testimony chiefly in regards to her invocation of the marital privilege at trial. She invoked the marital privilege for the purposes of this PCR hearing as well. C. Rauch Wise appeared at the evidentiary hearing on her behalf in this regard. Gerrick established that she has been married to Applicant since 1995.

Charlene Gerrick testified that when law enforcement interviewed her as part of the investigation into the prosecution of this case, they delivered threatening statements to induce her to tell them her husband committed the murder. She alleged that law enforcement told her that

she would lose her daughter and could be charged with murder. She also testified that her interviews with them were recorded. She testified that law enforcement did not notify her of the marital privilege. She recalled being interviewed on two occasions by local law enforcement agents. She also recalled a search warrant being executed upon her home.

Charlene Gerrick also testified that she met with the prosecutors who tried the case, Applicant's trial counsel Daniel Williams, and other law enforcement agents, but never told anyone about the alleged threatening statements from local law enforcement. She testified that this evidentiary hearing was the first time she was disclosing this information.

Charlene Gerrick also recalled meeting with Applicant's trial counsel Daniel Williams prior to trial. Gerrick testified that she recalled her trial testimony being limited to actions she took as part of the investigation. She agreed that her trial testimony did not pertain to communications with her husband that would have been covered by the privilege she invoked.

Charlene Gerrick offered testimony concerning the "root" which was discovered by law enforcement in the center console of Applicant's truck. Gerrick testified that she made the "root" and placed it there on August 1, 2011. She speculated that Applicant did not know it was there. Gerrick also briefly stated she believed in the doctrine and that she wrote Judge Early's name on the "root" because he previously presided over a bond hearing Applicant had.

Charlene Gerrick also testified that a person named Gerard Saxon told investigator Kenny Bamberg that Applicant did not kill the victim. This was the only testimony on this point offered at the evidentiary hearing. Saxon did not testify and was not otherwise identified to the court.

Trial Counsel also testified. Due to the length of Counsel's testimony and the number of allegations raised in the amended PCR application, Trial Counsel's testimony is included in more

detail herein where each individual PCR claim is addressed. However, the following constitutes a general summary of Trial Counsel's qualifications and preparation for trial,

Trial Counsel Williams testified that he was appointed to Applicant's case as a member of the private bar. He represented Applicant for over a year prior to trial. This case was a conflict case from the Second Circuit Public Defender's Office due to the hiring of one former public defender by the Second Circuit Solicitor's Office. He has been practicing law for thirty years.

Trial Counsel testified that he prepared for trial by speaking with Applicant about the charge and evidence, reviewing all of the documents provided by the State in discovery, and by hiring a series of individuals to assist in the investigation of a defense. He hired a medical examiner to review the autopsy in this case. He hired Roger Sharp as an investigator to speak with witnesses that Applicant himself had pointed counsel in the direction of. This included Applicant's wife Charlene Gerrick, though he never talked to her about the "root" which was at issue at trial. Trial counsel did explain that he informed Mrs. Gerrick that she could retain counsel.

Trial Counsel also testified about consulting with a qualified friend concerning the vegetation surrounding the victim's gravesite. He explained that he did so in an effort to follow a possible lead that would exculpate Applicant by showing that the victim was killed elsewhere. Trial Counsel testified that his investigation ultimately dead-ended.. Related to this investigation, Trial Counsel also explained that he had prepared to put forward a witness in Applicant's defense who would testify that he killed the victim in Santee and came and buried the body in Barnwell County. However, the note written by this witness that would corroborate this defense lost all credibility when the trial testimony of Early Glover came to light. As Trial Counsel recalled, Early Glover testified at trial that Applicant paid him \$1000 to write a note

providing Applicant with an alibi. Trial Counsel testified that he had to make a strategic decision as to whether, after Glover's testimony, his own defense witness would be credible. He decided it would not be credible, but would rather corroborate Glover's testimony delivered on behalf of the State. Moreover, that potential witness invoked his Fifth Amendment privilege during *in limine* hearings at trial. In sum, Trial Counsel explained that he could not corroborate the letter from this witness or the leaves found in the gravesite, and thus decided to abandon this potential defense because in his assessment it would have done more harm than good.

Applicant's testimony chiefly addressed the "root" evidence. He testified that he did not believe in it. He testified that he did not tell his trial counsel that it was in his truck. Applicant was aware that a handwriting expert consulted by his trial counsel confirmed that Applicant himself did not write the note made part of the "root." He testified he did not learn that his wife made it until after he was convicted at trial.

Applicant also testified that he disagreed with trial counsel's decisions about specific jurors excused or elevated from the panel of alternates during the course of trial. He stated that he wanted to keep seated the juror who was dismissed for having a history of mental health issues and that his trial counsel instead made that determination for him. Applicant expressed that he did not see anything about this juror that made her disqualified to serve. Applicant also testified that he did not want to retain Juror 23, who was subject to an in-chambers discussion between the attorneys, but that counsel told the trial court it was okay if that juror stayed on the jury. Applicant expressed he felt that it was a violation of his Constitutional rights to be excluded from decisions regarding these jurors' service.

Applicant called as his final PCR witness Dr. Ross, the forensic pathologist who conducted the victim's autopsy and testified at trial. She testified about the state of

decomposition of the victim's body at the time she conducted the autopsy on August 5, 2011. Referencing her file, she stated the victim was affected by discoloration and skin slippage at the autopsy. His fingernails were falling off. She testified that external factors affect the rate of decomposition such as air type and temperature, body temperature at the time of death, and the location of the body in relation to outdoor elements. Ross stated there was no way to determine precisely how long the victim had passed prior to autopsy. She noted that such a determination would not be for her to conclude, but rather could be done by examining when the victim was last seen or contacted.

Dr. Ross provided PCR testimony about the manner and cause of death. She reported the manner of death as homicide. She testified that in making this determination she considered that the victim's hands and feet were bound and that he was discovered in a shallow grave. She testified the ligatures binding the victim were not part of a consideration of where he was killed. As for the cause of death, Dr. Ross stated it was undetermined. The victim did not show signs of internal bleeding. She stated he may have had defensive wounds but because of the extent of the decomposition, specifically skin slippage, she could not determine them to a precise certainty. Also because of the decomposition, Dr. Ross could not determine whether the victim had sustained a blow to the head, which would have left bruising. Dr. Ross cited asphyxiation as another possible cause of death. The victim did not sustain any visible evidence of choking. He had no inhaled dirt or particles from the earth such that they could be found during autopsy.

The PCR Allegations

The Court now turns to the allegations on the merits in the order presented in the amended application:

- a) *Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.*

Applicant alleges Trial Counsel is ineffective for failing to move for the recusal of Judge Early from the trial based on a conflict of interest with the "root" presented at trial. Applicant argues that the writing on the "root" led reasonable jurors to conclude that the trial court "declined to 'help' Mr. Gerrick keep the law away or obtain his freedom," constituting a judicial opinion that Applicant's trial should proceed. (Applicant's Br. at 20). This Court finds this allegation without merits as no basis for recusal can be found in the record which would lead to a finding of deficient performance or prejudice.

The "root" was found during the execution of a search warrant in Applicant's vehicle. Law enforcement found it in the center console of Applicant's truck and some of the writing on the root included the name of the trial judge presiding over Applicant's case. (Tr. p. 344-47). Trial Counsel moved to suppress the evidence found in the vehicle, arguing it was overly prejudicial and would cause the jury to act on emotion or prejudice. (Tr. p. 36.) The trial court denied the motion to suppress and allowed the "root" in as evidence of consciousness of guilt. Trial Counsel did not move for the trial court to recuse himself from the case based on the root, and the trial court made no mention of the inclusion of his name in the capsule.

At the evidentiary hearing, Trial Counsel testified he saw no reason to move for judicial recusal, and he did not believe the court's failure to *sua sponte* recuse had any effect on the

jurors. He explained that he did not see the trial judge's name on the "root" as the real issue at hand, and that the real issue was Applicant's admission of guilt. On that basis, Trial Counsel did not move for recusal.

Though Applicant now asserts the trial court should have been recused from the case, this argument is meritless, as the mention of his name in the "root" does not create an actual conflict of interest. Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." Canon 3(E)(1), Rule 501, SCACR. "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citation omitted); *Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct.App.2008); see also *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) ("In cases involving a violation of Canon 3, this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice.") (citations omitted). Appellate courts "accord great weight to the trial judge's assurance of his own impartiality." *Id.* It is the movant's responsibility to provide some evidence of the existence of the judge's impartiality. *Lyvers v. Lyvers*, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct.App.1984) (citation omitted).

This Court finds that the presence of the trial judge's name on the root does not form a basis for judicial recusal such that Trial Counsel performed in a deficient manner by failing to move for the trial court to recuse on Applicant's case. The judicial canons do not otherwise provide a basis for recusal fitting of the facts of Applicant's case. Canon 3(E)(1)(a)-(d). The use of the trial judge's name in the "root" introduced at trial does not create any kind of conflict or the appearance of a personal bias or prejudice on the judge's behalf. The trial court made no

mention of his personal opinion on the root during trial and carefully avoided all potentially prejudicial of the root as evidence of "witchcraft." This Court finds Applicant's claim attenuated in its base assertion that reasonable jurors would interpret the presence of the only resident circuit court judge's name on the "root" constituted any specific comment by the court on the facts of the case. As Trial Counsel testified, Applicant's trial judge was, and is, the only resident judge in the Second Circuit of South Carolina, so it would not be unusual or notable that the note included his name rather than another judge's name. There is no basis in the record from which one could conclude the trial court reasonably questioned or should have questioned his impartiality, nor was any comment made about the text included in the root which would convey to the jury that the trial court itself had an opinion about the root evidence. Trial Counsel was not deficient as Applicant alleges.

As to any potential prejudice caused by Trial Counsel's failure to move for judicial recusal, even if, as Applicant asserts, the fact the trial judge's presiding over Applicant's case somehow conveyed a personal opinion about the root evidence to the jury, any potential prejudice was cured by the judge's jury instructions during his charge:

Now, if at any time during the trial of the case you've seen me smile or frown or roll my eyes or yawn or stretch or do anything that you think that I have an opinion about the facts, disregard that. I cannot and I do not. I try cases all over the State; day in and day out, week in and week out. And my position does not allow me to have any opinion whatsoever about the facts. That is your sole responsibility, your sole duty to determine what the true facts are in the case.

(Tr. p. 749, line 18 – p. 750, line 1.) This language cured any possibility that the jury could assume the trial judge had a personal opinion about the case and use that to sway their verdict. Our courts "presume juries follow their instructions." *State v. Young*, 420 S.C. 608, 623, 803 S.E.2d 888, 898 (Ct. App. 2017); *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702 (1987) (noting "the almost invariable assumption of the law that jurors follow their

instructions"). See also *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) ("A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission."); *State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998) (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission). The trial court's jury instructions directed the jury to disregard any act or appearance on his own part that may intimate to a juror that he has any opinion about the facts. (Tr. pp. 749-50).

Accordingly, because there was no conflict of interest requiring the trial court to recuse, and because that court's curative jury instructions cured any possible effect the appearance of the judge's name in the "root" could have had on Applicant's jury, this Court finds Applicant has failed to demonstrate *Strickland* error-and-prejudice warranting a grant of post-conviction relief on this ground.

b) Failing to investigate and present available evidence explaining the "root."

Applicant alleges Trial Counsel was ineffective for failing to investigate and present evidence explaining the "root," which consisted of testimony from Applicant's wife, Charlene Gerrick, explaining that she created the "root" capsule and placed it in Applicant's car without his knowledge. Applicant alleges Trial Counsel should have interviewed Charlene Gerrick about the "root." It was not disputed at trial that Applicant himself did not write the words on the "root," Trial Counsel himself established this un rebutted fact during his cross-examination of one of the State's investigators. (Tr. p. 388).

At PCR, Trial Counsel testified that he spoke with Charlene Gerrick about the case, but he did not speak with her specifically about the root because Applicant told him that the "root" was his. Trial counsel's PCR testimony explained that his concern during his investigation was

the inevitable impression upon the jury that the "root" constituted evidence of consciousness of guilt. Accordingly, Counsel moved to exclude it but was ultimately unsuccessful. (Tr. pp. 36-47, see id. pp. 132-33). Counsel's pre-trial motion sought to exclude the "root" under SCRE 403 as overly prejudicial by arousing passion in the jury; he renewed the motion post-trial. The motion was denied, and that denial affirmed on direct appeal. Trial Counsel explained that when his motion was denied and the "root" was admitted into evidence, his trial strategy was to try to minimize the "root" as much as possible because it was damaging to his client.

Also at PCR, Charlene Gerrick testified that she put the "root" and the Law Stay Away canister in her husband's truck, and she did it because she kept hearing around town that her husband killed the victim. She testified that Trial Counsel never interviewed her and had no knowledge about her creation of the "root." Applicant later testified that he does not believe in "roots," and he did not write the note around the root in this case or put it in his car. He testified that he did not tell his attorney that he wrote the note.

This Court finds Charlene Gerrick and Applicant's testimony not credible on this subject, as their testimony directly contradicted Trial Counsel's credible testimony that Applicant admitted to him during their pre-trial consultations that he was aware of the "root" and that it belonged to him.

This Court further finds Trial Counsel is not deficient for failing to investigate any further information about the "root." "Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'" *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597 (2007) (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986)); see also *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. 2052. Where a significant investigation has been conducted, and a defendant raises a collateral challenge to the strong

presumption that the attorney's investigation was reasonable, a court must look to the specific facts of the case, as well as the decisions of the defendant that may have hindered trial counsel's preparation. *Campbell v. Coyle*, 260 F.3d 531, 553 (6th Cir. 2001). "When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" *Ard v. Catoe, supra* (quoting *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. 2052). To establish deficient performance, it is not enough for the petitioner to show that his attorney's strategy was merely wrong, or his actions unsuccessful; he must demonstrate that the actions his attorney took were "completely unreasonable." See *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997).

The record in this case is clear that trial counsel investigated the issue of the "root" and was informed by his client that he knew about it. Given that information, trial counsel assessed that the root could not assist his client in any way. This determination was reasonable and sufficient in light of the evidence at issue, concluding in an unsuccessful motion to exclude the "root" and the related novelty item—and the post-trial motions that followed on the same bases. This Court finds trial counsel exercised reasonable trial strategy when he moved to exclude the "root" and continued to exercise reasonable trial strategy when he was not successful in his motion and accordingly decided to minimize at trial any mention of the "root" or its implications.

Trial Counsel cannot be deficient where he articulated a valid trial strategy in attempting to minimize the root as much as possible so as not to further harm his client's case. Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995). *Strickland* requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of

detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992).

This Court further notes that in order to present the breadth of the PCR testimony about the "root" at trial, Charlene Gerrick would likely have had to waive her invocation of the spousal privilege to testify to the facts she presented at the PCR. Additionally, Applicant would have had to make the decision to testify at trial, opening him up to cross-examination on a variety of subjects at issue in the case as well as to impeachment. Based on how the trial proceeded, it seems extremely unlikely that either witness would have chosen to testify in this manner under those circumstances. Not to mention that this course runs afoul of the strategic decision-making by Trial Counsel regarding the minimization of the "root" and the attempt to exclude it based on arousal of passion and prejudice.

This Court additionally finds no prejudice flowing from Trial Counsel's performance in regards to his investigation of, and trial treatment of, the "root" given the weight of the evidence against Applicant. Applicant gave multiple statements to law enforcement, all different from the

last, and each admitted at trial. In light of the varying statements and the remainder of the circumstantial evidence presented by the state and outlined above the by undersigned, any additional evidence explaining the root would not have made a difference in the jury's verdict. "As a general rule, any guilty act, conduct or statements on the part of the accused are admissible as some evidence of consciousness of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (rule consistently applied thereafter). The root showed consciousness of guilt after the crime was committed, but the other evidence presented was relevant to Applicant's guilt in committing the crime itself. Finally, as held in the direct appeal, the root was admissible in the manner utilized by the State at trial, so it was valid evidence of consciousness of guilt, and any evidence presented to "explain" it likely would not have affected the outcome of the trial.

Accordingly, Applicant cannot prove either prong of the *Strickland* test, and this allegation is denied and dismissed with prejudice.

- c) *Failing to object to the trial judge's opening comments and final instruction on the law, instructing the jurors to find the "true facts" in the opening and closing instructions.*

Applicant alleges trial counsel failed to object to certain instructions to the jury regarding their role in determining the "true facts." Specifically, Applicant points this opening instruction:

... at the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict.

(Trial Tr. p. 145, lines 7-11). Applicant additionally points to two final instructions to the jurors:

It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;

That is your sole responsibility, your sole duty to determine what the true facts are in this case; and

You're here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I've given it to you.

(Trial Tr. p. 748, line 14 – p. 749, line 1; Trial Tr. p. 756, line 23 – p. 757, line 1).

Applicant premises his ineffective assistance of counsel argument on *State v. Aleskey*, 343 S.C. 20, 538 S.E.2d 248 (2000), and the recent decision in *State v. Beaty*, 813 S.E.2d 502 (2018) *reh'g denied* (May 25, 2018) (S.C. citation not yet available). At the evidentiary hearing, this claim was primarily addressed through testimony by Trial Counsel. Trial Counsel testified that while he was not discretely aware of the holding from *Aleksey*, he did not identify a big distinction between an instruction telling the jurors to find the “true facts” or just “the facts.” Trial Counsel later testified that he did not identify the cited jury instructions as misleading or confusing the jury regarding the State’s burden of proof.

On this issue, our State Supreme Court has cautioned that “[j]ury instructions on **reasonable doubt** which charge the jury to ‘seek the truth’ are disfavored because they ‘[run] the risk of unconstitutionally shifting the burden of proof to the defendant.’” *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (emphasis added). However, the *Aleksey* court went on to hold that because the “truth-seeking” instruction in that case was “given in the context of the jury’s role in determining the credibility of witnesses” there was “not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt.” *Id.* at 28-29, 538 S.E.2d at 252. That court cautioned the circuit courts to abandon the truth-seeking language in future charges, but held that the instruction as a whole in that case was a correct statement of law and found no basis for reversal on that ground. *Id.*

The recent opinion in *State v. Beaty* revisited the *Aleksey* decision and held that a preliminary instruction using the phrases "search for the truth," "true facts," and "just verdict" were delivered in error but caused no prejudice warranting reversal where the instruction appeared in the preliminary remarks to the jury and, again, did not speak to the State's burden of proof. *Beaty*, 813 S.E.2d at 506. The *Beaty* court held "the disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*." *Id.*

This Court finds that the jury instructions Applicant cited do not form the basis for a grant of post-conviction relief. The instructions delivered in this case does not mirror either *Aleksey's* "seek the truth" or "search for the truth" language, or *Beaty's* "just verdict." The language at issue is limited to the phrase "true facts." The limited nature of this phrase imparted no duty upon counsel to object in light of the *Aleksey* decision, which existed at the time of trial, and the failure to object to this limited phrase did not rendered counsel's performance deficient. As trial counsel's testimony touched upon, the addition of the word "true" as a modifier of the word "facts" does not carry same connotation as instructing the jury that the trial is a search for the truth. "True facts" merely indicates there may be incongruent testimony and they may have to weigh credibility of evidence in reaching their conclusion, which is indeed the jury's role.

Furthermore, the lack of objection to the charges excerpted above did not prejudice Applicant because the trial court's issuance of any language pertaining to the jury's role at trial did not address the burden of proof the jury was to apply to its deliberations. *Strickland v. Washington*, 466 U.S. at 697, 104 S. Ct. at 2069. ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."). The

cited preliminary instructions were issued by the trial court in introduction and explanation of courtroom procedure, not as a means of explaining the burden of proof by which they must decide the case. (Trial Tr. p. 145). In the closing charge, the cited instruction regard only the jury's role in the greater scheme of the trial (compared with the court's role as the judge of the law) and role to deliver a unanimous verdict. (Trial Tr. p. 747, line 25 – p. 749, line 1; Trial Tr. p. 756, line 6 – p. 757, line 8). The relevant case law makes it clear that the instructions did not prejudice Applicant because they spoke only generally to the jury's role as the factfinder. Neither *Beaty* nor *Aleksey* contain a mandate that makes their holdings retroactive. *Id.* Moreover, even if counsel had objected and preserved the issue for appellate review, there is no reasonable likelihood of success on direct appeal given the previous findings of the South Carolina Supreme Court in regards to a nearly identical instruction. *See State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994) (jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error). There is no reasonable possibility of a different outcome had counsel lodged an objection to the "truth facts" phrasing.

Accordingly, pursuant to *Aleksey* and *Beaty*, this Court finds Applicant has failed to demonstrate *Strickland* error-and-prejudice warranting a grant of post-conviction relief.

- d) *Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.*

Applicant alleges a due process violation occurred when he was excluded from discussions about possible excusal of two jurors during the trial. He further frames this allegation as one of ineffective assistance of counsel for failing to object to his exclusion from the proceedings. This Court finds he has failed to meet his burden of proving either allegation.

First, this court notes Applicant's due process violation allegation is barred by the *Simmons* doctrine. When a PCR claim was proper on direct appeal, it is not cognizable in the present action. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). An action for PCR "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B). When the *Simmons* doctrine applies, summary dismissal is appropriate. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005).

Regardless, this Court finds Applicant has failed to prove a due process violation occurred. Applicant's right to be present was not violated in this case because of the record made by the trial court regarding the initial in-chambers discussions. "A defendant has the right to be present at any stage of the criminal proceeding that is *critical to its outcome* if his or her presence would contribute to the fairness of the procedure." *Starnes v. State*, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991) (emphasis in original). This may include "when a trial judge conducts voir dire during the course of the trial to determine the jury's continued impartiality." *State v. Rivers*, 294 S.C. 123, 125, 363 S.E.2d 105, 106 (1987). A violation of the right to be present may occur when a court's mid-trial voir dire of a juror occurs in the jury room *without the presence of counsel*. *Id.* (emphasis added). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 105-08, 54 S.Ct. 330, 332-33 (1934).

Here, the alleged due process violation does not form a basis for relief. *State v. Caldwell*, 300 S.C. 494, 500, 388 S.E.2d 816, 819 (1990), *overruled on other grounds by State v. Evans*, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006) ("the exclusion of a defendant from a trial

proceeding should be considered in light of the whole record"). The in-chambers discussions included counsel for both parties and were revisited on the record. (Tr. pp. 139-41, 481-82). Thus, the in-chambers talks were not in and of themselves critical to the outcome of the proceedings. The trial court presented the context of those discussions on the record, lending counsel an opportunity to agree or disagree with the characterization, and further lending an opportunity for counsel to alter his course after consulting with his client. *See State v. Farries*, 125 S.C. 281, 118 S.E. 620, 621 (1923) ("At the hearing of these motions the defendant was represented, and was fully heard by his able counsel. His personal presence could have subserved no useful purpose. It cannot be assumed, certainly in the absence of an affirmative showing, that he would have elected, if present, to be heard by himself as well as by counsel.").

As to the ineffective assistance of counsel allegation framed in the application, this Court finds Applicant has failed to meet either prong of the *Strickland* test. *See Weaver v. Massachusetts*, __ U.S. __, __, 137 S.Ct. 1899, 1910 (2017) (applying *Strickland* error-and-prejudice standard to claim of ineffective assistance of counsel for an alleged violation of the defendant's right to public trial).⁴ Counsel established through his PCR testimony a strategic decision as to each Juror #23 and #9 which is entitled to deference in this action. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.").

Juror #23 was elevated from an alternate to the regular jury panel "and as she was going home [one] night [after trial] she informed one of the deputies that on her Facebook account she

⁴ *Weaver v. Massachusetts*, *infra*, is instructional on the point of the application of the *Strickland* standard, but does not otherwise govern the type of violation alleged to have occurred in this case.

was a ["friend"] to one of the witnesses who had testified yesterday. . . . And she said that she really didn't even know that particular witness, they just happened to be on Facebook." (Tr. p. 481). There had been no correspondence between them on that social media platform. (Tr. p. 482). The initial in-chambers discussion concerning this information about Juror #23 was revisited on the record, at which time Applicant was present and trial counsel had an opportunity to alter his position regarding whether the juror should continue or be excused. (Tr. p. 482). At PCR, trial counsel testified that he took the position that he wished to keep Juror #23 on the jury because it thought that the fact that the juror had come forward about being Facebook friends with the witness indicated that Juror #23 was a good, honest juror. Thus, her continuing on the jury did not concern counsel. Given that the juror candidly expressed that she could be impartial, did not have any communication with the witness and that any interaction was limited to a simple "connection" via a social media platform, counsel made an objectively reasonable decision to retain that juror.

In a similar vein, Juror #9 was released after an on-the-record discussion regarding the concerns leading to the juror's excusal. The trial record reflects that this juror appeared before trial counsel's wife, who was a probate judge, for "mental health issues," and some of the issues presented to the court left it with "great concern as to her ability to serve as a juror." (Trial Tr. p. 14). Ultimately, the trial court decided that this juror should not continue.⁵ (Tr. pp. 139-41). At PCR, trial counsel testified that he did not wish to have a juror whose competency may be questioned due to a known history of mental health issues, and that he in fact preferred the alternate juror who was elevated in place of Juror #9. Again, counsel calculated a reasonable

⁵ The trial court decided on another occasion to remove a juror who was sleeping. Counsel for neither side objected. (Trial Tr. p. 281). The excusal of this juror mid-service led to the elevation of Juror #23 (Trial Tr. p. 282).

reaction to the court's concerns with the jurors and in fact ended up with a juror he assessed was more favorable to his client.

Thus, as to both jurors, the record developed at PCR evidences another series of strategic decisions made by able, credible counsel with thirty years of practice experience, and no finding of ineffective assistance is warranted. *Strickland, supra*. *Whitehead v. State, supra* (addressing deference owed strategic decisions by trial counsel); *Roseboro v. State, supra*; *Underwood v. State, supra*; *Stokes v. State, supra*.

Furthermore, Applicant was not prejudiced by the excusal of Juror #9 and retention of Juror #23. Applicant must demonstrate he was actually prejudiced by the inclusion and exclusion of the cited jurors. *See Weaver v. Massachusetts, supra*. The relevant question on whether juror's service prejudiced a defendant is whether there is any indication in the record that the challenged jurors, or the jurors who did serve, did so without impartiality. *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 326 (2002); *see State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247-48 (2002) (finding that a juror's "scant acquaintance" with the defendant's family would not have prejudiced the State had the juror remained on the jury); *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict."); *Williams*, 321 S.C. 455, 460, 469 S.E.2d 49, 52 (1996) ("[W]e discern no prejudice to [the defendant] from the seating of the alternate juror here."); *State v. McDaniel*, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980) ("The alternate juror had been approved by both sides at the inception of the trial, and there is no showing that appellant withdrew that approval at the time of substitution. Moreover, appellant has failed to establish in what manner this procedure prejudiced him."). There is no right to be tried by a jury composed of particular individuals. *State v. McDaniel*, 275 S.C. 222, 268 S.E.2d 585 (1980). This Court

finds the record in this case void of any inference of actual prejudice caused by the excusal of Juror #9 and retention of Juror #23, as there exists no evidence of bias or other improvident mindset.

Given the foregoing, Applicant's claim is speculative at best and Applicant has failed to meet his burden of demonstrating *Strickland* error-and-prejudice. See *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); see also *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden). Thus, there exists no basis in the record for a grant of post-conviction relief, and this allegation is denied and dismissed with prejudice.

- e) *Failing to make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors' minds as to deny Mr. Gerrick due process*

Applicant alleges Trial Counsel was ineffective for failing to object or to stipulate to photographs of the victim's body. However, he has failed to meet his burden of proving counsel was ineffective in this regard. The trial record evidences that counsel in fact acted in the manner alleged deficient, filing a motion to exclude photographs of the autopsy and the victim at the crime scene, and also stipulating to the introduction of others (some in lieu of publishing the physical ligatures removed from the victim's body). (Trial Tr. pp. 33-36). This Court finds the application of the *Strickland* standard to this claim provides no basis for relief.

At trial, Trial Counsel objected to the photographs of the body at the time they were offered by the State. The parties immediately conferred and agreed upon which photos the State

would introduce. (Trial Tr. pp. 411-13). The record also evidences that some photographs were eliminated from the State's intended introduction. (Trial Tr. p. 419). The photographs entered into evidence depicted the condition of the victim as discovered and the process by which he was withdrawn from the shallow grave, including details associated with the condition of the gravesite. (Trial Tr. pp. 410-21).

At PCR, Counsel recalled the photographs coming in, commenting that the State had an issue regarding the origin of the ligatures found on the victim's body. Trial Counsel testified that he did not want the ligatures themselves introduced. Trial Counsel testified he conferred with the State as well as the trial court regarding what photographs would be excluded, and that the total number of photos the State sought to introduce was in fact reduced. Counsel testified that he gave consideration to the total number of photographs and thought the best course of action was to limit that number since he was aware the court would allow at least some into evidence. Trial Counsel expressed he was cognizant that the photos of the victim are ordinarily relevant to the case, and were in this particular case as well.

On this record, there can be no finding of deficient performance or prejudice. First, as to counsel's decision to confer with the State and consent to the limitation of photographs, that course of action denotes a reasonable exercise of valid trial strategy. Any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). Trial counsel did not act unreasonably by expecting that the

trial court would find some photographs of the body admissible. He testified that, in his experience, some photographs would be coming in regardless of the extent of his objection.

Applicant also has not met his burden of establishing prejudice in regards to this claim. The photographs were ⁷⁵⁵inadmissible so that, even had trial counsel taken some alternate course of action, there remains no reasonable probability of a different result at trial. Photographs "are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (no abuse of discretion in admission of pre-autopsy photographs of child victim mauled by dogs); see also *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) (in prosecution for murder and lynching, gruesome autopsy photographs held more probative than prejudicial and relevant to issue of malice). When photographs, even gruesome ones taken prior to autopsy, corroborate witness testimony and illustrate the circumstance of the crime, they will be deemed admissible. *State v. Collins*, 409 S.C. at 536, 763 S.E.2d at 28. "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996).

Notably, Applicant did not incorporate the photographs into the PCR record in this case. However, the remainder of the record demonstrates that the photographs identified by Applicant served to corroborate other circumstantial evidence. Applicant was seen putting two shovels in the back of his truck and driving towards the area where the body was found. The victim was seen following Applicant in that direction. (Trial Tr. pp. 230-31, 234-36, 542-43, 574-76). The victim was located in a shallow grave, his arm outstretched around an underground root. (Trial Tr. pp. 410-21). The discovery of the victim's body in a shallow grave was not disputed at trial, but the location and condition of the body and gravesite were relevant to the State's case.

Photographs of that gravesite and of the victim's body during autopsy were probative of factual issues before the jury such as the timing and manner of death. The forensic pathologist in this case could not determine, to any reasonable degree of certainty, how the victim died. "Where the State had the burden of proving the elements of the offenses charged and there were no eyewitnesses to the incident resulting in the victim's death, the photos here provided concrete evidence as to what transpired on that fateful day." *State v. Collins, supra* at 536, 763 S.E.2d at 28. The photographs were relevant to the integrity of the investigation as well.

Given the status of South Carolina jurisprudence on this issue, any likelihood that Applicant would have prevailed in eliminating the photographs in some other manner is substantially low. Though this Court concludes that Trial Counsel did not render deficient performance in the manner in which he objected to and resolved the admission of the photographs at trial, even assuming Trial Counsel acted in error, there can be no prejudice from his tactical decision in this regard because there is no likelihood of a different result at trial. Accordingly, this allegation is denied.

f) Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.

Applicant alleges Trial Counsel was ineffective for failing to move to exclude from trial the testimony of his wife Charlene Gerrick as "fruit of the poisonous tree" obtained in violation of her spousal privilege and as a result of improper witness intimidation. Charlene Gerrick testified at PCR that she was interviewed by SLED investigators, and she was not advised during these interviews of her spousal privilege rights. She stated that she asserted her privilege at trial, but she testified about moving the victim's car from the woods to a Chinese restaurant in

Orangeburg. She testified law enforcement would not have known about the car without the information she gave them during her interview.

This Court finds no deficient performance or prejudice in regards to Trial Counsel's failure to move to exclude Charlene Gerrick's trial testimony. The trial record reflects that Charlene Gerrick's trial testimony remained within the boundaries allowed by a witness who has invoked the spousal privilege. South Carolina Code Section 19-11-30 provides that, in criminal proceedings, "no husband or wife may be required to disclose any communication made by one to the other during their marriage." The privilege belongs to the witness and cannot be invoked by the other spouse. *State v. Motes*, 264 S.C. 317 (1975). The spousal privilege applied to Charlene Gerrick such that only Charlene Gerrick could invoke it, which she did. S.C. Code Ann. § 19-11-30; *State v. Motes*, 264 S.C. 317, 324, 215 S.E.2d 190, 192-93 (1975) ("the right to exercise the privilege against disclosing marital communications is solely that of the witness spouse from whom the privileged information is being sought").

Invocation of the privilege does not stop law enforcement officer testimony regarding what transpired after speaking with the witness who invoked the privilege. *State v. Copeland*, 321 S.C. 318, 468 SE2d 620 (1996). Gerrick's invocation of the privilege did not preclude fact testimony about what transpired and formed no basis for a motion to exclude. *Id.*

Trial Counsel did move pre-trial to exclude Charlene Gerrick's testimony about her communications with her husband. The trial court ruled that the privilege was the witness's to invoke, and she would need to invoke it at the proper time. Trial Counsel ensured Charlene Gerrick was given the opportunity to invoke her right during the trial outside the presence of the jury. However, her assertion of the spousal privilege did not prevent the State from questioning her as a fact witness about events in which she partook that were directly relevant to the

investigation into the victim's disappearance and the discovery of his body. *State v. Copeland, supra.*

Trial counsel testified at PCR that he was aware of the statements Charlene Gerrick had provided to law enforcement as part of the investigation. He testified he advised Charlene Gerrick of her right to seek representation by independent counsel. She did not do so until the PCR hearing. And, to the extent Charlene Gerrick testified at trial, the record reflects that the court and the parties respected her invocation the spousal privilege and her testimony did not divert from the boundaries prescribed. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). No communications between Charlene and Sammie Gerrick were made to be placed on the record. She served solely as a fact witness. (Tr. pp. 302-10; *see id.* pp. 294-98). Any statement(s) Charlene Gerrick submitted to law enforcement were not made part of the trial record.

Trial Counsel also testified at the evidentiary hearing that he believed he had no basis on which to move to suppress any of this testimony as "fruit of the poisonous tree" because he did not have standing to raise that issue; only Charlene herself had standing, as it was her right that was allegedly violated.

This Court finds no error or prejudice related to Trial Counsel's failure to move to exclude Charlene Gerrick's testimony as "fruit of the poisonous tree" because Trial Counsel could not have successfully moved to suppress on this basis. Thus, he cannot be deficient for failing to do so. "[A] defendant challenging the admissibility of evidence obtained in violation of constitutional rights must often show he is challenging the evidence based on a personal violation of *his* rights by the manner in which the evidence was obtained[.]" *State v. Miller*, 359 S.C. 589, 598-99, 598 S.E.2d 297, 302 (Ct. App. 2004), *aff'd*, 367 S.C. 329, 626 S.E.2d 328

(2006) (emphasis added) ("Thus, where one does not have an expectation of privacy, he may not challenge the admission of evidence based on the violation of another's right to privacy.").

Furthermore, as a result of *Copeland*, any error in Charlene Gerrick's testimony would not change the outcome of the trial because the law enforcement testimony about taking Charlene to the white Honda at the Chinese restaurant was still admissible, so there can be no prejudice. This Court further finds that Mrs. Gerrick's testimony concerning the alleged threat is not credible. Trial counsel credibly testified at PCR that Mrs. Gerrick made a video-recorded statement that he reviewed and discerned to contain no evidence of threat or intimidation. Mrs. Gerrick did not act upon the alleged receipt of any threat until the PCR hearing, despite meeting with multiple law enforcement agencies over the course of investigation and being advised by trial counsel that she could retain counsel in regards to any threat received. Because neither prong of the *Strickland* test is met, this allegation is denied and dismissed with prejudice.

g) Failing to object to improper victim impact evidence that was not relevant and which were intended not arouse sympathy, passion, and prejudice in the jurors' minds.

This Court finds without merit Applicant's allegation that Trial Counsel failed to object to improper victim impact testimony. Ordinarily, true victim impact evidence should be reserved for the court's consideration at sentencing. S.C. Code § 16-3-1550(F) ("The circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing. . . . The victim impact statement and its contents are not admissible as evidence in any trial."); *State v. Hill*, 331 S.C. 94, 105, 501 S.E.2d 122, 128 (1998) (addressing admissibility of victim impact evidence at sentencing phase of capital trial).

This Court finds that the evidence Applicant alleges was improper victim impact evidence was not offered as victim impact evidence at trial. Rather, the record evidences that the

State extracted the cited testimony to corroborate circumstantial evidence for the purpose of establishing Applicant's guilt beyond a reasonable doubt.

This case was based upon circumstantial evidence. "Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct.App.2013). "The State must prove the *corpus delicti* of the murders with evidence from a source other than" a defendant's extrajudicial statements. *Hill v. State*, 415 S.C. 421, 433-34, 782 S.E.2d 414, 420-21 (Ct. App. 2016) ("The corroboration rule applies whether a statement amounts to a confession or merely constitutes an admission of essential facts from which guilt might be inferred."); *State v. Osborne*, 335 S.C. 172, 179-80, 516 S.E.2d 201, 204-05 (1999) (. . . the corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred."); *see also Oppen v. United States*, 348 U.S. 84, 92-93, 75 S.Ct. 158, 164 (1954) (exculpatory statements are not an exception to rule that an accused person's extrajudicial, post facto admissions of essential facts or elements of a crime must be corroborated).

The evidence this Court can identify as being construed by Applicant as "victim impact evidence" was on each account not offered as the type of evidence deemed inadmissible by statute. Consider the following testimonies from the trial transcript in relation to the State's case at large.

The first witness to testify, the victim's girlfriend, mentioned the victim having children and that he was their main caretaker because his wife and mother-in-law had passed away. He

testified he also cared for his sister-in-law. (Trial Tr. pp. 160-163). Maurice Williams, a friend of the victim and acquaintance of Applicant, testified that on the day of the victim's disappearance, he had confided in Williams that he was interested in remarrying and moving to Aiken or Myrtle Beach. (Trial Tr. pp. 183-184). Williams also testified that Applicant took care of his children, that his wife had died, and that he had received a settlement as a result. (Trial Tr. pp. 176-77). Lana Joyner's testimony established that she was friends with the victim and knew that he had received a monetary settlement from his wife's death. She said she had known him her entire life and during that time had never known him to be involved with drugs. She testified that "he was nice, he was caring. He loved his kids, [and] he ain't never bothered nobody." (Trial Tr. pp. 493-94).

On each account, these blips of testimony were offered as probative evidence of whether the victim would have conformed with the versions of events put forward by Applicant throughout the course of the investigation. Did the victim have money to lend Applicant to bail him out of jail, and where did it come from? Would it have come from making an honest living? Is it credible that the victim would have engaged in a drug deal that resulted in his death? The jury learned through Joyner and Williams that Applicant had received a monetary settlement from his wife's wrongful death; any money he had to lend Applicant came from honest means. They heard from Joyner that the victim was not known to have been involved with drugs. Would the victim ordinarily have gone "off the grid," refusing to return phone calls and text messages from the loved ones in his life? Was it credible to believe he would have skipped town without informing those closest to him or taking them with him? Each witness testified this was not ordinary for the victim. Williams and the victim's girlfriend established that the victim was responsible for a family; he was the primary caretaker of his children. A series of witnesses

testified at trial that they engaged in regular two-way communication with Applicant throughout the day.

In a case where the victim disappeared without a trace and was found days later face-first in a shallow grave, these witnesses' testimonies established particulars about the victim's daily life which assisted the jury in assessing the weight of the swath of circumstantial evidence introduced in this case, specifically, the credibility of Applicant's versions of events. Because the evidence at issue was not offered as victim impact evidence but rather was offered as corroboration, the testimony was admissible as proof of the *corpus delicti*. Accordingly, this Court finds trial counsel did not render deficient performance or prejudice Applicant by failing to object to the above-cited testimony as victim impact evidence. When evidence admitted without objection is admissible, "then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001).

Also on this issue, Trial Counsel testified that he perceived this testimony to be background about the victim. He testified he did not object to the limited nature of this testimony because he did not want the jury to think he was trying to hide something. Counsel said that had the evidence at issue implied more, he would have objected. His testimony on this point evidences an exercise of valid trial strategy which cannot now, in hindsight, be deemed deficient. *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) ("when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel"). This Court therefore finds that because the evidence at issue was evidence corroborative of other material facts before the jury's consideration, it was

reasonable for trial counsel to interpret, as he testified to at PCR, that evidence was background and elect not to object for the reasons testified to at the evidentiary hearing.

Accordingly, Applicant failed to meet his burden of demonstrating *Strickland* error and prejudice on this allegation of ineffective assistance of counsel for the failure to object.

i) *Failing to object to impermissible character testimony that violated Rule 404, SCRE*

Applicant alleges Trial Counsel was ineffective for failing to object to instances characterized as evidence of prior bad acts which were not properly admitted under Rule 404, SCRE. He points to testimony that Applicant had "been in a little trouble before." (Tr. p. 205, line 12.) He likewise points to Applicant's statement read at trial which included an admission that he picked up an escape charge for running through the door of the courthouse and pushing down a sheriff. (Tr. p. 269, line 1-6.) There was also testimony about Applicant being transported by the U.S. Marshal's Task Force when he was incarcerated at the Charleston County Detention Center. (Tr. p. 333, line 7-12.) As to the testimony of Shaneka DeLoach cited by Applicant in his Post-Hearing Brief, she offered testimony at ^{trial in} ~~trial~~ _{PCSS} relation to her identification of Applicant and was challenged on cross-examination by trial counsel when he pointed out that this witness was way across the road from where she saw Applicant, whom she did not know well. (Trial Tr. pp. 239-40 (Q: "But you don't know Sammie Gerrick that well; right"? A: No, I don't. Q. And some people move their arms like this (indicating) when they talk and some people don't; correct? A: Yes. . . .)).

This Court finds Applicant was not prejudiced by the lack of objection to the introduction of this evidence. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 ("A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . .") Any testimony regarding Applicant being

incarcerated before or during the crime in question is admissible as *res gestae* evidence, such that no prejudice flows from its introduction by either the State or by trial counsel. "Under the *res gestae* theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct.App. 2004); *State v. Simmons*, 352 S.C. 342, 573 S.E.2d 856 (Ct.App. 2002) (finding evidence of burglary occurring the same night as the burglary for which defendant was convicted "was necessary for a full presentation of the case without fragmentation."). *Res gestae* provides for the admissibility of other bad acts when such evidence is close in time to the charged crime and "furnishes part of the context of the crime" or is necessary to a 'full presentation' of the 'case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case" that its proof completes "the story of the crime on trial by proving its immediate context" *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (quoting *United States v. Masters*, 622 F.3d 86 (4th Cir. 1980)).

The evidence at trial which reflected that Applicant was in custody at various times was relevant to the investigation into the victim's death because the circumstances under which the victim was last seen alive directly pertained to his bailing the Applicant out of jail. (See Tr. pp. 179-85, 214-18). Because this evidence was admissible as *res gestae*, any mention characterized by Applicant as evidence of "prior bad acts" likely had no prejudicial effect on the outcome of the trial, as the jury was already aware that Applicant had served time in jail for other crimes. The crux of the case was that the victim had to bail Applicant out of jail and then the victim went missing when it was time for Applicant to pay him back. Some of the evidence subject to this PCR allegation was also contained within, or pertained to the circumstances in which Applicant

provided, a number of statements to law enforcement over the course of the investigation. (Trial Tr. pp. 269, 333). Furthermore, compared to the amount of corroborative evidence of Applicant's guilt as delineated in the undersigned's above statement concerning the facts presented at trial, any potential error in the admission of the "prior bad acts evidence" cannot be said to have prejudiced Applicant under *Strickland*.

This Court finds there is no deficient performance or prejudice flowing from counsel's representation in regards to this allegation. Accordingly, this Court denies and dismisses this allegation with prejudice.

(k), (m), (n) Trial Counsel's failure to object to the State's closing argument

Applicant alleges that counsel failed to object to the portions of the State's closing argument which Applicant now identifies as: (k) being unsupported by the evidence in the case and misstating testimony presented at trial; (m) intended to arouse sympathy, passion, and prejudice among the jurors and urging them to seek justice for the victim rather than determine whether the State met its burden of proof; and (n) intended to arouse sympathy, passion, and prejudice among the jurors due to their defaming Applicant. This Court finds Applicant has failed to meet his burden as to these claims.

Regarding prejudice, the underlying question before this Court on this conglomerate of allegations is "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998). "Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). "[I]ts content should stay with

the record and reasonable inferences to it.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor’s closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

However, any excerpt of the State’s closing exists as “one moment in an extended trial.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). Accordingly, a court must conduct an “examination of the entire proceedings” in context. *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* (“We must review the [closing] argument in the context of the entire record.”); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990). Even “[i]mproper comments do not require reversal if they are determined not to be prejudicial to the defendant.” *State v. Navy*, 370 S.C. 398, 412, 635 S.E.2d 549, 556 (Ct. App. 2006), *aff’d in part, rev’d in part on other grounds*, 386 S.C. 294, 688 S.E.2d 838 (2010). “Arguments of counsel are not considered so inflammatory as to require a reversal where ‘counsel responds in kind to a previous argument of opposing counsel.’” *Id.* (quoting *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 258, 509 S.E.2d 269, 271 (1998)).

Regarding the alleged failure to object, there exists in this action the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant’s trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). “[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel’s strategy is viewed under an ‘objective standard

of reasonableness.” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). The United States Supreme Court has cautioned that “every effort be made to eliminate the distorting effects of hindsight” and evaluate counsel’s decisions at the time they were made. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Any post-conviction relief court must be wary of second-guessing trial counsel’s tactics. *Whitehead v. State*, 308 S.C. at 122, 417 S.E.2d at 531. “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Smith v. State*, 386 S.C. at 567, 689 S.E.2d at 632 (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

In support of these allegations, Applicant referred at the evidentiary hearing to a series of instances in closing argument where the State referred to Applicant as lying and concealing the truth. (See Trial Tr. pp. 696-740). Trial Counsel, however, testified that he did not recognize anything particularly inflammatory within the State’s closing. He credibly testified he felt that the State’s closing permissibly commented on the record established at trial. He testified he felt that objecting to the State’s closing would draw negative attention and may damage his own credibility with the jury. He explained that his general trial strategy is not to object where counsel believed the jury may interpret the objection as an attempt to hide something. Trial counsel further testified that he was acutely aware that the problem inherent in defending Applicant was the number of inconsistent statements he made to law enforcement. In his final statement to law enforcement, Applicant placed himself at the scene. Trial counsel could not corroborate his statements during his investigation into Applicant’s defense. In order to retain his credibility with the jury, counsel testified, he had to concede that the Applicant indeed changed his story over time and not all statements could be explained. Trial counsel also credibly testified that in his analysis of the case, Applicant’s inability to refrain from giving statements to law

enforcement harmed his defense. Based on the record established by Trial Counsel at PCR, this Court finds that counsel exercised objectively reasonable trial strategy in refusing to object to the State's characterization of Applicant during closing argument such that the failure to object was not deficient performance. *Smith v. State, supra*; *Lounds v. State, supra*; *Whitehead v. State, supra*.

This Court further finds the failure to object cannot be determined to have prejudiced Applicant in any event. Ineffective assistance claims based on failure to object can reasonably be tied to the admissibility of the underlying evidence. *Hough v. Anderson*, 272 F.3d 878 (7th Cir. 2001); see *Thompson v. State*, Op. No. 27785, 2018 WL 1404480 at *2 (Mar. 21, 2018) (Shearouse Adv. Sh. No. 12 at 14) (deficient performance found for failure to object to inadmissible hearsay evidence), *pet. for reh'g pending* (June 6, 2018); see also, *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"). On a similar closing argument allegation, the South Carolina Court of Appeals has held that, while the State delivered an "aggressive" closing when it referenced the defendant as a liar on multiple occasions, the closing was not so inflammatory as to require reversal. *State v. Navy, supra* at 414, 635 S.E.2d at 557. This was because, in the context of the evidence presented at trial, "the solicitor's closing argument was a direct response to [the] defense and merely pointed out the problems with [the defendant's] argument based on the evidence of record." *Id.* The closing argument delivered in Applicant's case was comparably permissible, as it was confined to the unique record developed at trial.

The trial record demonstrates Applicant provided a series of voluntary, yet incongruent statements to law enforcement. Each time law enforcement received a new tip in their investigation, Applicant came forward with "a new story which would explain the new

information.” (Trial Tr. p. 605). Applicant first explained that the victim bailed him out of jail and took him home, where Applicant took a shower. Trial Tr. pp. 270-71 (“I then went in, shave, cut my hair and showered.”)). Applicant said that went to Enterprise Bank and the Junior Food Mart with the victim, but then went home. (*Id.*; Trial Tr. pp. 266-67). Then Applicant said he has access to the victim’s bank account because they had joint ownership of \$18,000 from a backhoe. (Trial Tr. p. 322-24). Days later, Applicant contacted Chief Holston to say that “Black” held the victim for \$25,000 ransom, but did not re-contact the Chief with proof of life or contact information as requested. (Trial Tr. p. 274-79).

Even later, having discovered the victim’s body, law enforcement brought Applicant in for another interview, confronting him with the information about the victim’s car. (Trial Tr. p. 333). Applicant admitted to being in Orangeburg, but did not come forward with information that he was at the crime scene. (Trial Tr. p. 350). It was not until he was served with the murder warrant that Applicant began to claim that he remained with the victim after their stop at the Junior Food Mart. (Trial Tr. pp. 361-62). After Lieutenant Harley told him homeowners on the road saw his truck, Applicant changed his initial story about never being present at the crime scene. (Trial Tr. pp. 369-71).

Applicant next divulged a drug deal which allegedly also involved Andre Hightower and O’Shane Dixon. (Trial Tr. pp. 509-604). Both Hightower and Dixon testified that they had no knowledge or involvement with a drug deal; they had an alibi for the day the victim disappeared. (Trial Tr. pp. 558-66). Dixon added that Applicant kept calling him after the victim disappeared to see if Dixon knew anything about the investigation. (Trial Tr. pp. 565-66). Applicant instead stated that he was instructed by Hightower to move the victim’s car to Orangeburg in exchange for \$400. (Trial Tr. pp. 364-68). He was arrested at this point, and on the morning after his arrest

asked to speak with law enforcement again, now claiming he looked on as the others involved in the drug deal beat the victim. (Trial Tr. pp. 599-604). The victim allegedly arranged the drug deal with "Big Joe" from Georgia, and Applicant stated that he went along on the deal because he was supposed to receive some of the funds. (Trial Tr. p. 363). However, the victim had no connection to drugs, nor did he test positive for any drugs during autopsy. (Trial Tr. pp. 376, 453).

Then, Early Glover testified at trial that months after the crime, Applicant promised him \$1000 in exchange for copying a statement that said he and Glover were present when the victim was beaten, but that neither of them had anything to do with it. Applicant wrote the statement and Glover copied and signed it. Applicant never mentioned Early Glover in any prior statement, but did send a letter to SLED stating that somebody could vouch for his innocence. (Trial Tr. pp. 372-74, 583-88).

Further, to the extent Applicant contests that evidence does not conclusively demonstrate that Applicant took a shower on the afternoon in question, a statement by Applicant admitted at trial stated that the victim bailed him out of jail and took him home, where Applicant took a shower. (Tr. pp. 270-71 ("I then went in, shave, cut my hair and showered.")). Also, as to the portion of Applicant's Post-Hearing Brief which takes issue with the State's reference to witness Taylor White's testimony in closing, the State argued that White's testimony about changing clothes and walking into the laundry room circumstantially corroborated Applicant's own statement that he took a shower. (Tr. pp. 721-22). The argument matches the substance of White's trial testimony in this regard. (Tr. pp. 222-23).

The portion of the State's closing which addresses the condition of the victim's body also aligns with the testimony delivered by the forensic pathologist at trial. (Tr. pp. 731). Dr. Ross

testified at trial that the body was in a moderate-to-advanced state of decomposition at the time of autopsy, that she could identify "probable defensive wounds" on the victim, that there was evidence the victim had been bound, and that "it is most likely that there was some kind of asphyxiation" or "strangulation around the neck . . . as a cause of death." (Tr. pp. 439-48). The record, therefore, directly reflects the facts and reasonable inferences therefrom which were argued by the State in closing. (Trial Tr. pp. 696-740).

In light of this evidence and the remainder of the circumstantial evidence presented, (*infra* at pp. 3-16), the State's closing argument tracked the evidence of (1) motive, (2) opportunity, and (3) guilty acts in the context of the record developed at trial. (E.g. Trial Tr. p. 707). The State argued that the number of different statements Applicant provided law enforcement could not be corroborated or squared with the chain of circumstantial evidence presented at trial. (Trial Tr. pp. 696-744). The characterizations singled out by Applicant during the PCR hearing were supported by, and contained to, the record presented. It could reasonably be inferred from the record in this case that Applicant was in fact concealing the truth in the statements he delivered. As law enforcement presented Applicant with more information about the victim's disappearance, Applicant would deliver a statement which was inconsistent with the last and which would explain away the additional details with which he was confronted.

Additionally, the State's closing argument was delivered in response to trial counsel's own closing. Trial counsel's closing acknowledged that Applicant provided a series of inconsistent statements that counsel himself could not quite square away, but counsel also asked the jury to refuse to believe the State's chain of events because their version did not quite add up either. (Trial Tr. pp. 687-95). Trial counsel characterized Applicant as "the boy who cried wolf," arguing to the jury that Applicant may have given inconsistent statements, but that he finally told

the truth at the end. (Trial Tr. pp. 692-94). On June 13, 2018, the South Carolina Court of Appeals addressed an argument concerning the order of closing argument discussion from *State v. Beaty* in its opinion *State v. Shands*, Op. No. 5569, Adv. Sh. p. 63 (S.C. Ct. App. filed June 13, 2018) (Shearouse Adv. Sh. No. 24 at 59). In *Shands*, the Court of Appeals held that the closing argument delivered by the State, which was the final closing in that case, did not violate the defendant's due process rights because the defense was aware of the State's theory of the case at the time it delivered its closing argument and thus "could have used his closing argument to respond to them." *Id.* at 77. Further, that the State's comments during its reply closing argument "were arguably in response to Shands's closing argument" and thus were not prejudicial. *Id.* at 78. This Court finds this principle from *Shands* instructive. Applicant could not be prejudiced by the State's closing argument, which addressed Trial Counsel's theory that Applicant was "the boy who cried wolf."

Given that the trial record reflects that State contained its argument to the record and reasonable inferences therefrom, this Court finds that Trial Counsel was not deficient for failing to object for the reasons alleged and that no prejudice flows from the State's closing argument which was delivered without objection by trial counsel. Accordingly, Applicant's allegation fails to meet *Strickland's* error-and-prejudice standard and this Court denies and dismisses claims (k), (m), and (n) with prejudice.

- (l) *Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.*

Applicant alleges Trial Counsel was ineffective for asking for an opportunity to respond to the prosecutor's closing. As to this specific claim, Trial Counsel testified that he was aware

that there is a rule regarding the order of closing arguments. The rule, counsel correctly testified, is that where the defense put in evidence, the State gets the final closing. *State v. Gellis*, 158 S.C. 471, 485-86, 155 S.E. 849, 855 (1930) (“if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments”). Counsel further testified he was aware that the presiding judge not only followed that rule, but followed a routine practice of having the State’s initial closing argument be only “on the law” in such a circumstance, saving argument on the facts of the case for the end. *State v. Lee*, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971) (holding “a solicitor is no longer required to make an opening argument to the jury on issues of fact” even where requested by defense counsel); Rule 37, SCRCrimP (“where no provision is made by statute or these rules, the procedure shall be according to the practice as it has heretofore existed in the courts of the State”). Counsel also testified that when he made the strategic decision to put in evidence at trial, he made that decision with awareness that doing so waived his right to have the last word before the jury.

This Court finds no deficient performance or prejudice in regards to this allegation. The order of closing argument has not changed by either judicial opinion or a change in the rules of procedure. *Beaty*, 813 S.E.2d at 510. The recent opinion in *Beaty* did not alter the practice or procedure of closing arguments in a criminal trial.⁶ *Id.* (“Absent authority to formally adopt

⁶ Our current closing argument rules consist of the following patchwork: Pursuant to the common law rule pronounced in *Brisbane* and as clarified in *Garlington*, in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State’s closing argument. Pursuant to the common law rule set forth in *Huckie*, if two or more defendants are jointly tried, if any one defendant introduces evidence, the State has the final closing argument. Pursuant to the common law rule as clarified in *Gellis*, in cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether

procedural rules, our authority—and the authority of the trial court—is but to address due process considerations as they arise.”). Instead, the *Beaty* court stressed “trial judges must, on a case-by-case basis, ensure that a defendant’s due process rights are not violated during the closing argument stage.” *Id.*

While making a plea for the adoption of a procedural rule to address the issue before it, *Beaty* ultimately held:

... In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State’s reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge’s authority to ensure that a defendant’s due process rights are not violated during a criminal trial.

Id. (also holding the appellant in that case, who had introduced evidence and lost the right to the last argument, was not prejudiced by the State’s closing).

In the context of a PCR action, our courts have “never required an attorney to be clairvoyant or anticipate changes in the law.” *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). Even if the edict in *Beaty* could be construed as a change in the law, trial counsel in this case is not ineffective for failing to request the last argument before the jury. *Beaty* does not authorize the right to final closing in this case even if trial counsel had requested it. Trial counsel put in evidence and waived his right to last closing. Not even today’s precedent allows Applicant the last closing argument after he introduces evidence at trial. *Id.* at 510 (citing *Gellis, supra*). Counsel further did not prejudice Applicant by failing to ask for another word before the jury.

the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State’s reply argument.

813 S.E.2d at 510 (internal citations omitted).

In light of our State's jurisprudence on this issue, this Court finds no deficient performance or prejudice in regards to the order of closing arguments and trial counsel's failure to ask for the "last word," and denies and dismisses this allegation with prejudice. This Court additionally finds that, to the extent Applicant argues in his post-hearing reply brief that the trial judge erred, that allegation is again barred by the *Simmons* doctrine. S.C. Code Ann. § 17-27-20(B); 264 S.C. at 423, 215 S.E.2d at 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."); *Dempsey v. State*, *supra*

- o) Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in this case, which denied Mr. Garrick's right to a fair and impartial grand jury presentment.*

Applicant asserts Trial Counsel was ineffective for failing to move to quash the indictment in this case on the basis that a grand juror was also a witness in Applicant's case and that "[o]nce the grand juror discussed the case with the other grand jurors, empaneling a new grand jury was the only way to cure the error." (Applicant's Br. p. 37). This Court finds this allegation without merit; Applicant has not met his burden as to this claim.

In his Post-Hearing Brief, Applicant cites to pages 136-37 of the trial transcript and characterizes that portion of the record as being an unrebutted admission that the grand jury proceedings were tainted in this case. Applicant does not cite to the record in its full and proper context. During pre-trial matters, the Assistant Attorney General prosecuting this case brought to the court's attention:

And lastly, Your Honor, we did push through or have the grand jury rule on a new indictment last week. As we were here for trial prep we -- Lieutenant Harley realized that one of the individuals on the grand jury had -- was a witness in the case. Not -- just kind of an auxiliary fact witness. **And so fortunately the grand jury was in session. So we put the indictment through and she had recused herself obviously for that, but I've served that indictment on Mr. Williams.** He's aware of that, but I just wanted to make --

(Trial Tr. p. 136).

The trial record reflects that the State acknowledged a potential defect in the latest indictment issued in this case and cured it prior to the start of trial because the grand jury was in session at the time the potential defect came to light. At the PCR hearing, trial counsel testified that he believed the defect in the indictment was cured on the third indictment which was issued in this case. This claim, therefore, lies solely on Applicant's speculation that there was an error in the grand jury proceedings. Yet the record affords no basis to "presume that the State abused the grand jury process in order to obtain a finding of probable cause to prosecute." *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991).

"Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary." *Id.* Where a defendant does not present clear evidence of an abuse of the grand jury proceedings, a motion to quash the indictment will not prevail. *See State v. Shands*, Op. No. 5569, Adv. Sh. Pp. 63-65 (S.C. Ct. App. filed June 13, 2018) (Shearouse Adv. Sh. No. 24 at 59) ("Without any clear evidence, Shands's argument that there was a grand jury abuse in his case is pure speculation."). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." *State v. Thompson, supra* at 502, 409 S.E.2d at 424.

Given that Applicant produced no credible evidence in support of this allegation at PCR, it follows that counsel cannot be found deficient for failing to move to quash the indictment for the reason briefed, or that any purported deficiency prejudiced Applicant. *See State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (affirming the trial court's denial of the defendant's motion to quash the indictments even though direct evidence "is difficult to provide due to the secretive nature of the grand jury proceedings").

There can also be no resulting prejudice on this ground, as Trial Counsel testified that he was on notice of the charges before the trial. "An indictment is merely a notice document." *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing *State v. Gentry*, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005)). The court must look at "the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it appraises the defendant of the elements of the offense that are intended to be charged." *Id.* (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500).

Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." *Id.* at 63, 700 S.E.2d at 443 (citing *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007.)) A court reviewing an indictment for sufficiency should consider the indictment "'on its face,' and consider the events at trial." *State v. Reddick*, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). In other words, a court should examine "the totality of the circumstances" to determine if the defendant was cognizant of the crimes for which he was charged. *Id.*

This Court further finds Applicant has failed to prove either deficient performance or prejudice by failing to present any information about the witness who allegedly tainted the proceedings. *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809 (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure

to testify at trial); *Glover v. State*, 318 S.C. at 498-99, 458 S.E.2d at 540 (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden).

This Court finds Applicant has failed to provide a concrete basis upon which trial counsel should have moved, for an additional time, to quash the indictment in this case. Applicant's speculative argument fails to prove any defect in Applicant's latter indictment. Moreover, if any credence were lent to Applicant's presentation of the facts pertaining to this claim, the same witness testified before the jury, and the jury thoroughly explored that testimony as a predicate to returning a verdict of guilt beyond a reasonable doubt, which is a much higher burden than probable cause. *See Thompson, supra*.

Because Applicant failed to put forth any evidence of a flaw in Applicant's indictment, and because there is no resulting prejudice as Applicant was on notice of the charges against him, this allegation is denied and dismissed with prejudice.

p) *Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.*

Applicant asserts Trial Counsel was ineffective for failing to use a third-party guilt defense at trial. This allegation is meritless, as Trial Counsel articulated valid strategic reasoning for not presenting any evidence of third-party guilt.

At PCR, testimony by Trial Counsel established that Applicant, pre-trial, convinced two separate people who were incarcerated with him, Early Glover and Dustin Williams, to write a note falsely confessing to the crime for which Applicant was charged. Dustin Williams' note included information alleging that he killed the victim in Santee and the body was moved to the gravesite in Barnwell County. In order to attempt to corroborate this information, Trial Counsel testified that he conducted an extensive investigation into the possibility that the victim was

killed elsewhere and moved. He testified that he consulted with a friend who was a forestry major to analyze the bright green leaves found around the victim's body which did not match the surrounding leaves. Trial Counsel also hired an expert from Clemson to come out to the scene during the trial. He stated the result of this investigation showed that the leaves could be Laurel Oak leaves rather than Sweetgum leaves, so they could actually have come from the Laurel Oak trees at the gravesite. This information did not align with his attempt to show the leaves came from another location. Based on the results of this investigation, Trial Counsel strategically chose not to use this argument to assert third-party guilt.

Additionally, the note written by Williams that would have corroborated this defense lost all credibility when the trial testimony of Early Glover came to light. As trial counsel recalled, Early Glover testified at trial that Applicant paid him \$1000 to write a note providing Applicant with an alibi. Trial counsel testified that he had to make a strategic decision as to whether, after Glover's testimony, his own defense witness would be credible. He decided it would not be credible, but would rather corroborate Glover's testimony delivered on behalf of the State. Moreover, that potential witness invoked his Fifth Amendment privilege during *in limine* hearings at trial. In sum, Trial Counsel explained that he could not corroborate the letter from this witness or the leaves found in the gravesite, and thus decided to abandon this potential defense because in his assessment it would have done more harm than good.

Trial Counsel's PCR testimony established that his investigations into third-party guilt dead-ended such that Counsel exercised a strategic decision to not present evidence of third-party guilt because he could not credibly corroborate it. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Roseboro v. State*, 317 S.C. 292, 454

S.E.2d 312 (1996); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court finds that Trial Counsel's election in this case was made after a thorough investigation and does not constitute deficient performance.

This Court also declines to find that Applicant was prejudiced by Trial Counsel's decision not to present evidence of third-party guilt. Applicant admitted in a statement to law enforcement that he was present at the scene of the crime. Given Early Glover and Dustin Williams, it would have been difficult for Trial Counsel to present any credible evidence of third-party guilt in this case; and, if any were presented, it likely would not have changed the outcome of the trial based on the remainder of the evidence presented at trial.

Furthermore, Applicant failed to present at PCR any specific evidence of third-party guilt which could have been used at trial, and thus this Court cannot speculate as to the prejudice prong of *Strickland*. The South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover v. State*, 318 S.C. at 498-99, 458 S.E.2d at 540. Applicant did not present any testimony from favorable witnesses to show how Trial Counsel should have properly presented the defense, thus he has not proven prejudice.

This allegation is denied and dismissed with prejudice as this Court finds Applicant has failed to meet his burden of demonstrating *Strickland* error-and-prejudice.

q) *Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal*

Applicant's allegation of ineffective assistance of counsel for failure to federalize the issues raised on direct appeal is meritless. If a direct appeal claim (a claim of trial court error) is based solely in state law, it is ordinarily barred from review by the United States District Court should Applicant later pursue the same claim in a collateral federal action seeking a writ of habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480 (1991) ("Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). "Federal habeas courts are without authority to correct a simple misapplication of state criminal law or procedure 'but may intervene only to correct wrongs of [a federal] constitutional dimension.'" *Luchenburg v. Smith*, 79 F.3d 388, 391 (4th Cir. 1996) (quoting *Smith v. Phillips*, 455 U.S. 209, 221 (1982)).

Applicant alleges Trial Counsel prejudiced Applicant by failing to provide some federal constitutional basis for the objections which were preserved and pursued on appeal. Applicant has not proffered the federal nature of the claims he perceives should have been pursued on appeal. Applicant also failed to proffer any testimony in furtherance of this allegation at the evidentiary hearing. Therefore, Applicant has failed to present any factual support for this claim and has thus failed to meet his burden of proof.

This Court declines to grant PCR in regards to trial counsel's pursuit and treatment of the issues pursued on direct appeal before the South Carolina Court of Appeals. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland v. Washington*, 466 U.S. at 697, 104 S. Ct. at 2069. To

demonstrate prejudice here, Applicant must prove that, if counsel had objected in a way that “federalized” the issues above, that “there is a reasonable probability the outcome of the [appellate] proceeding would have been different.” *Stone v. State*, 419 S.C. 370, 390, 798 S.E.2d 561, 572 (2017) (quoting *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)). Applicant must meet the high burden of showing that the “ignored issues are clearly stronger than those presented[.]” *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 726, 766 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (prejudice standard for ineffective assistance of appellate counsel requires applicant to show “that, but for counsel’s error, there is a reasonable probability that he would have prevailed on appeal”).

By and through appellate counsel, Applicant pursued the following evidentiary issues on direct appeal:

1. Whether the court erred by admitting into evidence a “root” associated with witchcraft and a can of “Law Stay Away” that were seized from the center console of Appellant’s truck pursuant to a search warrant because this evidence was not relevant and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant?
2. Whether the court erred by denying Appellant’s motion for a mistrial after a law enforcement officer characterized the “brown piece of paper bag” that was “taped up” to form some sort of “capsule” with weeds, twigs, and a penny inside and the words “Set me Sammie Gerrick free from murder and revoked bonds” written on the outside as “witchcraft root” in front of the jury since this testimony was highly prejudicial and the court’s curative instruction failed to cure the prejudice suffered by Appellant?
3. Whether the court erred by refusing to grant a mistrial after the state showed a videotape of Appellant’s interview with law enforcement before his arrest with a polygraph machine clearly visible on the table since this was unduly prejudicial and denied Appellant a fair trial?

The Court of Appeals affirmed Applicant's conviction and sentence, upholding each of these evidentiary rulings on the merits. *State v. Gerrick*, Op. No. 2016-UP-092 (S.C. Ct. App. filed Feb. 24, 2016) (unpublished).

This Court finds there is no probability that these issues would have been stronger on appeal had they been "federalized" rather than raised simply as state law evidentiary issues. The underlying facts and issues would remain the same on direct appeal to the South Carolina Court of Appeals had they been "federalized."

Also, as the opinion of the South Carolina Court of Appeals is supported by relevant facts and case law, Applicant cannot demonstrate any due process violation or other error of a federal constitutional dimension which would warrant relief had the issues been framed in an alternative way. *Id.* Applicant cannot demonstrate how the evidentiary rulings in this case caused some fundamental unfairness in the trial which would warrant relief. Not only were the trial court rulings upheld as a matter of state law, but the record evidences very strong evidence of guilt. (Br. of Respondent at pp. 17-47). Therefore, even had the South Carolina Court of Appeals determined the trial court erred in respect to one or more of the existing appellate claims, the error would not warrant reversal. *State v. Thompson, supra*, 352 S.C. 552, 562, 757 S.E.2d 77, 83 (Ct. App. 2003) (improperly admitted evidence and the denial of a mistrial only constitute reversible error when the admissions cause prejudice).

Moreover, even on later collateral review, the United States District Court may reach the direct appeal claims *as they exist* to determine whether the admission of the evidence itself so infected the entire trial that the resulting conviction violated due process. *E.g. Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir. 2008) (state-court evidentiary may be considered by federal court if "erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair

proceeding”) (quoting *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir. 2000)); *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993) (relief may be warranted if state court error had “substantial and injurious” effect or influence in determining the jury’s verdict); *Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321 (2007) (holding “in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the ‘substantial and injurious’ standard set forth in *Brecht*”).

For the foregoing reasons, Applicant cannot establish prejudice flowing from the failure to “federalize” the issues pursued on direct appeal. Therefore, this allegation is denied and dismissed with prejudice. *Strickland, supra*.

r) *The cumulative effect of trial counsel’s error requires a new trial*

Applicant seeks to invoke the cumulative error doctrine. “Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina.” *Simpson v. Moore*, 367 S.C. 587, 604 S.E.2d 701, 710 (2006). But when a court finds no error by counsel on any claim raised, and finds that counsel’s representation caused the applicant no prejudice on any claim, there can be no sum of either error or prejudice upon which this Court may grant relief. *Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding where none of the errors alleged by the PCR applicant were meritorious, the alleged errors did not have the cumulative effect of denying the applicant effective legal representation to the extent that prejudice was presumed); see *United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) (“When ‘none of [the] individual rulings work[] any cognizable harm, . . . [i]t necessarily follows that the cumulative error doctrine finds no foothold.’” (quoting *United States v. Sampson*, 486 F.3d 13, 51 (1st Cir. 2007))); see also *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004) (errors must “so fatally infect the trial that they

violated the trial's fundamental fairness" for cumulative error to apply in this jurisdiction). For the reasons discussed herein, Applicant has not been awarded a grant of PCR on any one allegation pursued at the evidentiary hearing. This Court thus denies and dismisses this final PCR allegation.

Prejudice

As explained above, this Court finds no resulting prejudice from any allegation presented by Applicant. In addition to the specific reasoning described within this Court's ruling on each individual allegation, this Court also considered the totality of the evidence presented against Applicant at trial. Based on the totality of the evidence presented at trial, this Court makes an additional finding that there exists no probability of a different result at trial had counsel acted in any manner complained of within the individual PCR allegations.

"To satisfy the prejudice prong, an applicant must demonstrate 'there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "As the Supreme Court of the United States explained in *Strickland*, 'the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 695, 104 S.Ct. at 2068-69). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068).

But PCR court's prejudice determination must also include a consideration (1) as to the specific impact of any error determined to have been made by counsel on the outcome of the

trial, as well as (2) a consideration of "the strength of the State's case in light of all the evidence presented to the jury." *Smalls v. State*, 422 S.C. at 188, 810 S.E.2d at 843 (also stating that to *categorically* preclude a prejudice finding, "the evidence must include something conclusive").

The evidence presented allows for the connection of collateral facts which paints a narrative of guilt. See *State v. Logan*, 405 S.C. 83, 97-98, 747 S.E.2d 444, 451-52 (2013); *State v. Rogers*, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). Here, there is no other reasonable explanation. First, Applicant's incarceration and his need for bail and bill money give rise to the inception of the investigation and establishes motive. Because Applicant could not pay his bills, he also could not refund the victim and his friend Maurice Williams for their bonding Applicant out of jail.

The victim followed behind Applicant after the bailout with the expectation that Applicant was collecting money for repayment. The two were spotted in tandem the remainder of that afternoon. First they left Applicant's house, but not before Applicant put two shovels in the bed of his truck (the victim was recovered from a shallow grave). (Tr. p. 230, l. 24 – p. 231, l. 9). Then they were seen at the Enterprise Bank ATM and at the Junior Food Mart, both in Blackville. (Tr. p. 236, ll. 1-23; Tr. p. 537, ll. 17-34). Joe Thomas saw Applicant drive past Thomas' house with another car close behind around 3:00 that afternoon, which is corroborated by a call from that friend to Applicant. (Tr. p. 574, l. 4 – p. 575, l. 18). Applicant said during an interview with law enforcement that he went by Thomas' house to get sand, but according to Thomas, that never happened. (Tr. p. 575, l. 19 – p. 576, l. 3). Thomas' house lies within a mile or so of the crime scene. (Tr. p. 576, ll. 4-16).

No one heard from the victim afterwards, and then the victim's cell phone permanently goes off the grid, as evidenced by undelivered text messages. (Tr. p. 476, l. 18 – p. 478, l. 19;

State's Exhibit 72). Cell phone records show that the last four phone calls the victim ever makes are to Applicant. (Tr. p. 612, l. 24 – p. 614, l. 21; Tr. p. 705, ll. 3-11; State's Exhibits 71 and 72). After that last phone call, made from the Blackville area, Applicant's phone escaped from the grid for two hours during the same time period as when the victim's phone forever lost service. (Tr. p. 461, l. 4 – p. 470, l. 1; Tr. p. 705, l. 12 – p. 707, l. 1; State's Exhibits 71 and 72).

Applicant resurfaced that evening, telling Maurice Williams that he and the victim dug up a safe full of money to reimburse him for the bailout, but that the victim drove off with it. (Tr. p. 189, l. 2 – p. 190, l. 20). Also that night, a visitor at Applicant's residence saw him change clothes around 7:30 and place his other clothes in the laundry room. (Tr. p. 222, l. 5 – p. 223, l. 17). This was after Applicant came home to shower after being bailed out of jail. (Tr. pp. 270-71 ("I then went in, shave, cut my hair and showered.")).

The next day, an ATM camera catches Applicant using the victim's debit card to withdraw money. The victim's card was also used several times the day the victim disappeared, including paying energy bills around midnight. (Tr. p. 545, l. 6 – p. 546, l. 25; Tr. p. 552, l. 1 – p. 554, l. 23; Tr. p. 555, ll. 2-14). The victim went missing long before midnight. The victim's sister-in-law, with whom he lived, testified that the victim would never lend his debit card or PIN number to anyone. (Tr. p. 261, ll. 19-23).

Maurice Williams also sees Applicant the next day and notices scratches on his chest. (Tr. p. 200, ll. 19-25). When questioned about those scratches by law enforcement, who also noticed them, Applicant stated that a lightbulb burst overhead in his jail cell days prior, causing injury. Jailhouse employees testified that Applicant did not report any injury during his incarceration, nor did it appear that he had any scratches. (Tr. p. 216, l. 1 – p. 218, l. 20; Tr. p. 272, ll. 13-15; Tr. p. 402, ll. 10-17; Tr. p. 487, l. 3 – p. 488, l. 25).

The victim's friends also received a mysterious text message purporting to be from the victim, but from an unknown number, claiming that the victim was hurt and asking for help. (Tr. p. 195, ll. 4-17; Tr. p. 246, l. 18 – p. 247, l. 1). When one recipient asked Applicant about the text, Applicant replied that it might take the heat off of him. (Tr. p. 248, l. 22 – p. 249, l. 14). The texts incorrectly used "am" as a substitute for "I'm," just like Applicant consistently did as well. (Tr. pp. 197-200). Those texts came from a trac phone pinging from the same location as Applicant's phone at the time the texts were sent. (State's Exhibit 73; Tr. p. 611, ll. 3-18; Tr. p. 719, l. 13 – p. 720, l. 11).

Of import, Applicant's wife testified that late during the night of the victim's disappearance, she followed Applicant out to the woods near Sunshine Road so that the Applicant could collect the victim's car, drive it to Orangeburg, and park it at the China Express. (Tr. pp. 303-309). She took law enforcement to the woods where the Applicant initially retrieved the victim's car; those woods proved to be the crime scene. (Tr. pp. 327-29). The victim was found in a shallow grave, face-down, with asphyxiation the probable cause of death. (Tr. p. 417, ll. 1-4; Tr. p. 445, ll. 1-18). Autopsy results showed defensive lacerations on the victim's left arm. (Tr. p. 441, ll. 1-7).

Investigators found full set of Applicant's fingerprints on the victim's car. (Tr. p. 525, ll. 1-10; Tr. p. 532, ll. 1-8). Also apparent at the crime scene was some green netting. (Tr. p. 411, ll. 15-18). That same type of netting was present in Applicant's yard from sod which was laid about a year prior, and more green netting was collected from Applicant's other Blackville residence. (Tr. p. 231, l. 25 – p. 232, l. 10; Tr. p. 427, ll. 16-20; Tr. p. 429, l. 25 – p. 430, l. 2).

Adding insult to injury, Applicant provides a series of voluntary, yet incongruent statements to law enforcement. Each time law enforcement received a new tip in their

investigation, Applicant came forward with "a new story which would explain the new information." (Tr. p. 605, ll. 13-20). Applicant first explained that the victim bailed him out of jail and took him home, where the Applicant took a shower. (Tr. pp. 270-71). Applicant said that went to Enterprise Bank and the Junior Food Mart with the victim, but then went home. (Tr. pp. 266-67). Then Applicant said he has access to the victim's bank account because they had joint ownership of \$18,000 from a backhoe. (Tr. p. 322-24). Days later, Applicant contacted Chief Holston to say that "Black" held the victim for \$25,000 ransom, but did not re-contact the Chief with proof of life or contact information as requested. (Tr. p. 274-79).

Having discovered the victim's body, law enforcement brought in Applicant for another interview, confronting him with the information about the victim's car. (Tr. p. 333). The victim admitted to being in Orangeburg, but did not come forward with information that he was at the crime scene. (Tr. p. 350). It was not until Applicant was served with the murder warrant that he began to claim that he remained with the victim after their stop at the Junior Food Mart. (Tr. pp. 361-62). After Lieutenant Harley told him homeowners on the road saw his truck, Applicant changed his initial story about never being present at the crime scene. (Tr. p. 369, l. 14 – p. 371, l. 8).

Applicant next divulged a drug deal which allegedly also involved Andre Hightower and O'Shane Dixon. (Tr. pp. 509-604). Both Hightower and Dixon testified that they had no knowledge or involvement with a drug deal; they had an alibi for the day the victim disappeared. (Tr. pp. 558-66). Dixon added that Applicant kept calling him after the victim disappeared to see if Dixon knew anything about the investigation. (Tr. p. 565, l. 18 – p. 566, l. 25). Applicant instead stated that he was instructed by Hightower to move the victim's car to Orangeburg in exchange for \$400. (Tr. pp. 364-68).

The morning after his arrest, Applicant asked to speak with law enforcement again, now claiming he looked on as the others involved in the drug deal beat the victim. (Tr. pp. 599-604). The victim allegedly arranged the drug deal with "Big Joe" from Georgia, and Applicant stated that he went along on the deal because he was supposed to receive some of the funds. (Tr. p. 363). However, the victim had no connection to drugs, nor did he test positive for any drugs during autopsy. (Tr. p. 376, ll. 11-22 Tr. p. 453, ll. 5-17).

Then, Early Glover testified that months after the crime, Applicant promised him \$1000 in exchange for copying a statement that said Glover and Applicant were present when the victim was beaten, but that neither of them had anything to do with it. Applicant wrote the statement and Glover copied and signed it. Applicant never mentioned Early Glover in any prior statement, but did send a letter to SLED stating that somebody could vouch for his innocence. (Tr. pp. 372-74; Tr. pp. 583-88).

Finally, law enforcement discovered the "root" and a novelty canister labeled "Law Stay Away" during the execution of a search warrant on Applicant's vehicle. Lieutenant Shaun Harley with SLED first testified as to examining "like a brown piece of paper bag, looked like." "It was just taped up . . . with dust, weed, twigs and a penny inside." (Tr. p. 344, ll. 7-10). Harley testified as to the handwriting on each side of the brown paper, which on one side exhibited the contents of Psalms 130, and on the other appeared as a prayer, which Harley referred to as a letter: "Set me Sammie Gerrick free from murder and revoke bond. Jack Early set me free now . . . Amen." (Tr. p. 346, l. 4 - p. 347, l. 15). SLED crime scene investigator Melissa Skipper Wallace found the items in the center console of Applicant's truck. Through Wallace, the State introduced photographs of the undisturbed contents of the open center console, the novelty canister of incense powder labeled "Law Stay Away," and close-ups of the brown paper parcel

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both opened and unopened. The items themselves were not introduced. (Tr. p. 425, l. 4 – p. 426, l. 24).

This Court finds persuasive the evidence in this case and finds that it constitutes a strong case of substantial circumstantial evidence. Whether by motive, opportunity, or acts of guilt, when one strings it together, all evidence points to the Applicant as the sole perpetrator.⁷ Applicant has failed to specifically analyze or prove that any one alleged deficiency would have changed the outcome of the case in light of the strong evidence against him, as is his burden.

IV. CONCLUSION

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

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

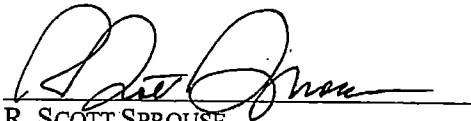
⁷ Even if this case were prosecuted under the theory of the hand of one, hand of all, the evidence points to Applicant's guilt as he was instrumental in leading Applicant to, and was present at, the site of the deadly drug deal Applicant eventually alleged to have occurred. *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.").

Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

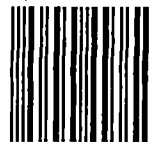
AND IT IS SO ORDERED this 27 day of July, 2018.


R. SCOTT SPROUSE
Presiding Judge
Second Judicial Circuit

Walhalla, South Carolina



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The Honorable Daniel E. Shearouse
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