

December 7, 2018

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

RECEIVED  
DEC 12 2018  
S.C. SUPREME COURT

Re: Edward W. Stackhouse vs. State of South Carolina  
C/A No: 2014-CP-33-0192

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Stackhouse in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, Esq.

Enclosures

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM MARION COUNTY  
Thomas A. Russo, Circuit Court Judge

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2014-CP-33-0192

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RECEIVED  
DEC 12 2018  
S.C. SUPREME COURT

Edward W Stackhouse, #296243,

Appellant,

v.

STATE OF SOUTH CAROLINA,

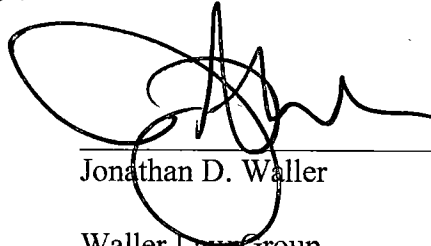
Respondent.

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NOTICE OF APPEAL

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Edward W Stackhouse, #296243, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 9, 2018, issued by the Honorable Michael G. Nettles, Presiding Judge, Twelfth Judicial Circuit.



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Jonathan D. Waller

Waller Law Group  
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803-520-7278 (phone)  
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ATTORNEY FOR PETITIONER

December 7, 2018

Other Counsel of Record:

4.1.1  
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Columbia, SC 29211  
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STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM MARION COUNTY  
Thomas A. Russo, Circuit Court Judge

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2014-CP-33-0192

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RECEIVED  
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S.C. SUPREME COURT

Edward W Stackhouse, # 296243,

Appellant,

v.

STATE OF SOUTH CAROLINA,


Respondent.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.

  
Christopher Leventis

December <sup>10</sup>~~X~~, 2018



ALAN WILSON  
ATTORNEY GENERAL

October 24, 2018

The Honorable Michael G. Nettles  
Presiding Judge, Twelfth Judicial Circuit  
South Carolina Circuit Court  
180 North Irby Street, MSC-XX  
Florence, South Carolina 29501

FILED  
2018 NOV -9 AM 9:47  
MARION COUNTY SC  
CLERK OF COURT

**Re: Edward W. Stackhouse, #296243 v. State of South Carolina**  
**2014-CP-33-0192**

Dear Judge Nettles:

Enclosed please find the State's original proposed **Order of Dismissal** in the above-captioned case. If this order meets your approval, please sign and forward to the Marion County Clerk of Court to be filed and served.

Sincerely,

Lindsey McCallister  
Assistant Attorney General

LM/can  
Enclosures

cc: Jonathan D. Waller, Esquire

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
TWELFTH JUDICIAL CIRCUIT

Edward W. Stackhouse, #296243, )  
Applicant, )

C.A. No. 2014-CP-33-0192

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

FILED  
2018 NOV -9 AM 9:47  
MARION COUNTY SC  
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Edward W. Stackhouse (Applicant) on March 11, 2014. Applicant, through counsel, filed amendments on January 25, 2015. Respondent made its return on July 7, 2016. An evidentiary hearing on the matter was convened on January 30, 2018, at the Florence County Courthouse. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Applicant testified on his own behalf. Scott Floyd, Esquire, Applicant's original trial counsel, testified for the State. The Court had before it the trial transcript, the Marion County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's application with amendments, Respondent's return, and Applicant's appellate records.

**PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Marion County Clerk of Court's orders of commitment. Applicant was indicted at the February 2011 term of the Marion County Grand Jury for murder (2011-GS-33-0061), attempted murder (2011-GS-33-0061), assault and battery of a high and aggravated nature (2011-GS-33-0061), and

possession of a weapon during commission of a violent crime (2011-GS-33-0061). Applicant was represented by Scott Floyd, Esquire. Solicitor E.L. Clements, III, Esquire, prosecuted the case on behalf of the State. Applicant was tried on May 15, 2012, before the Honorable William H. Seals, Jr. and a jury. The jury found Applicant guilty of murder, assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime. Applicant was acquitted of the attempted murder charge. On May 17, 2012, Judge Seals sentenced Applicant to life imprisonment without parole for murder, twenty years' imprisonment for assault and battery of a high and aggravated nature to be served consecutively, and five years' imprisonment for possession of a weapon during a violent crime, to be served concurrent to the other sentences.

Counsel filed a Notice of Appeal was filed on Applicant's behalf, and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967), by Applicant's appellate counsel, Robert Dudek, Esquire, of the South Carolina Office of Indigent Defense – Appellate Defense Division. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Stackhouse, Op. No. 2014-UP-051 (Filed February 5, 2014). The remittitur was issued February 24, 2014.

#### **SUMMARY OF FACTS ADDUCED AT TRIAL**

On September 17, 2010, Officer Ken Alford of the Mullins Police Department responded to a call at Meadow Park Apartments where Applicant; his wife, Sharon Stackhouse; and her two sons lived. Tr. pp. 95-96. When Alford arrived at the apartment he was met by a young boy who was bleeding from a wound to the head. Tr. p. 96. The boy began screaming, "Please help my mama" at Alford repeatedly. Tr. p. 97. Alford gave the boy some basic first aid, then approached the apartment. Tr. p. 97.

Officer Alford testified he “could see a large knife with a wooden handle laying in front of the couch on the floor” from outside. Tr. p. 97. He entered the apartment with another police officer, and they saw a cell phone broken into “a bunch of pieces” on the hallway floor. Tr. pp. 97-98. In the back bedroom, Alford discovered the body of “a small-stature black lady” with “blood on the left side of her body.” Tr. p. 101. According to Alford, “it seemed it like she had on more than just one set of clothing.” Tr. p. 101. The woman was not moving or breathing. Tr. p. 101. Alford took possession of the knife until the evidence technician from SLED arrived on the scene to collect it. Tr. p. 107.

Officer Alford then testified he left the apartment to wait on paramedics, and as he began writing a crime scene log, a second young boy came running up to the scene screaming. Tr. pp. 101-04. Officer Alford testified the boy said, “He hurt my mother, he hurt my mother,” and when he saw the officers putting up crime scene tape, the boy started screaming, “Edward Stackhouse killed my mama.” Tr. p. 105. Alford got a description of Stackhouse from the boy and put it out over the radio. Tr. pp. 105-06. According to Alford, the boy told him Stackhouse was wearing jean shorts, a white shirt, and white Air Jordan shoes with a red logo on the side. Tr. p. 106.

Timothy Harrellson, the first paramedic on the scene, testified he quickly checked both the injured boy and the woman inside, and upon determining the woman was deceased, focused his efforts on treating the child. Tr. p. 117. Harrellson testified the boy was in critical condition with a serious, large laceration to the right side of his head and neck. Tr. p. 118. Harrellson testified the boy was bleeding profusely, so medics called for helicopter to transport him to the closest trauma center. Tr. p. 120.

Adam Rogers, the EMS supervisor for Marion County, also responded to the 911 dispatch on September 17. Tr. p. 158. Rogers testified he went to confirm the female victim was deceased

and notice a large amount of blood next to the body on the bed, with a single stab wound on the left side of the chest below her armpit. Tr. p. 160. Rogers explained, based on the location of the wound, the knife likely hit the victim's heart and lung, causing rapid blood loss and death. Tr. pp. 164-66. After confirming the female victim was deceased, Rogers went outside to administer first aid to the young boy. Tr. p. 166. According to Rogers, the boy had "an obvious puncture stab wound to the right flank and also a stab wound to the back of the neck." Tr. p. 166. Rogers testified he was concerned about the location of both wounds, but particularly the wound to the abdomen, so he called for a helicopter to transport the boy to the hospital trauma center. Tr. pp. 167-70. Rogers testified he considered the boy's injuries to be life-threatening. Tr. pp. 170-71.

Officer Mark Collins, with the Marion County Sherriff's Office, testified he received a call from his boss on September 17 informing him the Mullins Police Department needed assistance and directing him to go to the Mullins police station. Tr. p. 135. Collins testified, as he was driving through town, he passed a black male wearing a light-color shirt and jeans on a red and white bicycle. Tr. p. 136. Almost simultaneously, Collins received another call advising him the Mullins Police Department was looking for a suspect fitting that description, so Collins turned around, located the man, and asked to speak with him. Tr. p. 136. The man confirmed he was Edward Stackhouse, and Mullins Police Chief Kenneth Davis arrived at the scene, placed the man under arrest, and read his Miranda rights. Tr. p. 137.

Chief Davis testified the only question he asked Applicant at the time of his arrest was whether Applicant needed medical attention. Tr. pp. 288-89. However, according to Davis, Applicant said he had a question, and after being reminded anything he said could be used against him should he decide to speak, Applicant asked Davis, "Did anyone survive?" Tr. pp. 293-94. Chief Davis testified, at that time, Applicant had not been told anything about why he was being

arrested other than that police wanted to speak with him about an incident that had occurred “down the street” earlier that morning. Tr. p. 294. When Chief Davis responded “it didn’t look good for one of the parties,” Applicant asked if it was “Sharon.” Tr. pp. 295. Chief Davis testified the exchange “struck him,” and he had never been asked a question like that in his time as a law enforcement officer. Tr. p. 295.

Chief Davis further testified he ordered one of his officers to take Applicant to a waiting room in the police station and prohibited anyone from question Applicant. Tr. p. 296. Chief Davis testified Applicant was fed, given something to drink, and a change of clothes while officers gathered some resources and started putting together a case file. Tr. pp. 296-99. A few hours later, Chief Davis and Captain Michael Bethea interviewed Applicant on camera in Bethea’s office at the station.<sup>1</sup> Tr. pp. 299-300. Chief Davis testified Bethea again read Applicant the Miranda warnings, and Davis himself asked Applicant if he understood and if Applicant wanted to speak with them. Tr. pp. 300-01. Applicant agreed to talk to the officers and gave a statement over the course of approximately one hour, all of which was recorded and a redacted version played for the jury. Tr. p. 301.

Davis testified Applicant told him the fight with Sharon began when Applicant was on the phone, and she thought he was talking to another woman. Davis recalled Applicant told him “an argument that ensued from that, and he indicated to us that they fought down the hallway. They wound up in the bedroom and. . . he was knocked to the floor by Daquan [the victim’s oldest son], and [Applicant] indicated that when he fell to the floor he came upon a knife and. . . he switched hands with the knife and he came up defending himself, he said ‘slashing,’ because. . . he was scared they might hurt him.” Tr. pp. 302-03. Applicant never admitted he stabbed Sharon, but he

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<sup>1</sup> Captain Bethea also testified and confirmed Chief Davis’s testimony. Tr. pp. 190-99.

demonstrated on the videotape how he attempted to defend himself by swinging the knife. Tr. p. 303. According to Davis, Applicant said he eventually realized something was wrong because she stopped fighting him. Applicant further told Davis that Daquan, "came in and knocked him down during the confrontation. . . and he was scared that Daquan and Sharon might hurt him and. . . he figured he hit Daquan or had hurt Daquan or nicked Daquan. . . because Quan jumped back and said, 'Ow.'" Tr. pp. 304. According to Davis, he asked Applicant multiple times if either victim had a weapon, and Applicant admitted neither did. Tr. p. 304. However, Applicant claimed his wife had stabbed him once before and had hit him with a hammer or threatened to hit him with a hammer on a prior occasion. Tr. p. 316.

Daquan, the male victim and Applicant's oldest stepson, testified he was fifteen years old at the time the incident took place. Tr. pp. 336-37. Daquan testified on the day of the incident he heard "a lot of noise bumping against the wall, and I looked up out of the corner of my eye and I seen [sic] [Applicant] come back from the kitchen with a knife. And my momma called me. So I got up, me and my brother, I went in there. [The brother] went out the door. I seen [sic] [Applicant] stabbing her right in the abdomen right here. So I grabbed his hands. . . and that's when I guess he cut me. . . ." Tr. pp. 338-39. Daquan testified when he grabbed Applicant's hands, Applicant turned toward him, grabbed his head and cut his neck, then stabbed him in the right side. Tr. pp. 341-42. According to Daquan, Applicant then turned around and walked away down the hallway, took his bike from the living room, and left the apartment. Tr. p. 343. Daquan denied either he or his mother had a weapon at the time of the attack. Tr. pp. 348-49. On cross-examination, Daquan admitted he did not tell police, in his statement given a few days after the attack, that he had seen Applicant coming from the kitchen with the knife in hand. Tr. p. 352. He also agreed his statement indicated

he witnessed the stabbing, but actually he had only entered the room once the knife was already in the victim's body. Tr. pp. 357-58.

William, Daquan's younger brother, was fourteen years old at the time of the stabbing. Tr. p. 324. He testified he and Daquan were asleep in their room when they heard "a large noise," like things were "crashing and falling hitting the floor." Tr. p. 325. They heard their mother calling for Daquan, so they both got up and ran toward her bedroom. Tr. p. 325. William testified he stopped at the doorway and then immediately left to go get help. Tr. p. 325. According to William, when he looked into the bedroom, he saw Daquan and Applicant "tussling," and Applicant had something in his hands, but William could not tell what the object was. Tr. pp. 325-26. William testified Daquan and Applicant were standing up, and he never saw either of them on the floor. Tr. p. 326.

The pathologist who performed the autopsy, Dr. Ellen Riemer, testified Sharon died from a single stab wound to the chest. Tr. p. 259. She further testified "[t]his was a non-survivable injury because there were too many essential vital structures that were severely damaged including the heart and both lungs and the aortic pump. There's no way that anybody would have been able to recover from that even if there was an expert team of surgeons at the scene." Tr. pp. 259-60. According to Dr. Riemer, there were no other wounds, defensive or otherwise, on Sharon's body. Tr. p. 258.

Mary Boehm, a DNA analyst with SLED,<sup>2</sup> testified she took swabs from the knife to be tested for blood and compared them to known samples from Applicant, Sharon, and Daquan. Tr. pp. 83-84. Boehm testified there was DNA from two different people on the knife; she confirmed Sharon's blood was on the knife and Daquan could not be excluded as the other contributor, but

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<sup>2</sup> Agent Boehm was qualified without objection as an expert in DNA and serology. Tr. p. 81.

Applicant's DNA was not present. Tr. pp. 84-85. Boehm also tested cuttings from Applicant's t-shirt, which returned with a mixture of DNA from Applicant, Sharon, and Daquan. Tr. pp. 85, 88.

The judge charged the jury on the law of murder, self-defense, voluntary manslaughter, and involuntary manslaughter in Sharon's death. He also charged attempted murder, assault and battery of a high and aggravated nature, and other lesser-included assault offenses as to Daquan's injuries. Tr. pp. 409-23.

### ALLEGATIONS

In his Application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. "Counsel failed to impeach witnesses"
  - b. "Counsel failed to object and impeach witnesses"
2. Prosecutorial Misconduct

Through counsel, Applicant filed amended allegations on January 25, 2017, alleging as follows:

1. As to representation rendered by Scott P. Floyd, Esquire:
  - a. Counsel was ineffective for failing to properly cross-examine DNA expert to [sic] the presence of touch DNA;
  - b. Counsel was ineffective for failure to impeach victim with inconsistent statement;
  - c. Counsel was ineffective for failure to impeach [William] with inconsistent statement;
  - d. Counsel was ineffective for failure to object to, and move to suppress, new testimony of witnesses not disclosed in discovery, as the failure to disclose the substance of the testimony constitutes a discovery violation;
  - e. Counsel was ineffective for failure to object to impermissible vouching for witness by solicitor;
  - f. Counsel was ineffective for failure to object to testimony of Adam Rogers as outside the scope of layman testimony;
  - g. Counsel was ineffective for failure to object to, and move to suppress, testimony of Kenny Davis. The complete content of statements made by Applicant to Officer Davis were not disclosed in discovery, nor were they testified to during the Jackson v. Deno hearing;

- h. Counsel was ineffective for failure to object to, and move for a mistrial, [due] to the improper comments made by the State at the conclusion of the direct examination of [Daquan];
- i. Counsel was ineffective for failure to object to impermissible comments made during the State's closing argument;
- j. Counsel was ineffective for failing to conduct a complete investigation into the facts and circumstances surrounding Applicant's arrest, including his possession of a knife at the time of his arrest;
- k. Counsel was ineffective for failure to allow Applicant to view surveillance video prior to its introduction at trial;
- l. Counsel was ineffective for failing to provide Applicant with a copy of discovery in a medium that Applicant was able to view while detained;
- m. Counsel was ineffective for failure to ensure Applicant had a complete understanding of the constitutional rights that Applicant was waiving by pleading guilty;
- n. Counsel was ineffective for failing to conduct a complete investigation into the facts and circumstances surrounding Applicant's statements to law enforcement for a potential defense as a result of coercion by law enforcement.

At the commencement of the evidentiary hearing, counsel for Applicant indicated he would be proceeding only on the claims contained in the January 25th amendment, with the exception of the allegations contained in section (m) of the amendment, which were included as a scrivener's error. Additionally, at the close his case, Applicant moved to amend his application to include an allegation Counsel was ineffective for failing to raise self-defense. This Court finds Applicant abandoned all allegations raised in his original application but not addressed at the evidentiary hearing, and those allegations are hereby denied and dismissed.

#### **SUMMARY OF TESTIMONY**

Applicant testified Counsel was appointed to his case about a year after his arrest, after several other attorneys were relieved. According to Applicant, these charges arose when he got into a fight with his wife, her son tackled him to the ground, and Applicant was able to pick up a knife from the floor and began stabbing. Applicant testified Counsel became his attorney approximately

a year before trial, and in that time, he and Counsel met twice. According to Applicant, Counsel did not have much discovery at their first meeting, including the victim's toxicology report, which Applicant requested because he expected it to show alcohol in the victim's system. Applicant testified Counsel had also not yet received Daquan's statement, and he told Counsel he wanted to see both of these things. Applicant further testified Counsel came back to see him a second time and had his statement, along with three discs of pictures and the surveillance video, but Applicant was unable to see what was on the discs because there was no way to view them from the jail. Applicant testified the video showed a third person, whom Applicant could have identified, but he never saw the video prior to it being played at trial. He also testified the pictures showed Daquan could not have seen the hallway from where he said he did. Applicant testified Counsel did not introduce the toxicology report or subpoena toxicologist for trial. However, Applicant did not offer the pictures, the video, or the toxicology report or testimony into evidence at the hearing.

Applicant further testified he and Counsel did not discuss the elements of the crimes charged, the possible penalties, defenses or trial strategy. Applicant testified he gave Counsel information regarding potential helpful witnesses, and he did not know what the defense theory was. Applicant also testified he and Counsel did not discuss any of the medical evidence or testing, he did receive the DNA reports. Applicant testified he had questions regarding the serology and touch DNA, but Counsel did not cross-examine the SLED analyst on whether Applicant had touched the knife. Applicant also testified he thought Counsel should have challenged the pathologist's credibility regarding the wound path. As noted above, however, Applicant did not present any expert witness evidence or testimony as to the pathology, serology, or touch DNA issues.

Applicant testified he thought Counsel should have objected to the Solicitor's opening

statement in which he said the boys saw Applicant going down the hallway toward the bedroom because that detail was not disclosed to the defense until Daquan testified. Applicant also testified Counsel should have cross examined the boys more thoroughly, and Counsel missed opportunities to point out inconsistencies in the testimony of police officers. Applicant testified Counsel failed to object to the Solicitor's comments bolstering the boys' testimony in closing. Finally, Applicant testified his theory of the case was self-defense, and although he and Counsel went over it briefly, he did not believe Counsel had a particular trial strategy. Applicant testified they never discussed the victim's history of violence or mental health issues.

Counsel testified he was appointed to Applicant's case approximately a year before trial, and they met several times – more than twice, as testified to by Applicant. Counsel testified he went to the jail to meet with Applicant, and Applicant told him a similar scenario to what he described in his statement the day of his arrest. According to Counsel, the defense and trial strategy was accident or an unintentional stabbing. Counsel testified Applicant alleged he and Sharon were arguing in the bedroom when Daquan came in, jumped on Applicant's back, and knocked Applicant to the ground; while on the ground, Applicant picked up a knife and began flailing his arms, unintentionally stabbing his wife. Counsel testified Applicant told him they had both been drinking at the time, but he did not recall being told about a history of violence.

Counsel testified he prepared for trial by talking about the case with Applicant, reviewing discovery multiple times, and watching the videos of Applicant's statement and the surveillance footage from the apartment complex. Counsel agreed with Applicant that the surveillance video was unable to be played at the jail, and he could not recall how he handled the issue. Counsel testified he also reviewed the autopsy report and the statements of the other victims and witnesses.

Counsel testified he did not recall if spoke with a DNA expert about this case, and he

explained he did not cross-examine the State's witness about touch DNA because Applicant admitted he had touched the knife and swung it around, so it was irrelevant. Further, Counsel testified Applicant told him that wasn't the knife when the State moved to admit it at trial, but Applicant had never mentioned that before trial. Counsel further testified he reviewed both boys' statements, and he cross-examined them on the differences between the statements and their trial testimony. Counsel testified he did not know before trial that their testimony had changed. In any event, Counsel explained he did not want to question the boys aggressively because they were young, had been traumatized, and were clearly sympathetic witnesses, and the jury was visibly reacting to their testimony. Counsel testified he did not object to the Solicitor's comment apologizing to Daquan for having to testify because he saw no need. Additionally, Counsel testified he did not object to Rogers' testimony because Rogers could testify to what he saw and observed, nothing Rogers said was inconsistent with the pathology report, nor was it ever in doubt the victim died from a stab wound. Counsel testified Rogers' testimony did not concern him.

Finally, Counsel testified the jury was charged on the law of self-defense, although Counsel did not raise self-defense or request the charge himself. Counsel testified he did not present self-defense because Applicant's story did not support it; Applicant claimed he picked up the knife, was flailing around, and unintentionally stabbed the victims. Counsel further explained Applicant never claimed Sharon had attacked him, neither victim was armed, and Applicant never told Counsel he feared for his safety or tried to leave the room. Further, Counsel testified there was no independent evidence to suggest this occurred in self-defense. Counsel testified, nonetheless, the judge decided to charge self-defense, involuntary and voluntary manslaughter, and accident.

## 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 466 U.S. at 688 (1984)). 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

**A. Failure to cross-examine DNA expert on the presence of touch DNA on knife**

“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). Trial counsel’s strategy is reviewed under “an objective standard of reasonableness.” Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004). “[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include ‘which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, *[and] whether and how a witness should be cross-*

examined.”” Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (citing Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998)) (emphasis added).

In this case, Counsel explained his decision not to cross-examine the DNA expert because Applicant never denied touching the knife or stabbing the victims. This Court has reviewed the transcript, and the record reflects Applicant’s DNA was not found on the knife, which neither proves nor disproves accident, so her testimony did not contradict the defense theory. Tr. pp. 84-85. Further, the transcript reflects the State established a complete chain of custody for the knife, so there was no basis for Counsel to object or challenge the testimony as to the knife itself or tests performed on it.<sup>3</sup> Tr. pp. 230-31. Therefore, this Court finds no deficiency in Counsel’s handling of the cross-examination of Agent Boehm, the DNA and serology testing, or the chain of custody for the knife because there was no factual dispute between the State and the defense on these issues. This allegation is therefore denied and dismissed.

**B. Failure to Impeach Daquan and William Using Prior Statements**

As noted in section A above, “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). Trial counsel’s strategy is reviewed under “an objective standard of reasonableness.” Magazine, 361 S.C. at 617, 606 S.E.2d at 764. “[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include ‘which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, *[and] whether and how a witness should be*

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<sup>3</sup> The knife was tested for fingerprints, but none were recovered. Agent Dinh, of SLED, testified that was not unusual due to the nature of latent fingerprints. Tr. pp. 232-33.

*cross-examined.*” Abney, 408 S.C. at 48, 757 S.E.2d at 547 (citing Sexton, 163 F.3d at 885) (emphasis added).

The purpose of cross-examination at trial is “to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.” State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff’d as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)). Applicant testified the pictures of the scene showed Daquan could not have seen what he claimed, but Applicant did not introduce those pictures into evidence at the hearing. See, e.g., Mozee v. United States, 963 A.2d 151, 165 (D.C. 2009) (“Ineffective assistance of counsel complaints sometimes allege the failure to adequately follow-up cross-examination answers with more detailed questions further examining those answers. But a successful ineffective assistance complaint requires more than speculation that additional information would have had an impact on the outcome of the case.”); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (In order to prevail on a claim of ineffective assistance of counsel, the South Carolina Supreme Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.) (emphasis added). In this case, Applicant has offered only speculation that further or more rigorous cross-examination of Daquan and William would have changed the outcome of his case.

Additionally, the record reflects Counsel cross-examined both Daquan and William in detail about their statements and pointed out numerous inconsistencies, particularly between Daquan’s statement and his trial testimony. Tr. pp. 352, 358, 398. Counsel also explained he felt

his cross-examination of the boys needed to be handled in a particular way due to their age and because they had been traumatized and were eliciting emotional reactions from the jury. Further, because the discrepancies identified by Applicant relate only to impeachment, and Counsel did in fact impeach the witnesses with their prior statements, this Court finds no discovery violation. See Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (“Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”) (citing United States v. Bagley, 473 U.S. 667 (1985)). This Court finds Counsel articulated a reasonable strategy to explain the decisions he made at trial, and therefore, this Court finds no deficiency in his handling of the cross-examination and impeachment of Daquan and William. This allegation is therefore denied and dismissed.

**C. Failure to Object to Testimony of Adam Rogers (EMT)**

Rule 701, SCRE, explains lay witness testimony “in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training. “Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.” Watson v. Ford Motor Co., 389 S.C. 434, 445-46, 699 S.E.2d 169,

175 (2010). Any alleged error in qualifying a witness as an expert is subject to a harmless error analysis. See State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 608-09 (2009) (“However, although Herod did not need to be so qualified in this case, we nonetheless affirm the result. . . because Douglas suffered no prejudice either as a result of Herod’s testimony or by her qualification as an expert.”).

This Court finds Applicant has failed to prove he was prejudiced by any deficiency in Counsel’s handling of Rogers’ testimony. See Strickland, 466 U.S. at 691, 104. (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”). Further, Counsel testified he did not object to Rogers’ testimony because Rogers could testify to what he saw and observed, nothing Rogers said was inconsistent with the pathology report, nor was it ever in doubt the victim died from a stab wound. Counsel testified Rogers’ testimony did not concern him. This Court finds, while Rogers’ testimony may have been objectionable as outside the scope of testimony permitted by a lay witness, there was no dispute as to the cause of the victim’s death, and Rogers’ testimony was wholly consistent with that of Dr. Reimer, the pathologist, who was qualified as an expert witness. Because Rogers’ testimony is immaterial to any issue in dispute, this Court finds it had no effect on the outcome of the trial. Accordingly, Applicant’s allegation is denied and dismissed with prejudice.

**D. Failure to move to suppress Applicant’s statement to Chief Davis**

It is axiomatic that a defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of any statements made by the defendant before the admission of such statements in front of the jury at trial. Jackson v. Denno, 378 U.S. 368 (1964). Such a hearing was held in Applicant’s case prior to trial, and the judge ruled Applicant’s

statements were given voluntarily after receipt of the appropriate Miranda warnings, and the statements were submitted to the jury. Tr. p. 61. This Court finds Applicant has not presented any evidence his statements were involuntary, and therefore, this allegation is denied and dismissed. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“In order to prevail on a claim of ineffectiveness. . . the South Carolina Supreme Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice. . . .”).”

**E. Failure to object to vouching and impermissible comments in State’s closing argument and failure to object to State’s improper comments upon conclusion of Daquan’s direct examination**

The State’s closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Furthermore, a prosecutor cannot vouch for a witness’ credibility. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). A prosecutor improperly vouches for a witness’ credibility and places the government’s prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony. Id. However, “[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. Improper comments do not require reversal if they are not prejudicial to the defendant, and the [applicant] has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) (citing Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002)). “[I]t ‘is not enough that the prosecutors’ remarks were undesirable or even universally condemned.’ The relevant question is whether the prosecutors’ comments ‘so

infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

In this case, Applicant alleges Counsel should have objected to the Solicitor’s comments in closing that the defense had no evidence to show the boys were lying “because they’re not lying” as improper vouching. See Tr. p. 393. Applicant further alleges Counsel should have objected to the portion of the solicitor’s argument where he told the jury, “I don’t believe this was voluntary manslaughter.” See Tr. p. 383. Finally, Applicant alleges Counsel should have objected and moved for a mistrial after the Solicitor, at the conclusion of Daquan’s direct examination, told him, “Son, I’m so sorry you had to be here today.” See Tr. p. 349.

This Court has reviewed the closing argument in full, as well as the challenged testimony from Daquan’s direct examination, and finds any deficiency by Counsel was harmless. While the comment regarding the boys’ testimony was potentially objectionable as burden-shifting; in the context of the entire closing argument, it appears to this Court the Solicitor was making a legitimate factual argument as to who was telling the truth. As to the Solicitor’s comment regarding voluntary manslaughter versus murder, the judge charged the jury on various lesser-included offenses, and the State was entitled to make an argument applying the facts of the case to the law, which the Solicitor did here. Similarly, this Court finds any deficiency in Counsel’s failure to object to the State’s comments to Daquan at the conclusion of his direct examination was harmless. Counsel offered a similar condolence to Daquan before beginning his cross-examination, and Daquan was an especially sympathetic witness. Accordingly, the Court finds Applicant has failed to prove any prejudice from Counsel’s failure to object, and these allegations are denied and dismissed.

**F. Failure to provide discovery in an accessible format and to allow Applicant to view surveillance video prior to trial**

While the State has an obligation to turn over evidence in compliance with Brady<sup>4</sup> and Rule 5, SCRCrP, evidence does not have to be disclosed to a defendant personally. Hyman v. State, 397 S.C. 35, 46, 723 S.E.2d 375, 380 (2012), overruled on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Furthermore, simply because an applicant is unable or not permitted to personally view evidence does not mean his counsel is ineffective. Id. at 47, 723 S.E.2d at 381. Defense counsel is obligated to inform his client what evidence the State has against him, and, in this case, Counsel testified he met with Applicant and reviewed discovery with him on several occasions. This Court finds Counsel's testimony credible on this issue. Further, this Court finds Applicant was aware of the existence of the surveillance video, but, although Applicant testified there was a person on the video he could have identified had he seen it prior to trial, this issue was irrelevant to Applicant's defense or the State's case. As both Counsel and Applicant testified at the hearing, Applicant never denied stabbing the victim, and there was no suggestion of third-party guilt; instead, Applicant's defense was that the stabbing was accidental. Therefore, the identity of the third party on the tape is wholly irrelevant to any fact in issue at Applicant's trial. Even if Counsel was deficient for not ensuring Applicant had a chance to see the tape prior to trial, Applicant was not prejudiced by such failure. Therefore, this allegation is denied and dismissed.

**G. Failure to argue self-defense**

A self-defense charge is not required unless it is supported by the evidence. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on

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<sup>4</sup> Brady v. Maryland, 373 U.S. 83 (1963).

the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007).

In this case, it is undisputed that Applicant's version of events is that he picked up the knife from the floor of the bedroom, began swinging and flailing around, and stabbed or cut the victims in the process. Counsel testified this is the story Applicant told him when they met to discuss the case, and it was the same version he gave the Mullins police officers in his statement. Applicant's own testimony at the evidentiary hearing recited these same facts. Counsel also explained he argued the defense of accident, rather than self-defense because in his opinion, these facts do not support a self-defense case. Counsel further testified Applicant never told him he was in fear of his life. In any event, the trial judge chose to give the self-defense charge to the jury, so Applicant still received the benefit of the charge. This Court finds Counsel's strategy was reasonable, and accordingly, Applicant's allegation is denied and dismissed.

#### **H. All other allegations**

As to any and all allegations which were raised in the original application or the amendment and not specifically addressed in this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the

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S.C. SUPREME COURT

applicant waived such allegations and failed to meet his burden of proof regarding them.

Specifically, this Court finds Applicant waived the allegation as to a guilty plea, as this was a scrivener's error in the amendment. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

CONCLUSION

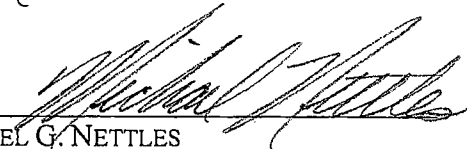
Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

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

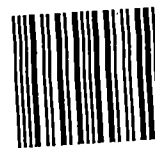
  
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 MICHAEL G. NETTLES  
 Presiding Judge  
 Twelfth Judicial Circuit

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