

# Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

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September 19, 2018

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

**RECEIVED**  
SEP 20 2018  
S.C. SUPREME COURT

RE: Adonis Williams, SCDC # 274626, vs. State of South Carolina  
Appeal of Case No. 2013-CP-40-2376

Dear Mr. Shearouse,

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

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

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

Respectfully,



Kristy Goldberg

CC: Kelly Oppenheimer  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Adonis Williams, SCDC # 274626  
Kershaw County Correctional Institution  
4848 Goldmine Highway  
Kershaw, South Carolina 29067

Jeanette McBride  
Richland County Clerk of Court  
Post Office Box 2766  
Columbia, South Carolina 29202

Office of Appellate Defense  
Chief Appellate Defender – Robert Dudek  
PO Box 11433  
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

SEP 20 2018

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

J. Derham Cole, Circuit Court Judge

Case No. 2013-CP-40-02376

Adonis Williams, #274626, ..... Appellant


v.

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

NOTICE OF APPEAL

Adonis Williams, by and through his undersigned and appointed attorney, hereby states this Notice of Appeal should be heard pursuant to the Final Order of Honorable J. Derham Cole, which granted a *White* review of the Applicant's criminal trial held on September 6, 2011 (2009-GS-40-2697, 2698, 2701). The Final Order denied Applicant's remaining allegations and the Applicant wishes to also Appeal the findings and fact and conclusions of law regarding those remaining allegations. Counsel for the Applicant received written notice of the Final Order granting a *White* review and denying other relief on September 12, 2018. A copy of the Final Order is attached herewith.

September 19, 2018

  
\_\_\_\_\_  
Kristy Goldberg  
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.  
1720 Main Street, Suite 303  
Columbia, SC 29201  
Phone (803) 667-6633  
kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Kelly Oppenheimer  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

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Case No. 2013-CP-40-02376

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Adonis Wiliams, #274626, ..... Appellant

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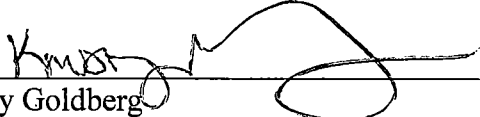
PROOF OF SERVICE

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I, Kristy Goldberg, appointed attorney for the Petitioner, certify that I have today served the within in Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

Assistant Attorney General, Kelly Oppenheimer  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served this 19<sup>th</sup> day of September, 2018.

  
\_\_\_\_\_  
Kristy Goldberg

Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.  
1720 Main Street, Suite 303  
Columbia, SC 29201  
Phone (803) 667-6633  
[kristy@kristygoldberglaw.com](mailto:kristy@kristygoldberglaw.com)

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
)

IN THE COURT OF COMMON PLEAS

Adonis Williams, SCDC #274626, )

Applicant, )

v. )

State of South Carolina )

Respondent. )

**ORDER**

GRANTING WHITE V. STATE APPEAL

and

DENYING OTHER RELIEF

Civil Action No. 2013-CP-40-02376

2013 SEP 10 PM 2:46  
JEANETTE W. HODRIGE  
Clerk of Court  
RICHLAND COUNTY  
FILED

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an application for post-conviction relief filed April 19, 2013, by Adonis Williams (Applicant). The State (Respondent) made its Return on October 18, 2013, requesting an evidentiary hearing be held. Thereafter, on July 1, 2015, and January 21, 2016, through his counsel, Applicant filed an amended application for post-conviction relief and a second amended application for post-conviction relief, respectively. An evidentiary hearing was convened on February 1, 2016, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esquire. Respondent was represented by Assistant Attorney General J. Clayton Mitchell, III, of the South Carolina Attorney General's Office.

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During its July 2009 term, the Richland County Grand Jury indicted Applicant for kidnapping (2009-GS-40-2697), armed robbery (2009-GS-40-2698), and first-degree burglary (2009-GS-40-2701). Mark E. Schnee, Esquire, represented Applicant on these charges. On September 6-9, 2011, Applicant proceeded to a jury trial before the Honorable James R. Barber, III<sup>1</sup>. Following deliberations, the jury convicted Applicant as indicted. Judge Barber sentenced

<sup>1</sup> Initially, on February 8-11, 2010, Applicant proceeded to a jury trial before the Honorable Clifton Newman, where he was represented by Byron E. Gipson, Esquire. That trial proceeded on the charges of first-degree burglary, armed robbery, and kidnapping, as well as additional charges of resisting arrest (2009-GS-40-2740) and assault on an officer while resisting arrest (2009-GS-40-2741). Following the presentation of all evidence, the jury convicted Applicant of resisting arrest and acquitted Applicant of assault on an officer while resisting arrest. Judge Newman sentenced

SCANNED

#1

him to a term of imprisonment of twenty-five years for kidnapping, twenty-five years for armed robbery, and twenty-five years for first-degree burglary. The sentences were to run concurrently.

Applicant filed a timely notice of appeal. By written Order dated March 30, 2012, the South Carolina Court of Appeals dismissed Applicant's appeal for failing to timely order the transcript as required by Rule 207, SCACR. The Remittitur was issued on January 24, 2013.

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

1. "No DNA in house or truck;"
  - a. "They had DNA but its [sic] wasn't mine. They couldn't find a match."
2. "No video of me at bank on camera;"
  - a. "Video from teller at bank."
3. "Video at Citgo gas station shows a white male doing what police n [sic] victim accused me of. She accused me in impact statement, police in impact statement, police in preliminary hearing."
  - a. "Video from gas station (Citgo)."

In his amended application for post-conviction relief, Applicant raised the following grounds:

1. "Ineffective assistance of counsel – Trial counsel failed to properly object and/or request a mistrial to preserve the record for appellate review on several occasions, including specifically:"
  - a. "Trial transcript page 163, line 5-16 – Statement was sufficiently prejudicial that counsel should have requested a mistrial;"
  - b. "Trial transcript page 170, lines 1-16 – Missed objection to leading and failed to appropriately renew pre-trial objection contemporaneously;"
  - c. "Trial transcript page 389, lines 16-25 – Missed objection to bolstering and hearsay;"
  - d. "Trial transcript pages 558-559 – Delayed objection to re-called testimony of Dr. Gray Amick;"
  - e. "Trial Transcript pages 569 – Failed to renew pre-trial objection regarding evidence that [Applicant] had been out of prison 10 months – and failed to object regarding relevance as the actual evidence showed that [Applicant] had been out of prison 8 months;"
  - f. "Trial transcript page 652, lines 1-25 – Missed objection to Solicitor's question as calling for overly prejudicial and irrelevant testimony with no probative value – trial counsel

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Applicant to a term of imprisonment of one year for resisting arrest. The jury could not reach a verdict on the charges of first-degree burglary, armed robbery, and kidnapping, so Judge Newman declared a mistrial with respect to those charges.

- should have requested that testimony be stricken from the record and requested a mistrial;”
- g. “Trial transcript pages 653-654 – Missed objection when Solicitor essentially offered testimony regarding the weather when there was no evidence offered on this topic;”
  - h. “Trial transcript page 669, line 4 – Failed to object when the Solicitor misstated the facts in evidence;”
  - i. “Trial transcript page 692, lines 18-22 – Failed to object when the Solicitor made an improperly prejudicial appeal to the jury.”
2. “Ineffective assistance of trial counsel – Trial counsel failed to properly object to the admissibility of evidence obtained from the cell phone on the grounds of an unconstitutional search and seizure under the 4<sup>th</sup> amendment and overly prejudicial content with no probative value (Trial transcript pages 493-499)[;]”
  3. “Ineffective assistance of counsel – Trial counsel failed to investigate and present possible evidence and witnesses[;]”
  4. “Ineffective assistance of counsel – Trial counsel failed to effectively cross examine the victim with her prior testimony[;]”
  5. “Ineffective assistance of counsel – Trial counsel failed to effectively argue the facts during closing argument[;]”
  6. “Ineffective assistance of counsel – Trial counsel failed to effectively argue the importance of DNA evidence during closing argument[;]”
  7. “Ineffective assistance of counsel – Trial counsel failed to request an alibi charge be included in the jury charges[;]” and
  8. “Ineffective assistance of trial counsel pursuant to White v. State – failure to properly initiate client’s direct [a]ppel.”

In his second amended application Applicant raised the following grounds:

1. “Ineffective assistance of counsel – Trial counsel failed to properly object and/or request a mistrial to preserve the record for appellate review on several occasions, including specifically:”
  - a. “Trial transcript page 163, line 5-16 – Statement was sufficiently prejudicial that counsel should have requested a mistrial;”
  - b. “Trial transcript page 170, lines 1-16 – Missed objection to leading and failed to appropriately renew pre-trial objection contemporaneously;”
  - c. “Trial transcript page 389, lines 16-25 – Missed objection to bolstering and hearsay;”
  - d. “Trial transcript pages 558-559 – Delayed objection to re-called testimony of Dr. Gray Amick;”
  - e. “Trial Transcript pages 569 – Failed to renew pre-trial objection regarding evidence that [Applicant] had been out of prison 10 months – and failed to object regarding relevance as the actual evidence showed that [Applicant] had been out of prison 8

- months;”
- f. “Trial transcript page 652, lines 1-25 – Missed objection to Solicitor’s question as calling for overly prejudicial and irrelevant testimony with no probative value – trial counsel should have requested that testimony be stricken from the record and requested a mistrial;”
  - g. “Trial transcript pages 653-654 – Missed objection when Solicitor essentially offered testimony regarding the weather when there was no evidence offered on this topic;”
  - h. “Trial transcript page 668, line 17-24; Trial transcript page 670, line 10-11 and 15-16; Trial transcript page 672 Line 4-12 – Failed to object when the Solicitor improperly vouched for the victim and witness;”
  - i. “Trial transcript page 669, line 4 – Failed to object when the Solicitor misstated the facts in evidence;”
  - j. “Trial transcript page 667, lines 7-12 – Failed to object when the Solicitor asked the jury to convict [Applicant] on an improper basis;”
  - k. “Trial transcript page 692, lines 3-22 – Failed to object when the Solicitor made an improperly prejudicial appeal to the jury;”
  - l. “Trial transcript page 710-711 – Failed to object when the Judge talked to the jurors in the jury room, without either party present.”
2. “Ineffective assistance of trial counsel – Trial counsel failed to properly object to the admissibility of evidence obtained from the cell phone on the grounds of an unconstitutional search and seizure under the 4<sup>th</sup> amendment and overly prejudicial content with no probative value (Trial transcript pages 493-499)[;]”
  3. “Ineffective assistance of counsel – Trial counsel failed to investigate and present possible evidence and witnesses[;]”
  4. “Ineffective assistance of counsel – Trial counsel failed to effectively cross examine the victim with her prior testimony[;]”
  5. “Ineffective assistance of counsel – Trial counsel failed to effectively argue the facts to the jury during closing argument[;]”
  6. “Ineffective assistance of counsel – Trial counsel failed to effectively argue the importance of DNA evidence during closing argument[;]”
  7. “Ineffective assistance of counsel – Trial counsel failed to request the following law to be included in the Judge’s charge to the jury.”
    - a. “an alibi charge[;]”
    - b. “a mere presence charge;”
    - c. “A charge regarding lack of criminal intent.”
  8. “Due to the cumulative effect of counsel’s errors the Applicant suffered prejudice such that, but for the combination of these errors, the result of the proceeding would have been different[;]” and
  9. “Ineffective assistance of trial counsel pursuant to White v. State –

failure to properly initiate client's direct [a]ppeal."

At the hearing, Applicant proceeded forward on the claims of ineffective assistance of counsel raised in his second amended application for post-conviction relief.

#### STATEMENT OF FACTS ADDUCED AT TRIAL

During the early morning hours of March 22, 2009, at approximately seven o'clock, Linda Wofford (hereinafter "the victim") was asleep in her home when she heard a loud banging noise. Trial Tr. 154. When she woke up from the noise, she saw a masked man, wearing a dark blue and white bandana, black pants, a beige coat with a green diamond on the back of it, and a toboggan-type hat. Trial Tr. 154-55, 192. He was not wearing gloves, and he held a revolver. Trial Tr. 154, 155. The man had entered the victim's bedroom from the hallway and was standing between the hallway door and the victim's bed. Trial Tr. 155. The man then stated to the victim: "I'm coming down. I'm coming down bad. I need some money. I need you to take me to a teller." Trial Tr. 155. The victim then got out of her bed and began to get dressed. Trial Tr. 155. Meanwhile the man stayed in her bedroom in a location from which he could see both the victim and the side door, through which he broke into the victim's home. Trial Tr. 155-56.

As she walked through her home, she noticed her furniture had been knocked all over the room. Trial Tr. 156-57. The victim attempted to use her front door to exit her home, but the man insisted she use the side door. Trial Tr. 156, 157, 158. The man then instructed the victim to drive him to the A.T.M. Trial Tr. 158-59. The victim got into the driver's side of her Toyota Tacoma pickup truck, which was parked in her driveway right next to her house, and the man got into the passenger's side. Trial Tr. 159-60. The man gave instructions to the victim, dictating the manner in which she should leave her neighborhood. Trial Tr. 160. While driving, the victim was able to observe the left side of the man's face, where he had a chicken pox scar around his eye. Trial Tr. 161. She also observed dark blood veins in the man's eyes. Trial Tr. 162, 191.

As the victim drove away from her home, she proceeded down Caroline Street, turned right onto Leesburg Road, and then took a left towards the V.A. hospital. Trial Tr. 160. While on the way to the A.T.M., the victim lit a Virginia Slim Menthol cigarette, as did the man. Trial Tr. 167, 199. The man also told her he was "down and out because he had just gotten out of prison" ten

months before. Trial Tr. 170. The victim then drove to her usual A.T.M., which was located on Garners Ferry Road across the street from the V.A. hospital. Trial Tr. 160, 162.

When she arrived at the A.T.M., she pulled into a handicap parking space in the parking lot. Trial Tr. 162. The man instructed the victim to get the money from the A.T.M. while he stayed in the truck. Trial Tr. 163. The victim retrieved \$200 from the A.T.M, but the man told her to get more, so she tried again. Trial Tr. 164. On her second attempt to get more money from the A.T.M., the victim was only able to retrieve an additional \$100. Trial Tr. 164. The man stayed in the car each time she went to the A.T.M. Trial Tr. 185. The man still appeared to be upset, so the victim took out her billfold and began giving him anything she had in that. Trial Tr. 165.

The victim then got back in the car, and the man instructed her to drive back the way they had come to the A.T.M. Trial Tr. 165-66. At that point, the man had a key and the cigarette butt from earlier in his hand. Trial Tr. 168. The man then instructed her to stop at a home with a red door on Patricia Drive, where he indicated his car was located and further instructed her to stay in her truck. Trial Tr. 169, 195, 204. After the man exited her vehicle, with the cigarette butt, the victim immediately started her vehicle and drove to a Citgo gas station approximately two blocks away in order to call 911. Trial Tr. 169. While in the Citgo station, the victim left her car parked on the left side of the building. Trial. Tr. 171, 200, 212. She then informed the employees at the Citgo what had happened and called 911. Trial Tr. 171. She waited there until law enforcement arrived. Trial Tr. 171.

When law enforcement arrived, at approximately 8:30 in the morning, she filled out a robbery questionnaire and gave a statement, giving a description of the man. Trial Tr. 172, 189, 210, 265, 286-87. In her description, she indicated the man's height and build, as well as her observations of the man's left side of his face. Trial Tr. 174. Specifically, the victim described the man as a black male, who was taller than she was (approximately five feet, ten inches), slender, about 170 pounds, with short black hair, dark spots in his eyes, and a chicken pox scar<sup>2</sup>. Trial Tr. 184, 190-91, 197-98, 203, 269, 273, 279, 512-13. She further described the man was wearing a mask, a dark blue and white bandana with a design, black hat, dark pants, beige windbreaker, and no gloves. Trial Tr. 184, 190, 192-93, 198, 273-74. She indicated she did not know if the man

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<sup>2</sup> Applicant testified he does, indeed, have a mark on his temple, which he described as a "spot" or a "scratch." Trial Tr. 654.

had facial hair because he was wearing a bandana the entire time. Trial Tr. 190, 272. She also showed him the route she was forced to take, indicating the A.T.M. location and the location the man exited her truck. Trial Tr. 172-73, 262. When she returned to the Citgo station to retrieve her truck, she noticed the windows had been broken. Trial Tr. 182, 200, 212-13, 266. Initially, law enforcement believed the vandalism of the truck was connected to the victim's kidnapping, but another individual, Charles Alexander Blankenbecklor, who was with a man named Isaac Tucker a/k/a Boochee, was ultimately charged and convicted for that vandalism. Trial Tr. 480-84, 507-08, 510-11, 518-20, 536-38, 562, 564. Indeed, Blankenbecklor did not match the description of the assailant given by the victim and had no connection to Applicant. Trial Tr. 508-10.

Upon initial observation of the truck, law enforcement observed glass on both the inside and the outside of the vehicle, as well as personal belongings of the victim. Trial Tr. 214. Further, law enforcement had information the man did not leave anything in the victim's truck. Trial Tr. 214. Investigator Kristin Polis then processed the truck for fingerprints, focusing on the passenger side. Trial Tr. 216. In particular, she processed the passenger side door handle, the center console, the dash area around the glove box, and the exterior of the passenger door. Trial Tr. 221. She was unable to retrieve any usable fingerprints, which is not uncommon. Trial Tr. 221-22, 224, 252, 257, 343. Investigator Polis also processed a cigarette disposal container, which was left in the truck and was believed to be used to break the windows, for both fingerprints and DNA. Trial Tr. 222, 224. That did not produce any usable fingerprints. Trial Tr. 222. After processing the truck for fingerprints, Investigator Polis then processed the vehicle for DNA, swabbing the interior and exterior passenger door handle, the side of the center console, the passenger door latch, and the passenger door window and lock controls. Trial Tr. 222-23, 252.

Law enforcement released the truck to the victim, and she and law enforcement proceeded to the victim's home. Trial Tr. 174, 224. Upon entering the home, it was apparent damage had been done to the side door, and there was an area with some dirt around the door, and furniture had been pushed forward. Trial Tr. 225, 228, 241-43, 267-68, 288. Investigator Polis also walked through the home with the victim in order to determine the relevant areas to be processed. Trial Tr. 225, 241. The wires to the telephone line had been cut as well, and the area around the box which housed those wires had been freshly disturbed. Trial Tr. 175-76, 226, 230, 252. Fingerprints and some ridge detail were found on the box that housed the telephone wires, but Investigator Polis

was unable to lift them. Trial Tr. 231-32, 255. Consequently, the box was taken into evidence. Trial Tr. 232, 247.

Deputy Benjamin Lasher returned to the drop-off location on Patricia Drive and assisted in setting up a perimeter for a canine track. Trial Tr. 263. When the canine unit arrived, he indicated to those officers the direction in which the victim indicated the man had gone. Trial Tr. 264. Those officers then began a canine track, which was unsuccessful. Trial Tr. 264, 289.

The following day, law enforcement again went to the victim's home to speak with her and to go back through her home and her truck. Trial Tr. 302, 304, 470-71, 521. After speaking with the victim, they determined a cigarette butt could be pertinent to the investigation. Trial Tr. 304-05, 472-73, 527. As a result, he proceeded to the drop-off location on Patricia Drive. Trial Tr. 305, 315, 474-75. Upon searching the area, they discovered a Virginia Slims cigarette butt, which was collected into evidence. Trial Tr. 307-09, 475-77.

Subsequently, on March 25, 2009, Investigator Harold Bouknight made a comparison of the latent fingerprints found on the telephone box and Applicant's fingerprints. Trial Tr. 321-25. Investigator Bouknight determined Applicant's fingerprint was a match to that left on the telephone box<sup>3</sup>. Trial Tr. 326-27, 330, 487. Sergeant Stan Richards also did an independent comparison, which yielded the same results—the fingerprint on the telephone box was a match to Applicant. Trial Tr. 345-46. In addition to the box with the telephone wires, Investigator Polis also processed the side door, the storm door attached to the side door, and the bedroom doorknob for fingerprints and for DNA. Trial Tr. 234-36, 244-45. No usable fingerprints were discovered. Trial Tr. 235, 246.

DNA swabs from the victim's home, the victim's truck, the victim, Applicant, the cigarette butt found on Patricia Drive, an individual named Isaac Tucker, and Blankenbecklor were subsequently submitted for analysis. Trial Tr. 358, 361, 377, 381, 383, 505-06. From the DNA

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<sup>3</sup> Applicant testified he was storing drugs in the telephone box outside of the victim's house at the time, about one to two weeks prior to this incident, but he did not know her and did not know this house belonged to her. Trial Tr. 590, 610, 653. He explained he stored them there because, sometime before this incident, he was walking down Tama Road (where the victim's house is located) at night, and the police were driving down the road, shining a light at him. Trial Tr. 612-13. He further explained the police then shifted into reverse, and he thought they were going to come down the road on which he was travelling. Trial Tr. 613. Therefore, he ran across the street, jumped across the victim's fence, and ran into her backyard. Trial Tr. 613, 617. He testified he was so scared the police would catch him with drugs, he stashed them in the telephone box in her backyard. Trial Tr. 613, 617-18. Applicant testified he retrieved the drugs from the victim's backyard the same night he fled from the police and stored them there. Trial Tr. 618, 619.

on the cigarette butt, Dr. Gray Amick determined the DNA consisted of a mixture, from which Applicant and the victim could not be excluded as contributors. Trial Tr. 379, 388-90, 414-15. In fact, the likelihood of the victim and Applicant being the contributors to that sample was 140 times more likely than the mixture being from the victim and an unknown individual. Trial Tr. 389-90. Furthermore, the DNA from the cigarette butt was determined to be that of Applicant's through a CODIS search. Trial Tr. 434-35, 486. Blankenbecklor and Tucker were eliminated as potential contributors to the DNA sample. Trial Tr. 389, 390. Dr. Amick was able to exclude Applicant, the victim, Tucker, and Blankenbecklor as a contributor to the DNA mixture found on the interior passenger door. Trial Tr. 385, 414. In addition, the swab from the bedroom door handle matched the victim. Trial Tr. 387. Many of the swabs submitted, however, were too weak to interpret who could have been a contributor to that DNA profile. Trial Tr. 385-86.

After the fingerprint found at the victim's home and the DNA on the cigarette butt had been matched to Applicant, law enforcement began a search around the Garners Ferry Road and Leesburg Road area for Applicant. Trial Tr. 437-39, 451. The team encountered Applicant at a home located on True Street, which is located in the search area, and also encountered Applicant's girlfriend, Dawn Shea. Trial Tr. 439-40, 452-53, 460-61. When law enforcement first encountered Applicant at this home, they attempted to arrest him, but Applicant took off running. Trial Tr. 454, 457-58, 461. The search continued. Trial Tr. 454-55, 46, 5011. In continuing to search for Applicant, law enforcement also searched Applicant's sister's apartment pursuant to a search warrant. Trial Tr. 442-44, 490, 500-01, 533. Thereafter, law enforcement received information that Applicant was known to hang out with a friend, Zab. Trial Tr. 456, 462. Based on that information, law enforcement determined where Zab worked and lived, and ultimately apprehended Applicant in Zab's home. Trial Tr. 456-57, 463-64, 501-02.

Ms. Shea eventually gave law enforcement consent to search her home. Trial Tr. 440-41, 492, 533. During their search, law enforcement found a phone belonging to Applicant. Trial Tr. 441, 492-95. On the phone, law enforcement found text messages, which indicated the police were looking for Applicant and Applicant was about "to go into hiding". Trial Tr. 499. Law enforcement was unable to recover neither the items of clothing which the victim described nor the gun. Trial Tr. 500, 533-34.

At trial, Applicant testified he was at Michelle Wilcox's house<sup>4</sup>, located near Leesburg Road, until about seven o'clock in the morning on March 22, 2009. Trial Tr. 591. He briefly went out to sell drugs to an unknown individual at a dry cleaners on Patricia Drive, then returned to Ms. Wilcox's home. Trial Tr. 591-93, 621-29. Applicant also testified he stopped at another residence to sell drugs before returning to Ms. Wilcox's home. Trial Tr. 593. He explained as he walked up to the house, a truck, which he later learned belonged to the victim, was in the yard. Trial Tr. 594, 630-31. He spoke with the victim, thinking she would want to buy drugs, and asked her for a cigarette. Trial Tr. 594, 631-34. The victim gave him a cigarette and lit it for him, and the two talked. Trial Tr. 595. Applicant smoked the cigarette for a short time, then tore the butt off and threw it on the ground. Trial Tr. 636-37. He then threw the remainder of the cigarette on the ground next to the butt, but because it was paper and tobacco, "it burned up and there wasn't nothing but ashes left." Trial Tr. 637. After telling Applicant she had been robbed, the victim asked him if he had a cellphone with him, which he denied. Trial Tr. 595, 634-35, 639. As he walked back to Ms. Wilcox's house, Applicant's father called him to tell him he was close to picking him up. Trial Tr. 596-97.

He returned to Ms. Wilcox's house, dropped his drugs off in Ms. Wilcox's home, counted the money he had received from selling drugs, and then rode a green and black mountain bike to the Citgo station in order to buy some cigarettes. Trial Tr. 597, 639-41. Applicant testified when he arrived at the Citgo, there were two police cars there, and the victim was sitting in the back of one of the police cars. Trial Tr. 597, 642. Thereafter, he rode the bike to the front of the store and proceeded inside to purchase some cigarettes. Trial Tr. 597, 643. He then rode the bike to the back of the store, where he saw the victim's truck with the windows broken. Trial Tr. 597. When he was riding the bike back to Ms. Wilcox's house, he received a phone call from his father, who was waiting for him. Trial Tr. 597-98. He met up with his father, and the two of them went to his sister's house on Broad River Road. Trial Tr. 598, 644.

Applicant also testified he was at Ms. Shea's house when the police knocked on the door. Trial Tr. 599, 644. He opened the door, and the police asked him to identify himself. Trial Tr. 599-600. Applicant testified as soon as he said his name, the police grabbed his arm. Trial Tr.

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<sup>4</sup> Applicant testified he was unsure of the exact address of the house. Trial Tr. 606-07. In addition, he also testified in 2010 that Ms. Wilcox's last name was Sease. Trial Tr. 607. He explained he only learned her last name in 2011, nearly two years after this incident. Trial Tr. 607.

600. Applicant believed the police officer who grabbed him was trying to hurt him, so he “snatched away” and ran<sup>5</sup>. Trial Tr. 600-01, 646, 648. Thereafter, Applicant went to Zab’s house to hide. Trial Tr. 648-49. The police eventually found him there, where he was hiding in a closet. Trial Tr. 650.

### **TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of Gearand Williams, and Mark E. Schnee, Esquire (hereinafter “Counsel”). This Court also had before it a copy of Applicant’s trial transcript, the records of the Richland County Clerk of Court, Applicant’s appellate records, and Applicant’s records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant first testified on his own behalf. Applicant testified he was arrested for these crimes on March 27, 2009. PCR Tr. 14. He testified Counsel originally represented him at his bond hearing, but he later hired Byron E. Gipson, Esquire. PCR Tr. 14. He also testified, after hiring Mr. Gipson, he proceeded to a jury trial, where he was convicted of resisting arrest, acquitted of “resisting arrest B,” and the jury was hung on all other charges. PCR Tr. 14-15. He elaborated he was sentenced to one year for resisting arrest, but he was not transferred to the South Carolina Department of Corrections (hereinafter “SCDC”) at that time, but rather remained at the jail. PCR Tr. 15. He further elaborated at that point, Mr. Gipson no longer represented him, because he could not provide the necessary funds to retain Mr. Gipson. PCR Tr. 15. Applicant testified thereafter, his father retained Counsel to represent him at his second trial. PCR Tr. 15-16.

Applicant also testified Counsel visited him at Alvin S. Glenn Detention Center while he was awaiting trial. PCR Tr. 15. Applicant testified the victim and the police alleged a man fitting Applicant’s description vandalized the victim’s truck at a Citgo gas station, which they had on video. PCR Tr. 17. He elaborated the police further alleged this vandalism was an act of intimidation after-the-fact. PCR Tr. 17. He testified, however, the man who vandalized the

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<sup>5</sup> Applicant testified at that time he was aware of the arrest warrants out for him because people had told him he was on the news. Trial Tr. 601, 644-45. In fact, on March 26 at 7:20 in the morning, Applicant received a text message that the police were looking for him. Trial Tr. 648. He responded to Zab he was going into hiding. Trial Tr. 648-49.

victim's truck was a white man. PCR Tr. 23. Applicant further elaborated he told Counsel he was at the gas station that same morning, but it must have been after the vandalism occurred. PCR Tr. 17. He testified he wanted Counsel to obtain the video from the Citgo, but Counsel informed him he was not going to waste time in obtaining the video because the Richland County Sheriff's Office had already obtained the video. PCR Tr. 17. He further testified because of Counsel's refusal to obtain the video, his family fired Counsel. PCR Tr. 17-18. He elaborated Mr. Gipson went to the Citgo to obtain the video but was informed the video "sat in the corner [fifteen] days," so he, therefore "lost out on that video." PCR Tr. 18. Applicant also testified he gave counsel a list of witnesses' names, addresses, and phone numbers, but Counsel never contacted those witnesses. PCR Tr. 18. He elaborated on this list were Michelle Wilcox and his father. PCR Tr. 18. He further elaborated "[he] had spent a lot of time at Michelle's house. And the morning of the crime or whatever [he] was at her house, and my father came and picked me up that morning" in his old, powder blue Tempo. PCR Tr. 18, 39. He explained "me and my father also had several -- know what I'm saying -- conversations, phone conversations -- know what I'm saying -- throughout that night and that next morning." PCR Tr. 18. He further explained these witnesses could have testified as to his alibi. PCR Tr. 19. Applicant also testified he did not recall having a conversation with Counsel regarding whether or not to call these individuals as witnesses. PCR Tr. 19. Rather, he told Counsel he had been in contact with these individuals, and they had indicated they would testify, but Counsel never contacted them. PCR Tr. 19, 40. He elaborated Ms. Wilcox did, indeed, receive a voicemail at one time, but she never returned the call and was not contacted again afterwards. PCR Tr. 19.

Applicant testified he wanted Counsel to investigate the man who actually committed the vandalism of the victim's truck, Charles Alexander Blankenbecklor, who pled guilty to such. PCR Tr. 20, 40. He elaborated part of his defense was to blame these crimes on Blankenbecklor. PCR Tr. 40-42.

He testified he ran from law enforcement because a BOLO for him had been released to the news. PCR Tr. 39, 44. He elaborated the BOLO included the description of a car, which he had neither been in nor seen. PCR Tr. 39. He further elaborated while he was on the run, everyone was blaming him for these crimes, rather than looking for Blankenbecklor. PCR Tr. 40. He explained once he was arrested, unknown individuals called into Crime Stoppers, advising them

they had the wrong person because "his car still riding around." PCR Tr. 40-41. He further explained he could never identify who was calling in to Crime Stoppers because the State lost those tapes. PCR Tr. 41. He testified as a result, law enforcement searched neither Blankenbecklor's car nor his house. PCR Tr. 41. Applicant also testified when he was apprehended, he did engage in a physical confrontation with law enforcement and was convicted of resisting arrest as a result. PCR Tr. 44-45.

He further testified Blankenbecklor had been drinking at a bar approximately five miles from the Citgo, and there was also a club at the location where the victim alleged Applicant got out of her truck and ran. PCR Tr. 20. He elaborated he wanted Counsel to take pictures of the club at the drop-off location in order to show its operating hours and to indicate the person who vandalized the car was lying about his whereabouts, and the pictures the State introduced at trial did not depict the club. PCR Tr. 20, 43-44. Applicant explained the victim alleged the robber got out of her truck and indicated he parked a car around the corner from the house in front of which the victim dropped him off; however, there was no way to park a car around the corner, as there was only woods and a fence there and the only point of entrance was a parking lot. PCR Tr. 22, 43. He further explained next to that parking lot was an all-night club, called the Diamond Head Club. PCR Tr. 23. He testified he was in that area that morning—that he walked down Patricia Drive and went back into the neighborhood—but he never went to the club. PCR Tr. 23. He further testified the Citgo at which the victim's truck was vandalized was one street down from this location. PCR Tr. 23.

Applicant testified he wanted Counsel to introduce pictures of ditch, which is used as a path, behind the victim's home, and no pictures depicting this path were introduced at trial. PCR Tr. 24, 43. He elaborated he hangs out in that ditch. PCR Tr. 24. He further testified a couple of weeks before this incident, he was running from the police one night, when he hid some drugs behind the victim's house. PCR Tr. 24. He explained because he hid his drugs behind her house, his fingerprint was found at the scene. PCR Tr. 25. He further explained he testified at trial that he was on the path behind the victim's home. PCR Tr. 25.

Applicant also testified his "case was hurt in a lot of ways." PCR Tr. 25. He explained he believed "a lot of evidence that should have been presented weren't [sic] presented." PCR Tr. 25.

He further explained he believed the evidence was either altered with, tampered with, or disregarded. PCR Tr. 25.

He testified the victim stated she only smoked one cigarette the morning of this incident and she did not smoke in her car, but three cigarettes were found in the car. PCR Tr. 26. He elaborated based on the testimony at trial, it was unclear what happened to the cigarettes that were found in the car—that they were just thrown away<sup>6</sup>. PCR Tr. 26. He elaborated those cigarettes found in the victim's truck were never tested for DNA. PCR Tr. 26. He also testified the police found a cigarette butt at the drop-off location on Patricia Drive, but the victim alleged the robber had a cigarette that hadn't been smoked. PCR Tr. 30. He elaborated the cigarette the robber had would have had some of the actual cigarette left, but that was not found at Patricia Drive. PCR Tr. 30-31. He also testified the DNA on the cigarette butt that was found and tested came back with a match. PCR Tr. 38. He elaborated he obtained a cigarette from the victim outside of the drop-off location on Patricia Drive, but he was never in her truck. PCR Tr. 38. He further elaborated "every time I look around in the trial, it's like they getting more and more of this frivolous evidence putting up against me. And everything that could help me is -- getting neglected." PCR Tr. 26.

Applicant also testified Counsel should have gone through the cell phone, which was presented at trial, to obtain numbers to show the calls he made. PCR Tr. 26-27. He elaborated he told Counsel he was talking on his cell phone at specific times; and if those times coincided with the time of the crime, someone should have testified to that. PCR Tr. 27.

He also testified a lot of things changed between the first trial and the second trial. PCR Tr. 28. He elaborated things that had been stated previously changed during the second trial, and things that were stated in the second trial also changed. PCR Tr. 28. He further elaborated the victim, in her statement, alleged the robber told her he was robbing her in order to pay alimony and child support, but Counsel never argued against that. PCR Tr. 28. He explained he has paid neither alimony nor child support in the past. PCR Tr. 28, 30. Applicant also testified the victim alleged in her statement the robber told her he either grew up or worked on a farm. PCR Tr. 28. He elaborated he has neither grown up nor worked on a farm. PCR Tr. 28. Applicant testified the victim, in her statement, alleged the robber told her he was from Philadelphia, and he has neither been to nor is from Philadelphia. PCR Tr. 28-29. He testified he was born and raised in Bamberg,

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<sup>6</sup> Applicant admitted he did not know how Counsel could have investigated this issue. PCR Tr. 25.

South Carolina. PCR Tr. 29. He also testified the victim indicated in her statement she could not understand the robber's dialect. PCR Tr. 29. In addition, Applicant testified the victim stated the robber told her he had been out of prison for ten months. PCR Tr. 31-32. He explained, however, he had only been out of prison for eight months, which an SCDC employee testified to at trial. PCR Tr. 31. Applicant testified some of these inconsistencies were raised at his first trial with Mr. Gipson, but Counsel never brought up these inconsistencies. PCR Tr. 29. He explained because the jury did not hear these inconsistencies, they assumed these statements made by the victim were true. PCR Tr. 30.

Applicant further testified Counsel never brought up the inconsistencies with the cigarette at trial. PCR Tr. 30-31. He elaborated "the whole thing changed from the statement, which nothing was said about a cigarette to the first trial where the police are saying the victim told them." PCR Tr. 31. He further testified the victim told law enforcement she did not tell them about a cigarette—that she did not share a cigarette with the robber, but law enforcement insisted the victim told them she did share a cigarette with the robber. PCR Tr. 31. He also testified he was unsure how the robber could have smoked a cigarette when the victim alleged the robber wore a mask the entire time. PCR Tr. 32.

Applicant also testified Officer Lasher testified at trial he went to the Citgo gas station to see the victim, then immediately went back to the drop-off location on Patricia Drive. PCR Tr. 32. Applicant further testified the canine unit was called to track the robber, but the dogs did not go in the direction which the victim indicated the robber went. PCR Tr. 32. He elaborated the dogs also did not find a cigarette, but they should have. PCR Tr. 32-33. He further elaborated the canine unit went neither between the house nor towards the club, but rather went in the opposite direction from where the victim said the robber went. PCR Tr. 33.

Applicant further testified the robber did not wear gloves, and the DNA evidence and the fingerprints found in the truck was not matched to him. PCR Tr. 33. He similarly testified DNA found inside the home was not matched to him. PCR Tr. 33. Applicant testified the victim testified she did not share a cigarette with the robber. PCR Tr. 33. He elaborated "it's like when [Counsel] was arguing it, he was saying all of these big number and all of this math. And I'm thinking in my mind, like, what this right here got to do with it -- you know what I'm saying -- the -- the actual facts of what's going on." PCR Tr. 33. He further elaborated he believed Counsel "got way off

subject . . . I feel like he lost the jury.” PCR Tr. 34. Applicant testified during closing, Counsel was too technical when discussing the DNA evidence. PCR Tr. 37. He elaborated Counsel should have argued the fact the DNA expert did not test the cigarette butt, but it was his opinion the DNA was saliva or mixture, from which he could not discern a major or minor contributor. PCR Tr. 38.

Applicant also testified he believed Counsel should have requested an alibi charge. PCR Tr. 34. He elaborated he presented an alibi defense through his testimony at trial, and Counsel could have supported his alibi with the call log from his cellphone. PCR Tr. 34. He further elaborated he believed his testimony alone supported an alibi charge. PCR Tr. 34-35. Similarly, Applicant testified mere presence should have been charged at trial. PCR Tr. 35. He testified, however, Counsel did, in fact, object and preserve the record with respect to a mere presence charge. PCR Tr. 35. He also testified the jury should have been charged with criminal intent, which the trial court failed to do. PCR Tr. 35.

Applicant also testified he testified at both trials. PCR Tr. 36. He elaborated when he testified at both trials, his defense was that he did not commit these crimes. PCR Tr. 36. He further testified at the second trial, he attempted to explain why his fingerprints were found on the telephone box—explaining he was a drug dealer and had hidden drugs throughout the neighborhood. PCR Tr. 36-37. Applicant testified he testified similarly during the first trial. PCR Tr. 37.

Applicant then presented the testimony of his father, Gearand Williams. Williams testified he was aware Applicant sold drugs and was also aware Applicant used drugs. PCR Tr. 57. Williams testified he hired Counsel to represent Applicant. PCR Tr. 46. He also testified he met with Counsel approximately one or two times, but he does not remember what they discussed during those meetings. PCR Tr. 46. He further testified Counsel did not ask him to testify at Applicant’s trial, and he did not recall Counsel ever asking him if he had any alibi information. PCR Tr. 47, 50. He elaborated, however, he believed he told Counsel about this alibi information once, and, consequently, Counsel was aware of the fact he picked Applicant up the morning of these crimes. PCR Tr. 56.

Williams also testified Applicant was with him during the course of the robbery, but also testified: “I don’t know if he was with me when the crime was being done or if he wasn’t with me when the crime was being done.” PCR Tr. 47, 54. He elaborated he “kind of, sort of [remembered

the day of these crimes]. I mean, it's kind of vaguely in my head." PCR Tr. 47. He testified in 2009, he was working two different jobs. Williams also testified the day before these crimes occurred, Applicant called him, but he could not pick him up that day. PCR Tr. 48. Therefore, he told Applicant he would pick him up early the next morning before he went to work. PCR Tr. 48. He further testified he picked Applicant up from Michelle Wilcox's home early the next morning, approximately seven or eight o'clock in the morning—but not before, and dropped him off on Broad River Road, at his daughter's house. PCR Tr. 48, 50, 52-53, 54-55. Williams testified they stopped by a gas station on the way to Broad River Road, because Williams had to purchase some cigarettes. PCR Tr. 57. Williams speculated he picked Applicant up on a Sunday morning, but he wasn't sure. PCR Tr. 52. He stated he did, in fact, pick Applicant up on a weekend. PCR Tr. 52. When asked why he believed he picked Applicant up from Ms. Wilcox's home on March 22, 2009, Williams stated: "Well it's because of what you tell me. You just told me that that's what it was. So I'm going by what you say really." PCR Tr. 49. He explained: "Well, really I can't say that I honestly know that this was this day. I just know that when I went to pick him up it was shortly after that when they started chasing him and stuff like that and said he had robbed somebody. I really don't know when that robbery actually took place, or none of that." PCR Tr. 49. Ultimately, Williams could not be sure when exactly he picked up Applicant. PCR Tr. 51-52.

He testified he did not speak with Applicant again, but two or three days after picking him up, he called Applicant's phone. PCR Tr. 48. He elaborated someone from the Richland County Sheriff's Department answered when he called. PCR Tr. 48. He further elaborated at that time, he did not know that law enforcement was looking for Applicant. PCR Tr. 48. Williams testified law enforcement told him if he got in touch with Applicant before they did, to bring him down to the sheriff's department. PCR Tr. 48-49, 50.

Williams testified at that time, Applicant did not have a regular place in which he would stay. PCR Tr. 50-51. He testified, however, Applicant has always lived in South Carolina; and in 2009, he was not living on a farm. PCR Tr. 51. He further testified when Applicant was younger, they used to have farm animals. PCR Tr. 51.

Then, Applicant presented the testimony of Counsel. Counsel testified he has been practicing law since 2006, and he worked for the Public Defender's Office for three years immediately after passing the bar. PCR Tr. 95. He testified he was first appointed to represent

Applicant when he was still working for the Public Defender's Office, and he represented Applicant during his bond hearing. PCR Tr. 58. Counsel also testified he has represented numerous individuals who were charged with the same crimes as Applicant. PCR Tr. 96. He testified Applicant did not make any requests at the bond hearing regarding any investigation, and Applicant actually waived his bond. PCR Tr. 58. He elaborated he attempted to waive Applicant's presence, but the State refused. PCR Tr. 58. He further elaborated the State wanted to "make a very big production of it and blamed [Applicant] for the vandalism and quite a few other things, which turned out to be completely false, which was very beneficial for [Applicant's] first trial and even for the second one. PCR Tr. 58-59.

Thereafter, Counsel testified Applicant's family hired Byron E. Gipson, Esquire, to represent Applicant. PCR Tr. 58. He further testified he was only representing Applicant for a short period of time at that point, and he did not believe he had obtained all discovery at that point. PCR Tr. 58. Counsel also testified he became involved in Applicant's case again after the initial mistrial and the hung jury. PCR Tr. 59. He elaborated he was at the jail meeting with other clients when Applicant approached him and asked him if he would be interested in and willing to take his case again. PCR Tr. 59. He further elaborated at some point after that encounter, Applicant's family came to his office and formally retained him for the retrial. PCR Tr. 59-60. Counsel further testified he was retained approximately six to eight months prior to the trial. PCR Tr. 60.

Counsel testified this was a weak circumstantial case but also a very emotional case for the jury if they believed Applicant was the robber. PCR Tr. 111-12. He further testified it was an unusual case in that the victim did not identify anyone, despite the fact they were sitting next to each other in a car for a period of time. PCR Tr. 112. He elaborated there was nothing inside the victim's truck or her house which could be linked to Applicant, and the fingerprint found on the telephone box could have been from any period of time. PCR Tr. 112-13. He further elaborated he attacked the investigation by law enforcement in this case. PCR Tr. 112.

He also testified in preparing for the second trial, he reviewed a copy of the transcript of the first trial. PCR Tr. 60. He further testified he and Applicant reviewed issues with the transcript and with discovery in significant detail. PCR Tr. 60. Counsel testified he recalled reading in the transcript from the first trial the victim had mentioned the robber discussing chickens, pigs,

alimony, and child support, and he also remembered the victim testifying about the robber's particular dialect. PCR Tr. 90-91. He elaborated he did not question the victim about these things on cross-examination because the victim did not testify in the same way at the second trial. PCR Tr. 91. He elaborated he did not delve into such statements because he thought it might show to the jury the victim had very few details about the robber. PCR Tr. 91. Counsel further elaborated during his cross-examination of the victim, he attempted to bring out details about the robber's eyes, as Applicant had some unique features with respect to his eyes which the victim never discussed. PCR Tr. 113-14. He testified to his knowledge, Applicant did not have any pigs or chickens, and Applicant does not have a particular dialect. PCR Tr. 91. He also testified he had no knowledge of Applicant ever having alimony or child support payments. PCR Tr. 92. He testified highlighting such inconsistencies may have been used to show the robber was someone other than Applicant, as identification was a major issue. PCR Tr. 92. He testified, however, there was a major shift in his trial strategy a few days prior to the trial, specifically shifting to third party guilt based on receiving knowledge of the person who vandalized the victim's truck. PCR Tr. 92. He explained he wanted more time to investigate this issue, but was not permitted to do so. PCR Tr. 92-93.

Counsel also testified during the first trial the victim testified the robber did not like her Virginia Slim cigarette, and there was a good bit of the cigarette left. PCR Tr. 93-94. He elaborated the cigarette butt introduced at trial does not comport with the victim's testimony, because only the filter remained. PCR Tr. 94. He further testified he did not have a good reason for failing to highlight this discrepancy. PCR Tr. 94. He also testified he did not recall whether or not he argued that it did not make sense that Applicant would have smoked a cigarette while wearing a bandana to cover his face, but he intended to argue that point. PCR Tr. 94.

Counsel testified he had no particular reason for not requesting a mistrial when the victim testified at trial that the robber told her: "You know that man I had yesterday didn't have any money." PCR Tr. 61-62. He further testified he believed this comment was in reference to allegations Applicant had committed other robberies, which was why he would have objected to it. PCR Tr. 61-62. He elaborated he objected to the question, which was sustained, and he moved to strike the comment, after which the trial court gave a curative instruction. PCR Tr. 96. He elaborated at the time he did not feel he should move for a mistrial based on that comment. PCR

Tr. 96. Counsel also testified he was unsure if the curative instruction given by the trial court following this comment "was enough." PCR Tr. 96.

Counsel testified he objected when the solicitor asked the victim if the robber had told him anything specific about himself, which would motivate him to commit this robbery, based on a pretrial motion. PCR Tr. 62. He elaborated there was a pretrial motion dealing with the information that the robber had been out of prison for ten months. PCR Tr. 62-63, 101. Counsel explained he objected based on the State attempting to use this information in order to show Applicant's predisposition to commit these crimes, rather than as a form of identification, which they argued at trial. PCR Tr. 70-71, 101-02. The State, however, intended to admit this information as an aspect of identification, not to show motive. PCR Tr. 97. He further elaborated the trial court ruled this information would be admissible because it was being used for the purpose of identification, rather than Applicant's prior record. PCR Tr. 63. He explained following his objection to the initial question and a bench conference, the trial court instructed the State to follow the limiting instruction he had previously given. PCR Tr. 63, 102. He further explained he did, in fact, make a contemporaneous objection but did not reargue his entire pretrial motion. PCR Tr. 63.

Similarly, Counsel testified he did not object when the State called the SCDC employee to testify as to when Applicant was released from prison because he believed the issue had already been preserved at that point. PCR Tr. 71, 102-03. He elaborated he did not want to highlight the fact Applicant had been in prison previously by objecting because at that point the jury had already heard that fact. PCR Tr. 71. Counsel also testified the SCDC employee testified Applicant was released from prison July 1, 2008, which would have been approximately eight-and-a-half to nine months before the incident date. PCR Tr. 72, 98. He testified he did not believe this information was relevant to identification, and he also did not believe an objection would have made any difference with regards to preserving the record. PCR Tr. 72. He reiterated at that point of the trial, he was attempting to downplay the fact Applicant had been in prison. PCR Tr. 72-73. In addition, Counsel testified he did not recall if he considered arguing this "minor inconsistency" during his closing argument. PCR Tr. 73, 103. He further testified he was not sure he had counted the exact time Applicant had released from prison, but the solicitor's comment during closing

argument that Applicant would have been released from prison ten months prior was a misstatement of the evidence. PCR Tr. 79.

Counsel also testified he had no specific strategy based on bolstering when he did not object to the line of testimony, through Dr. Gray Amick, which elicited information that another DNA analyst concurred with Dr. Amick's results. PCR Tr. 64. Counsel elaborated DNA experts typically discuss the process of peer review during their qualifications, which is a requirement to being admitted as an expert in a scientific field. PCR Tr. 98. He further elaborated this line of testimony was simply detailing the analysis done on this particular DNA sample. PCR Tr. 98-99. He explained he was not concerned with this particular DNA sample. PCR Tr. 67. Counsel further explained the DNA match on the cigarette was not an issue because Applicant admitted he had a cigarette. PCR Tr. 65. Counsel elaborated Applicant testified in both trials that he was walking around the area in which these crimes occurred and approached the victim, asking for a cigarette. PCR Tr. 65. He further elaborated Applicant began smoking the cigarette and then dropped it. PCR Tr. 65. Counsel, therefore, testified his strategy was to essentially concede the DNA on the cigarette was Applicant's, but that did not necessarily prove Applicant committed the robbery. PCR Tr. 66, 99.

He elaborated his plan with respect to the DNA was to attack the way the State was utilizing it. PCR Tr. 64-65. He further elaborated his strategy was also to show that the DNA did not turn out the way in which the State was claiming it did, specifically highlighting the State refused to match other DNA found to someone else. PCR Tr. 65, 100. Counsel also testified he challenged the DNA for a number of items, in that there were no conclusive results or, in the alternative, there was no match for the DNA that was found. PCR Tr. 66, 99-100. Specifically, he testified he attempted to raise an inference that the DNA found in the victim's car was a match to Blankenbecklor. PCR Tr. 66-67, 100. He testified he believed he was able to poke holes in the DNA results quite extensively, both through cross-examination and closing argument. PCR Tr. 65, 113.

Counsel testified he objected when the State attempted to recall Dr. Amick, but he did not object immediately because he was unsure what the State was attempting to do. PCR Tr. 68. He elaborated he should have immediately asked for a mistrial and should have asked the trial court to hold the solicitors in contempt for prosecutorial misconduct. PCR Tr. 69. He further elaborated

based on the question the solicitor asked Dr. Amick, whether or not he could compare the DNA found to that of Blankenbecklor, she admitted that she had him investigate further during a nightly recess at trial and did not provide him with any documentation of that investigation, which was a clear violation of Rule 5, SCCrimRP, and *Brady*<sup>7</sup>. PCR Tr. 68-69, 101. Counsel testified, however, the jury ultimately did not hear the answer to the solicitor's question regarding a possible match, or lack thereof, to Blankenbecklor. PCR Tr. 69, 101. Counsel further testified the jury's inability to hear the answer to this question could have affected his strategy with respect to the DNA. PCR Tr. 69.

Counsel also testified he immediately objected when the solicitor attempted to ask Applicant about the meaning of his tattoos based on "Urban Dictionary," which was sustained. PCR Tr. 73, 104. He testified the absence of tattoos were somewhat relevant, and it surprised him when the solicitor began questioning Applicant as to the tattoos he had. PCR Tr. 73-74, 103-04. He elaborated any details as to the robber's physical appearance would have been relevant, and the victim had very few details about the robber's appearance. PCR Tr. 74.

Counsel testified it did not bother him when the solicitor asked Applicant whether or not he was aware it had rained after he allegedly stashed his drugs in the victim's telephone box. PCR Tr. 75. He elaborated the fact that it may have rained approximately three days prior to this robbery had no relevance to the trial, and he did not feel it was worthy of an objection at the time. PCR Tr. 75-76, 104. He further elaborated he was unsure what information the State was attempting to elicit by this line of questioning, and the information sought certainly was not elicited. PCR Tr. 76. He elaborated if the solicitor was attempting to suggest the fingerprints found on the telephone box had been washed off, there was no testimony elicited at trial that the fingerprints would have been washed off or if the telephone box was exposed to the elements. PCR Tr. 76. He further elaborated he did not recall arguing this point during his closing argument. He also testified a meteorological expert had not testified as to the weather conditions prior to the robbery. PCR Tr. 75.

Counsel similarly testified he did not object during the State's closing argument, specifically to comments made by the solicitor that the victim's report had been consistent, because he generally does not object during closing arguments unless there is something particularly

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<sup>7</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

egregious. PCR Tr. 77, 105. He elaborated this comment made by the solicitor was merely her interpretation of the testimony, even though it was slightly incorrect because there were, in fact, slight inconsistencies. PCR Tr. 77, 105-06. He further elaborated had the solicitor made up facts, he would have objected; but this was merely the State's interpretation. PCR Tr. 77, 106. For the same reasons, Counsel testified he did not object to the solicitor's comment during closing that law enforcement officers testified truthfully. PCR Tr. 78. He elaborated the State highlighted that the officer had thrown away his notes, thereby questioning his credibility herself. PCR Tr. 78.

Similarly, Counsel also testified he had the same reasons for not objecting to the solicitor's comment during closing argument regarding the chain of custody witnesses. PCR Tr. 78. He explained he almost never asks chain of custody witnesses questions during trials because they do not actually do anything. PCR Tr. 78. He further explained these witnesses merely sit in an office and receive sealed envelopes, having no idea what piece of evidence that envelope contains. PCR Tr. 78.

Counsel also testified the State's comment during closing that Applicant was a drug dealer had nothing to do with his guilt or innocence, but it was something he readily admitted at trial. PCR Tr. 79. Furthermore, he testified the State's comment during closing argument that Applicant was a convicted burglar was consistent with the facts presented at trial, as the two prior burglary convictions were an element of the offense of first-degree burglary. PCR Tr. 79-80. He further testified he did not see the benefit in objecting to such a comment. PCR Tr. 80. Counsel also testified he did not object to the State's reference to the terror attacks of 9/11, and he did not have a reason for failing to do so. PCR Tr. 80. He further testified this statement was made in order to invoke passion in the jury, and he should have objected. PCR Tr. 80-81. Counsel also testified had the solicitor continued with her statement "send [Applicant] a message," he would have objected; but the solicitor did not go any further than that, so he did not object. PCR Tr. 106.

Counsel testified he consented to allowing the trial court to go back into the jury room to answer a note received from the jury during deliberations, which was not unusual for the trial court to do. PCR Tr. 81, 107. He explained the jury had asked a very simple questions, which would take less than two seconds for the trial court to answer. PCR Tr. 81. He further explained had he insisted on the trial court answering in open court, it would have caused a substantial delay, as they would have had to brought Applicant back in the courtroom and he would have wanted Applicant's

family there as well. PCR Tr. 82. He elaborated no one was present for that conversation, except the trial court and the jury, and he did not believe the trial court said anything inappropriate. PCR Tr. 82.

Counsel also testified he made motions regarding content from a cellphone, in that the content from the phone had no relevance to the case and the text messages were the result of an illegal search. PCR Tr. 82, 107-08. He testified he objected on the basis that the text messages were hearsay and that they could not be authenticated, but they were entered into evidence. PCR Tr. 84. He further testified, however, the trial court denied his pretrial motions with respect to the cellphone and determined the search was valid. PCR Tr. 108. He elaborated the State attempted to use these text messages found on this cellphone, which was found at Applicant's girlfriend's home, to elicit evidence of flight. PCR Tr. 83. He testified Applicant's girlfriend did not testify at trial and, similarly, did not testify she had given law enforcement consent to search that phone. PCR Tr. 84. He testified he intended to preserve his objection to the text messages based on an illegal search; and if he had failed to do so, that was error. PCR Tr. 84-85. He further testified no one had directly testified at trial that Applicant had used that phone, but based on where the phone was found, it was insinuated that Applicant had used the phone. PCR Tr. 84. Counsel testified he objected to the text messages based on Rule 403, SCRE, because there was offensive language and discussion about some drug deals in the texts, which was not relevant. PCR Tr. 85. He elaborated almost everything Applicant said would have objectionable under Rule 403 as overly prejudicial with no probative value. PCR Tr. 85. He further testified the only relevant text was one from a woman informing Applicant law enforcement was looking for him. PCR Tr. 85. He also testified he was not sure if he ever asked these texts to be entered in a redacted format, but he probably should have. PCR Tr. 86-87. He elaborated he had no reason for failing to request a redacted format, but he was unsure if he saw those text messages prior to trial. PCR Tr. 86.

Counsel also testified he had a copy of the video from the gas station. PCR Tr. 87. He further testified he did not recall if Applicant had ever asked him to obtain a different video from the gas station. PCR Tr. 87. Similarly, Counsel did not recall whether or not Applicant asked him to take photographs of the crime scene, but he did not visit the crime scene in preparation for trial. PCR Tr. 89, 110. Counsel also testified he did not recall Applicant asking him to pull phone records. PCR Tr. 89.

He testified Applicant asked him to interview both Ms. Wilcox and his father, in preparation for the second trial. PCR Tr. 88. He elaborated he spoke with Ms. Wilcox one or two times, but she did not have any particularly useful information. PCR Tr. 88. He also testified he met with Applicant's father at least one or two times in order to establish an alibi for Applicant, but the information he provided did not provide a clear alibi. PCR Tr. 108-09. He further elaborated he did not receive any specific information which would have enabled him to assert an alibi defense. PCR Tr. 89. He also testified raising a new defense based on alibi at the second trial would have been difficult due to the testimony at the first trial. PCR Tr. 89, 109-10.

Counsel testified he did not recall requesting an alibi charge during the charge conference in chambers. PCR Tr. 94. He also testified he did not request anything specific with regards to criminal intent, other than the general charge. PCR Tr. 95. He elaborated the defense was Applicant did not commit these crimes and the State had the wrong person, "and if actually believed, I don't think anyone would believe that the acts were not with a criminal intent." PCR Tr. 95.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

##### ***Ineffective Assistance of Counsel***

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

*Counsel's alleged failure to properly object and/or request a mistrial to preserve the record for appeal review*

Applicant alleges Counsel was ineffective for failing to properly object and move for a mistrial in order to preserve the record for appellate review. Applicant contends Counsel should have objected, or in the alternative moved for a mistrial, at various points during the trial, which this Court addresses in turn.

First, Applicant alleges Counsel was ineffective for failing to move for a mistrial when the victim testified at trial: "[The robber] asked me how much money I had and I – I made up a figure of \$500, and he proceeded to say something to the effect that, 'You know that man I had yesterday.'" Trial Tr. 163. This Court finds Applicant has failed to establish any deficiency on the part of Counsel. Following the victim's statement, Counsel immediately objected to this line of testimony, which the trial court sustained. Trial Tr. 163. Thereafter, Counsel moved to strike the statement, at which time the trial court gave a curative instruction to the jury, instructing them to disregard the victim's comment. Trial Tr. 163. This Court finds Counsel was not defective in regards to this allegation, as he timely objected and thereafter, the trial court sustained the objection and gave a curative instruction.

Similarly, this court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. "Generally, a curative instruction is deemed to have cured any alleged

error.” *State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (quoting *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005)); *see also* 75B Am.Jur.2d Trial §, 1284 (1992) (“By striking the evidence and instructing the jury to ignore it, the court may often cure its error in admitting the evidence, or render such error harmless, even in criminal cases.”). “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.” *Walker*, 366 S.C. at 658, 623 S.E.2d at 130; *see also State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission). If the trial judge sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction. *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996). This Court, therefore, finds Counsel’s decision not to move for a mistrial was reasonable based on the proper curative instruction given by the trial court, which cured any possible error. Therefore, this allegation is denied and dismissed with prejudice.

Next, Applicant contends Counsel was ineffective for failing to object to leading questions and for failing to appropriately renew his pre-trial objection. *See* Trial Tr. 170. In particular, Applicant alleges Counsel was ineffective for failing to properly renew his pre-trial objection when the State elicited information through the victim that the robber indicated he had been released from prison ten months prior to these crimes. *See* Trial Tr. 170.

With respect to Applicant’s allegation Counsel was ineffective for failing to object to leading, “leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony.” Rule 611(c), SCRE. However, Applicant has wholly failed to establish any prejudice which would warrant a reversal. Indeed, it is extremely unlikely mere leading questions could garner the requisite prejudice to warrant a reversal here. Had Counsel objected to this line of questioning, the State simply would have rephrased its questions and still elicited the same testimony. Accordingly, this allegation must be denied and dismissed with prejudice.

With respect to Applicant’s allegation Counsel was ineffective for failing to appropriately renew his pretrial objection, this Court finds Applicant has failed to establish any deficiency on the part of Counsel. When the State asked the victim whether the robber had told her anything specific about himself, Counsel immediately objected based on his pre-trial motion. Trial Tr. 170.

In that pre-trial motion, Counsel moved to exclude any references to the fact Applicant had recently been released from prison based on Rules 403 and 404(b), SCRE, and under *Lyle*<sup>8</sup>. Trial Tr. 44. Counsel thoroughly argued this motion, particularly opposing the State's contention this was necessary as an identifying factor, as hundreds of people are released from prison each month. See Trial Tr. 44-46. Following arguments by both parties, the trial court ruled the evidence would be admissible, limited to its purpose as an identification factor. Trial Tr. 45-46; see also June 27-28, 2011 Tr. 43-44. Moreover, following Counsel's objection at trial, a bench conference was had regarding the pre-trial motion. Trial Tr. 170. At the evidentiary hearing, Counsel testified the trial court instructed the State at that bench conference to follow the limiting instruction he had previously given. Because Counsel properly renewed his objection to this line of testimony, this Court finds Applicant has failed to establish Counsel was deficient. Based on the foregoing, this allegation must be denied and dismissed with prejudice.

Next, Applicant contends Counsel was ineffective for failing to object to bolstering and hearsay during direct examination of the DNA expert, Dr. Gray Amick. Specifically, Applicant contends Counsel was ineffective for failing to object when the State elicited testimony from Dr. Amick that another DNA analyst independently reviewed his analyses and conclusions and, ultimately, agreed with his results. Trial Tr. 389. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Strickland*, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States*, 538 U.S. 500 (2003)). "Accordingly, when 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)). See also *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be

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<sup>8</sup> *State v. Lyle*, 125 S.C. 406, 118 S.E.2d 803 (1923).

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) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)).

Here, Counsel testified his strategy regarding the DNA found on the cigarette butt was to concede the DNA was, in fact, Applicant's, but there was a reason for his DNA being found at the drop-off location. Indeed, Applicant admitted during his testimony at trial he had a cigarette, which he obtained from the victim, and dropped it in the driveway of the drop-off location. Accordingly, this Court finds Counsel employed a reasonable strategy with respect to this DNA sample, and, therefore, Applicant has wholly failed to establish any deficiency on the part of Counsel. Similarly, Applicant has failed to establish any resulting prejudice. Applicant conceded he did, in fact, have a cigarette and conceded the DNA found on the cigarette butt was his. Based on this foregoing, it is unlikely the result of the proceeding would have been different had Counsel objected to this line of testimony by the DNA expert. Accordingly, this allegation must be denied and dismissed with prejudice.

Applicant further contends Counsel was ineffective for failing to immediately object when the State re-called Dr. Gray Amick as a witness. Rule 611(d) provides: "A witness may be re-examined as to the same matters to which he testified only in the discretion of the court . . . After the examination of the witness has been concluded by all parties to the action, that witness may be recalled only in the discretion of the court." Rule 611(d), SCRE. Here, the State re-called Dr. Amick during the presentation of its case. When re-called the State questioned Dr. Amick regarding specific DNA swabs, which Counsel had questioned him about during cross-examination. Trial Tr. 558. After Dr. Amick was asked whether he could compare these DNA swabs to two other individuals, after a late request to test the DNA by the State, Counsel immediately objected. Trial Tr. 558. The trial court sent the jury out of the courtroom, and Counsel indicated he objected to this line of testimony under both *Brady* and Rule 5, as well as Rule 611(d). Trial Tr. 558. Although Counsel's initial objection was under *Brady* and Rule 5, Counsel indicated at the evidentiary hearing he was unsure exactly what information the State was attempting to elicit when it recalled Dr. Amick, which explained his delayed objection under Rule

611(d). Based on the foregoing, this Court finds Counsel's actions were reasonable under the circumstances, and Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Following Counsel's objection to the State recalling Dr. Amick, the trial court sustained his objection, and Dr. Amick was unable to testify any further. Moreover, Dr. Amick was only able to testify as to matters Counsel raised during cross-examination, specifically that certain DNA swabs were too weak to interpret and that Counsel asked about specific alleles in those samples. Trial Tr. 558. Indeed, Dr. Amick was unable to testify any further due to Counsel's immediate objection following the State's question as to whether or not Dr. Amick had compared those DNA swabs to any other individuals. Trial Tr. 558. As Dr. Amick merely reiterated points Counsel raised during his initial cross-examination of Dr. Amick, it is unlikely the result of the proceeding would have been different. Therefore, this Court finds Applicant has wholly failed to establish any resulting prejudice from the alleged deficiency. Accordingly, this allegation must be denied and dismissed.

Next, Applicant contends Counsel was ineffective for failing to renew his pretrial motion regarding evidence Applicant had been released from prison ten months prior to these crimes. Additionally, Applicant alleges Counsel was ineffective for failing to object when the evidence presented at trial indicated Applicant had been released from prison eight months prior. Specifically, Applicant contends Counsel should have objected when the State called Michael Stobbe, an SCDC employee, to testify regarding Applicant's release date from prison. See Trial Tr. 569-70. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Strickland*, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. *Yarborough*, 540 U.S. at 8 (quoting *Massaro*, 538 U.S. 500). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith*, 386 S.C. at 567, 689 S.E.2d at 632 (citing *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517). See also *Stokes*, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); *Ingle*, 348 S.C. at 470, 560 S.E.2d at 402 (holding

counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). “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*, 308 S.C. 119, 417 S.E.2d 529 (citing *Goodson*, 564 F.2d 1071). Here, Counsel testified he did not want to highlight the fact Applicant had, in fact, been in prison shortly prior to the time in which these crimes were committed. He elaborated at this point in the trial, the jury had already heard testimony the robber indicated he had been released from prison shortly before committing these crimes. This Court finds Counsel, therefore, employed a valid strategic decision in choosing not to object and, therefore, finds Counsel was not deficient in this regard.

This Court further finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. The victim testified the robber indicated he had been out of prison for ten months before he committed these crimes, whereas Mr. Stobbe indicated Applicant had been released July 1, 2008—approximately eight-and-a-half to nine months prior to the incident date. *Compare* Trial Tr. 170 *and* Trial Tr. 570. Because the jury was, indeed, presented with this inconsistency, there is no indication the result would have been different had Counsel objected to this line of testimony. Accordingly, this allegation must be denied and dismissed.

Applicant further alleges Counsel was ineffective for failing to object when the State questioned Applicant about his tattoo. *See* Trial Tr. 652. Specifically, Applicant contends Counsel should have objected to this line of testimony in that it was overly prejudicial and had no probative value. Furthermore, Applicant contends Counsel should have moved to strike this line of testimony and should have moved for a mistrial. “Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE. Evidence is unfairly prejudicial if it suggests a decision on an improper basis. *State v. Huckabee*, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). When weighing the prejudicial effect of such evidence against the probative value, the entire record must be considered and great deference must be given to the trial court. *Id.* Counsel testified when the State began eliciting testimony about Applicant’s tattoo, he was unsure exactly for what purpose the State intended to introduce this testimony, as the victim had not testified to the robber having any tattoos. He did, however, testify he immediately objected when the State attempted to elicit the meaning of this tattoo based on “Urban Dictionary.” Because

Counsel did, in fact, object when the purpose of this line of questioning became apparent, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice. The victim never testified that the robber had any tattoos. In fact, the victim's description of the robber revealed very little details about the robber, except for a pock mark on the left side of his face. Counsel also testified the absence of tattoos, rather, were relevant. Based on the foregoing, Applicant has failed to establish any prejudice, and this allegation must be denied and dismissed.

Next, Applicant alleges Counsel was ineffective for failing to object when the State offered testimony about the weather in the days leading up to the incident date when there was no evidence offered on this topic. In particular, Applicant contends Counsel should have objected when the State asked Applicant whether or not he was aware it had rained five of the eight days leading up to this incident date. Trial Tr. 653-54. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "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 689. Furthermore, "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 693. 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).

Here, Counsel testified the fact it may have rained approximately three days prior to this robbery had no relevance to the trial, and he did not feel it was worthy of an objection at the time. He further elaborated he was unsure what information the State was attempting to elicit by this line of questioning, and the information sought certainly was not elicited. Based on the Counsel's strategic decision not to object to this line of testimony, this Court finds Applicant has failed to establish any deficiency on the part of Counsel. Furthermore, because the State was unable to elicit any damaging information to Applicant from this line of testimony, Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. This allegation must be denied and dismissed with prejudice.

Applicant's next allegations assert Counsel was ineffective for failing to object to varying alleged improper comments made by the solicitor during closing argument. Specifically, Applicant contends Counsel was ineffective for failing to object when the solicitor "improperly vouched for the victim and the witness." See Trial Tr. 668, 670, 672. Applicant further contends Counsel was ineffective for failing to object when the solicitor misstated the facts in evidence, specifically when the solicitor stated Applicant had been released from prison ten months prior to the commission of these crimes. Trial Tr. 669. Moreover, Applicant alleges Counsel was ineffective for failing to object when the solicitor asked the jury to convict Applicant on an "improper basis," namely asking the jury to "send a message" to Applicant. Trial Tr. 677. Finally, Applicant contends Counsel was ineffective for failing to object when the solicitor made an "improperly prejudicial appeal to the jury," in that "in the wake of the anniversary of one of the largest crimes committed on U.S. soil, we should be thanking law enforcement for what they do to protect us." Trial Tr. 692.

With respect to closing arguments generally, Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions."

*State v. Mouzon*, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Moreover, "a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." *Id.* at 609-10, 602 S.E.2d at 744. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

Moreover, a solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *Matthews v. State*, 350 S.C. 272, 276, 565

S.E.2d 766, 768 (2002) (citing *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)). A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction and is impermissible. *Id.* Here, Counsel testified at the evidentiary hearing he does not typically object during closing arguments, and he did not feel the solicitor's comments about the witnesses' consistency or truthfulness rose to the level of misconduct, which would warrant an objection. Based on the foregoing, this Court finds Counsel was not deficient. This Court further finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. At trial, Counsel consistently attacked the veracity of the victim's statements to law enforcement and also attacked the processes by which law enforcement investigated this case throughout trial. Therefore, this Court finds the solicitor's comments regarding the credibility of the witnesses were based on the record and its reasonable inferences. Accordingly, this allegation must be denied and dismissed with prejudice.

With respect to the solicitor's statement Applicant had been released from prison ten months prior, this Court finds it is inconceivable this minor inconsistency "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. The victim testified the robber told her he had been out of prison ten months, whereas the SCDC employee testified Applicant had been released approximately eight-and-a-half months prior. Although the State introduced this is an identifying factor, this was not the only identifying factor of the robber introduced at trial. In particular, the victim testified the robber had a pock mark on the left side of his face, which Applicant has. Furthermore, Applicant's fingerprint was found on the telephone box outside of the victim's home, and his DNA was found on a cigarette butt at the drop-off location. Based on the foregoing, this Court finds Applicant has wholly failed to establish any resulting prejudice from the alleged deficiency. This allegation must be denied and dismissed with prejudice.

Applicant further challenges the following comment in the State's closing argument: "Ladies and gentlemen, I ask you to send a message to [Applicant]. Please tell [Applicant] that the State of South Carolina, the citizens of Richland County will not tolerate drug dealers,

convicted burglars from coming into the home of innocent people.” The Supreme Court of South Carolina has previously held such “send a message” language does “not rise to the level of arousing juror passion or prejudice.” *State v. Cain*, 297 S.C. 497, 509, 377 S.E.2d 556, 563 (1988). Accordingly, this Court finds the solicitor’s comment was not improper, and Counsel cannot have been deficient for failing to object to such a comment. Accordingly, this allegation must be denied and dismissed.

Applicant contends Counsel was ineffective for failing to object when the solicitor made the following comments: “In the wake of the anniversary of one of the largest crimes committed on U.S. soil, we should be thanking law enforcement for what they do to protect us. Heroes do not always wear capes. They were badges, too.” Trial Tr. 692. Counsel’s strategy at trial was to attack the credibility of law enforcement and question the manner in which they investigated this case. As a result, the solicitor was fully permitted to comment on the credibility of law enforcement. *See State v. Ellenberg*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) (“Once the defendant opens the door, the solicitor’s invited response is appropriate so long as it does not unfairly prejudice the defendant.”); *see also State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) (finding solicitor’s closing argument comments were an invited response and did not render the trial fundamentally unfair); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor’s statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant’s guilt could be inferred from his failure to testify or present a defense). Based on the foregoing, this Court finds Applicant has failed to establish Counsel was deficient.

Even assuming Counsel should have objected to these comments, Applicant has failed to establish any resulting prejudice from this alleged deficiency. At multiple points throughout its final charge to the jury, the trial court instructed the jury to only consider the evidence and testimony presented throughout trial. In particular, the trial court instructed the jury: “You are to decide this case according to the testimony that you’ve heard from the lips of the sworn witnesses along with other evidence introduced.” Trial Tr. 706. The jury was clearly instructed not to take into account any statements made by the State or by Counsel during their arguments, therefore, it

is unlikely the result of the proceeding would have been different had Counsel objected. Accordingly, this allegation must be denied and dismissed with prejudice.

Finally, Applicant contends Counsel was ineffective for failing to object when the trial court talked to the jurors in the jury room without either party present. This Court finds Applicant has failed to establish Counsel was ineffective. Counsel testified he consented to allowing the trial court to answer the jury's very brief question, and neither party was present in the jury room when the trial court spoke with the jury. Furthermore, he testified had he objected, this would have caused a significant delay. Accordingly, this Court finds Counsel's actions were reasonable under the circumstances. Moreover, there is no indication the trial court did anything improper in speaking with the jury privately, so Applicant has failed to establish any prejudice. This allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to the admissibility of evidence obtained from the cellphone*

Applicant alleges Counsel was ineffective for failing to properly object to the admissibility of evidence obtained from the cellphone, which was found at Applicant's girlfriend's home and was admitted into evidence at trial. Specifically, Applicant contends Counsel should have objected to the admissibility of such evidence based on an unconstitutional search and seizure under the Fourth Amendment. Applicant further contends Counsel should have objected to such testimony on the grounds it was overly prejudicial with no probative value.

This Court finds Applicant has failed to establish any deficiency on the part of Counsel. During pre-trial motions, Counsel moved to suppress the text messages law enforcement obtained from Applicant's cellphone on the basis the cellphone and messages were obtained without a search warrant. Trial Tr. 86, 88-89. He further argued when law enforcement did search Dawn Shea's home, where they found Applicant's cellphone, they were looking for any relevant evidence to this robbery, and the cellphone did not constitute such evidence. Trial Tr. 88-89. Counsel further argued the text messages should be excluded under *Crawford*<sup>9</sup> and the rule against hearsay<sup>10</sup>, elaborating another individual was sending these messages to this phone. Trial Tr. 92.

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<sup>9</sup> *Crawford v. Washington*, 541 U.S. 36 (2004) (holding out-of-court statements by witnesses that are testimonial in nature are barred under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness).

<sup>10</sup> Rule 802, SCRE.

Counsel also argued the text messages should be excluded under Rule 403, SCRE. Trial Tr. 92. Specifically, Counsel argued: "I would argue that some of the language in there – they're going to attempt to use that as some sort of identification in terms of how he says black power. Part of the testimony that the victim in this case brought up was that the suspect made statements to the effect that all white people are bad and it's all their fault." Trial Tr. 92. Following argument, the trial court determined the cellphone was abandoned property and, therefore, would be admissible. When the State offered the cellphone into evidence during trial, Counsel again renewed his pre-trial motion to suppress the phone, which was again overruled. Trial Tr. 441-42. Similarly, when the State later attempted to introduce the text messages into evidence, Counsel again objected to the content of the text messages. Trial Tr. 496. Counsel specifically argued the State could not pinpoint exactly when the cellphone was abandoned, could not prove who sent or received the text messages, and objected under Rule 403, SCRE. Trial Tr. 497. The trial court again overruled Counsel's objection, ruling the messages were admissible to show evidence of flight. Trial Tr. 497-98. Based on the foregoing, this Court finds Counsel thoroughly objected to both the cellphone and the text messages being introduced on a number of grounds, and, therefore, Counsel was not deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. The Fourth Amendment guarantees us the right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; *see also* S.C. CONST. art. I, § 10. Generally speaking, warrantless searches are considered to be unreasonable *per se* unless they fall under an exception to the warrant requirement, and any evidence seized as the result of an unreasonable search must be excluded from trial. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007); *see State v. Peters*, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978) (instructing searches conducted without a warrant are *per se* unreasonable unless an exception to the warrant requirement is applicable). However, "warrantless searches are allowed when the circumstances make it reasonable . . . to dispense with the warrant requirement." *Kentucky v. King*, 563 U.S. 452, 462 (2011). Regarding the situations where a warrantless search is considered to be constitutionally reasonable, South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view

exception; (6) the consent exception; (7) the abandonment exception; and (8) the exigent circumstances exception. *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012); *see State v. Herring*, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009) (“A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement.”).

Under the abandonment exception, “abandoned property has no exception from either the search or seizure provisions of the Fourth Amendment.” *State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing *California v. Greenwood*, 486 U.S. 35, 40-41 (1988)). When determining whether property has been abandoned, “the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy.” *Id.* (quoting *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 371 (Minn. 1975)). “When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable.” *United States v. Stevenson*, 396 F.3d 538, 546 (4th Cir. 2005). When the property is a cellphone, the standard abandonment analysis applies. *State v. Lamar Sequan Brown*, Op. No. 27841 (S.C. Sup. Ct. filed June 13, 2018).

In determining the petitioner had abandoned his cellphone following a burglary, the South Carolina Supreme Court noted the petitioner’s decision not to attempt to recover the phone constituted his abandonment of such. *Id.* Specifically, the Supreme Court noted the phone remained in law enforcement’s possession for six days, during which time there was no evidence the petitioner attempted to call the phone, text the phone, or contact his service provider to determine its whereabouts. *Id.* Under the circumstances, it was reasonable for law enforcement to assume the cellphone was abandoned. *Id.*

Here, Applicant left his cellphone at Ms. Shea’s home, where he would occasionally stay. After obtaining consent to search her residence, on March 25, 2009, law enforcement found a cellphone in the residence. Law enforcement “maintained possession of the phone for a while,” during which time Applicant made no effort to regain possession of it. Trial Tr. 494. In fact, Applicant’s phone received numerous calls and texts after Applicant left it at Ms. Shea’s residence, but there is no evidence Applicant made or initiated any of those calls or texts. *See Id.* n.2. Based on the foregoing, it is reasonable for a law enforcement officer to assume the cellphone was abandoned. Consequently, law enforcement did not need a search warrant in order to obtain

information from the phone. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to investigate and present possible evidence and witnesses

Applicant alleges Counsel was ineffective for failing to investigate and present possible evidence and witnesses. Specifically, Applicant alleges Counsel was ineffective for failing to obtain a video of the gas station, at which the vandalism of the victim's truck occurred, and for failing to introduce photographs of the crime scene. Furthermore, Applicant contends Counsel should have introduced photographs of a path behind the victim's house, as well as a club located near the drop-off location. In addition, Applicant alleges Counsel should have obtained his cellphone records, which purportedly would have showed the phone calls Applicant made during the time these crimes were committed. Applicant also contends Counsel was ineffective for failing to fully investigate Applicant's purported alibi, namely Counsel failed to investigate Applicant's alibi through his father and Michelle Wilcox.

With respect to Counsel's investigation generally, "although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client." *Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). Moreover, "failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

As an initial matter, Applicant has wholly failed to provide this Court with the specific phone records, which Applicant alleges would have been beneficial to his case had Counsel obtained them. Without such evidence, Applicant merely speculates as to what these records would have shown. Such speculation does not rise to the level of proof required in order for

Applicant to meet his burden. Accordingly, this allegation must be denied and dismissed with prejudice.

With respect to the allegation Counsel was ineffective for failing to investigate a video from the vandalism crime scene, Applicant has failed to provide this Court with the video which he wished for Counsel to obtain during his investigation. Without the precise video Applicant hoped had been obtained, this Court is left to merely speculate as to what this video would have shown. Additionally, Counsel testified he, in fact, obtained a video from the Citgo gas station, which showed the vandalism of the victim's truck. Based on the foregoing, this Court finds Counsel's investigation into the gas station video was reasonable under the circumstances. This Court further finds that this allegation must be denied and dismissed with prejudice.

Regarding Applicant's allegation Counsel should have introduced photographs of the victim's home and the surrounding area of the drop-off location, this Court finds Applicant has failed to establish Counsel was ineffective. The photographs Applicant submitted into evidence at the evidentiary hearing depicted an area behind the victim's house, which Applicant described as a path by which he frequently travelled. Applicant argues these particular photographs would have corroborated his story at trial. In addition, the photographs introduced depicted a nightclub, which was located in the surrounding area of the drop-off location. Applicant's contention is Counsel should have used the pictures of the nightclub in order to place blame on Blankenbecklor.

With respect to photographs of the victim's home Applicant alleges Counsel should have introduced at trial, this Court finds Applicant has failed to establish any deficiency on the part of Counsel or any resulting prejudice. Numerous photographs of the victim's home were introduced into evidence at trial, including a picture of the back of the victim's home. *See* Trial Tr. 177-82. As Counsel is not required to uncover every scrap of evidence that could be potentially beneficial and numerous photographs of the crime scene were introduced into evidence, this Court find Counsel's actions were reasonable under the circumstances. Moreover, Applicant was able to testify at length regarding this path behind the victim's home, which he would frequent. *See* Trial Tr. 610-11, 616-17. Indeed, Applicant at his own trial criticized law enforcement for failing to take pictures of this path. Trial Tr. 617. Given the jury was presented with this theory Applicant used the path behind the victim's home in order to stash his drugs and the jury was able to pass on his credibility then, it is unlikely the result of the proceeding would have been different had

Counsel presented these photographs at trial. Accordingly, this allegation must be denied and dismissed with prejudice.

With respect to Applicant's allegation Counsel was ineffective for failing to investigate the nightclub located in the surrounding area of the drop-off location in order to place blame on Blankenbecklor, the admissibility of evidence of third-party guilt is governed by *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). In *Gregory*, the South Carolina Supreme Court held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. *Id.* at 105, 16 S.E.2d at 534. Furthermore, to be admissible, evidence of third-party guilt must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." *State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) *cert. denied*, 135 S. Ct. 400, 190 L. Ed. 2d 289 (U.S.S.C. 2014) (citing *Gregory* at 104, 16 S.E.2d at 534) (internal quotations omitted). Pursuant to this standard, this Court finds the evidence of the nightclub, which Blankenbecklor may or may not have attended, are not facts raising an inference or presumption of innocence because they are not facts or circumstances that tends to clearly point out this individual as the guilty party. Evidence of the individual's guilt is not inconsistent with Applicant's guilt, nor does it raise a "reasonable inference"—and certainly not a presumption—of Applicant's innocence. *See Id.* Therefore, this Court finds that Counsel did not perform deficiently. Furthermore, Applicant cannot establish any prejudice, as the trial court was hesitant to admit evidence of third party guilt at other points in the trial. *See* Trial Tr. 186-87. This Court finds that this allegation must be denied and dismissed with prejudice.

With respect to Applicant's allegation Counsel was ineffective for failing to investigate an alibi defense, through an alibi, an accused attempts "to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime." *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d Criminal Law s 136)). To do so, the accused must show "he was at a place so distant that his participation in the crime was impossible." *Id.* Furthermore, the alibi must account for the entire time during which these crimes were committed. *Id.*

As an initial matter, Applicant wholly failed to present the testimony of Michelle Wilcox, whom he alleges can provide alibi information. Furthermore, Counsel testified he spoke with Ms.

Wilcox in preparation for trial, but she did not provide him with any information that would have been helpful at trial. Applicant's mere speculation as to what Ms. Wilcox would have said does not constitute the level of proof required to establish his burden. Additionally, as Counsel did indeed interview Ms. Wilcox in preparation for trial, this Court finds Counsel's conduct was reasonable under the circumstances, and Applicant was not prejudiced by this alleged deficiency. Accordingly, this allegation must be denied and dismissed with prejudice.

Moreover, Williams testified Counsel did not ask him to testify at Applicant's trial, and he did not recall Counsel ever asking him if he had any alibi information. He believed, however, he told Counsel about Applicant's alleged alibi once, and, consequently, Counsel was aware of the fact he picked Applicant up the morning of these crimes. He testified he picked Applicant up from Michelle Wilcox's home early the one weekend morning, possibly Sunday morning, at approximately seven or eight o'clock in the morning—but not before, and dropped him off on Broad River Road, at his daughter's house. Williams also testified he could not be completely sure whether or not he picked Applicant up on Sunday and also was not sure if Applicant was, in fact, with him during the commission of these crimes.

Alternatively, Counsel testified he did speak with Williams regarding Applicant's whereabouts on the day of these crimes, but the information provided could not establish a complete alibi. Indeed, the information provided a very weak, indeterminate alibi. Consequently, Counsel testified he was unable to present an alibi defense at trial.

In light of Williams' inability to recall specifically whether or not Applicant was with him during the commission of these crimes, coupled with Applicant's testimony both at trial and the evidentiary hearing placing him at the crime scene during the time in which these crimes were committed, this Court finds Williams' and Applicant's testimony not credible, whereas Counsel's testimony is very credible. Counsel did, indeed, investigate Applicant's alleged alibi; and based on the information he obtained from these alleged witnesses, Counsel made a strategic decision not to present an alibi defense at trial. In fact, Counsel testified it would have been difficult to present such a defense, as there was no information through which he could establish a clear information. Accordingly, this Court finds Counsel's investigation into the purported alibi was reasonable under the circumstances, and Applicant has wholly failed to establish any deficiency on the part of Counsel.

Similarly, Applicant has failed to establish any resulting prejudice from this alleged deficiency. As Applicant's whereabouts could not be definitively accounted for, there is no indication the result of the proceeding would have been different if these purported alibi witnesses were presented at trial. In particular, Applicant's alleged alibi places him at or near the crime scenes during which these crimes were committed. Based on the foregoing, it is unlikely the result of the proceeding would have been any different. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to effectively cross-examine the victim with her prior testimony

Applicant alleges Counsel was ineffective for failing to effectively cross-examine the victim with her prior testimony. Specifically, Applicant contends Counsel was ineffective for failing to highlight inconsistencies in the victim's various statements and her testimony at the second trial. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "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 689. Furthermore, "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 693. 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).

Here, Counsel testified he did not delve into such prior descriptions of the robber the victim had given because he thought not highlighting those inconsistencies might show to the jury the victim had very few details about the robber. He further testified during his cross-examination of the victim, he attempted to bring out details about the robber's eyes, as Applicant had some unique features with respect to his eyes which the victim never discussed. Because Counsel wanted to highlight the victim, in fact, knew very little identifying information about the robber, this Court finds Counsel employed a valid trial strategy in not questioning the victim about prior statements, which gave more details about the robber. Accordingly, this Court finds Counsel was not deficient. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to effectively argue the facts during closing argument

Applicant alleges Counsel was ineffective for failing to effectively argue the facts during his closing argument. In particular, Applicant contends Counsel should have argued the victim's inconsistencies in her statements, as well as the inability of the robber to smoke a cigarette while his face was covered with a bandana, during his closing argument. This Court finds Counsel effectively argued the facts *presented at trial* during his closing argument. In particular, Counsel argued the victim was unable to testify the robber was Applicant. Trial Tr. 688. Furthermore, Counsel argued the victim was unable to identify Applicant's voice as that of the robber. Trial Tr. 688. In addition, Counsel cast blame on Blankenbecklor and Tucker throughout his closing, which was consistent with his theory of the case—that another individual committed these crimes. *See generally*, Trial Tr. 678-88. Accordingly, this allegation must be denied and dismissed.

*Counsel's alleged failure to effectively argue the importance of DNA evidence during closing argument*

Applicant alleges Counsel was ineffective for failing to effectively argue the importance of DNA evidence during closing argument. Specifically, Applicant contends Counsel did not argue the DNA evidence found on the cigarette butt effectively. This Court finds the record completely refutes this allegation. Specifically, Counsel highlighted in his closing law enforcement was unable to match a palm print and another fingerprint which were found on the telephone box. Trial Tr. 679, 681. He further criticized law enforcement for wholly failing to test these prints for DNA. Trial Tr. 679. Moreover, Counsel pointed out that law enforcement entirely failed to collect and test items found within the victim's truck. Trial Tr. 684. Still further, Counsel questioned law enforcement's probability statistics for the cigarette butt, particularly highlighting although law enforcement alleged there was a very slim chance of another match, the sample size compared to was much smaller. Trial Tr. 684-85. Counsel also described how other DNA swabs matched Blankenbecklor and Tucker, not Applicant. Trial Tr. 685-86. Based on the foregoing, this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to request specific charges on the law*

Applicant alleges Counsel was ineffective for failing to request specific charges on the law. Specifically, Applicant alleges Counsel was ineffective for failing to request an alibi charge, a mere presence charge, and a charge regarding the lack of criminal intent.

With respect to Counsel's alleged deficiency for failing to request an alibi charge, as aforementioned there was no evidence of an alibi. Furthermore, Applicant, during his testimony at trial, placed himself at or near the crime scene during the time these crimes were committed. See Trial Tr. 591-94, 597, 621-31, 639-42. As there was no evidence of alibi, this Court finds Applicant has failed to establish Counsel was deficient for failing to request an alibi charge. This allegation must be denied and dismissed with prejudice.

With respect to Applicant's allegation Counsel was ineffective for failing to request a mere presence charge, this Court finds Applicant has failed to establish Counsel was deficient. In fact, Counsel did request a mere presence charge during the charge conference in chambers and renewed that request on the record. Trial Tr. 709. Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Following Counsel's request to charge mere presence, the trial court reiterated it would not charge the jury on this matter of law. Trial Tr. 709. Accordingly, this allegation must be denied and dismissed with prejudice.

Regarding Applicant's allegation Counsel was ineffective for failing to request a charge on criminal intent, this Court finds Applicant has failed to establish Counsel was deficient. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "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 689. Furthermore, "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 693. 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). Here, Counsel testified he did not request a specific charge on criminal intent, rather than the general intent charge given. He elaborated his defense at trial was Applicant did not commit these crimes, and "if actually believed, I don't think anyone would believe that the acts were not with criminal intent." PCR Tr. 95. Based on the foregoing, this

Court finds Counsel employed a reasonable strategic decision in not requesting a specific charge on criminal intent based on his defense.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. In reviewing jury charges for error, the charge must be taken as a whole in light of the evidence presented at trial. *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). Moreover, a jury charge is correct if, when it is read as a whole, it contains the correct definition and adequately covers the law." *Id.* at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, "the substance of the law is what must be charged to the jury, *not* any particular verbiage." *Adkins*, 353 S.C. at 318-19, 577 S.E.2d at 464 (emphasis added). Here the trial court charged: "Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent." Trial Tr. 701. He further charged: "To do a thing unlawfully is to do it willfully against the law. Knowingly means with knowledge, consciously, not accidentally." Trial Tr. 703. Taken as a whole, this Court finds the trial court's charge on criminal intent contained the correct definition and adequately covered the law. This Court further finds Applicant has suffered no prejudice from this alleged deficiency. This allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to properly initiate Applicant's direct appeal*

Applicant alleges he was denied the effective assistance of counsel when trial counsel failed to properly initiate his direct appeal. At the evidentiary hearing, Respondent consented to allow Applicant to file his belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

This Court agrees Applicant's allegation he was denied a direct appeal is meritorious. Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. *Id.* at 118, 208 S.E.2d at 39. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by *Anders v. California*, 386 U.S. 738 (1967). *Id.* Where the post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to *White v. State*. Rule 243(i)(1), SCACR; *see*

also *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a *White v. State* review."). This Court affirmatively finds Applicant did not knowingly and voluntarily waive his right to a direct appeal. This Court further concludes Applicant is entitled to a belated review of his convictions.

#### Cumulative Error

Applicant alleges that the cumulative effect of Counsel's alleged errors constitutes ineffective assistance of counsel. "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); see also *Lorenzen*, 376 S.C. at 535 n. 3, 657 S.E.2d at 779 n.3. Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" and, therefore, does not recognize a cumulative error analysis. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). This Court finds that a cumulative error analysis would be inappropriate and therefore finds that this allegation must be denied and dismissed with prejudice.

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

**IT IS THEREFORE ORDERED:**

1. That Applicant be granted a belated appeal pursuant to *White v. State*;
2. That this application for post-conviction relief with respect to all other grounds must be denied and dismissed with prejudice; and
3. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 6 day of September, 2018.

*Spartanburg*, South Carolina

*J. Derham Sole*  
J. DERHAM SOLE, Presiding Judge  
The Fifth Judicial Circuit Court

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

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