Vol. II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

DEC 31 2018

S.C. SUPREME COURT

Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

JOHN F. KENNEDY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000877

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
(803) 734-1330

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Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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the presumptive test. This in no way confirms that the defendant had Mr. Scott's blood on his shorts. There is a very high likelihood that Mr. Scott coughed mucus or sputum onto the defendant's shorts while they were in the car that day.

14, In her closing argument Ms. Huey told the jury that: "Finally, we have blood evidence ... (the defendant) wearing the same shorts... And those shorts, according to DNA analyst, Katherine Leisey, had Schaffer Scott's blood on it in two spots. One in two hundred and fifty quadrillion chance that it wasn't Schaffer's blood . Those were on his shorts. (sic) " (p. 392: 3-11) It is prosecutorial misconduct to tell the jury "we have blood evidence" when in fact she did not. This disinformation is highly prejudicial in that the jury would likely believe this "blood evidence" was probative.

15, Ms. Huey relies on her witnesses who testified that Mr. Scott repeatedly states that John hit him. Mr. Scott was not able to testify that John hit him (or did it, or Dunnit) Yet, no one knew the defendant as "John". Because of his notable name, he was referred to as "John F." See paragraphs: 3,5,7,8. It is inconceivable that Mr. Scott could make a reliable identification by calling the defendant a name he was not known by. Even Ms. Huey called him "J.F.K." (paragraph 5) Ms. Huey said that Mr. Scott, despite being dazed like a boxer who was severely struck by another prizefighter and having garbled speech "could still communicate". (p. 381:2) If that were the case, why would Schaffer simply call him "John" when he knew him as John F." and were there other "Johns"? or with his broken jaws and severe head injury, and an oxygen mask over his face, was he trying to say "Ron"?

CONSTITUTIONAL RIGHT TO CONFRONTATION DENIED

16, The jury charge was erroneous. "The evidence presented at trial determines the charged jury instruction. State v. Lee, 298 S.C. 362, 380 S.E.2d 834, 1989. The purpose of a jury instruction is to 'enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273, 1987. If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. State v. Lee, Id. State v. Hewitt, 205 S.C. 207, 31 S.E.2d257, 1944. (Only) the law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury. State v. Lee, Id.; State v. Fair, 209 S.C. 439, 40 S.E.2d 634, 1946; State v. Rivers, 186 S.C. 221, 196 S.E. 6, 1938. (State v. Gregory Blurton, Opinion No. 25564, December 2, 2002, S.C. S.C.)
The Court instructed the jury: "I've had to make some rulings in this case. My job is the judge

of the law. You're the judge of the facts. You have to take the law as I'm giving it to you now as the law of the case. And you also have to take the rulings I made in the courtroom as the law in this case. You have to apply the law as I'm giving it to you now to the facts as you determine them to be to reach your verdict." (pp. 408:19-25 to 409:1)

17, The defendant was not permitted to "confront" his primary accuser, that being Mr. Scott, because Mr. Scott had expired, but the government witnesses made numerous references to hearsay testimony that was attributed to Mr. Scott, namely that he supposedly said that "black John did it, or hit him." This was overwhelming evidence against the defendant and the jury reached its verdict in about fifteen minutes (to jury room at 2:28 p.m. and returned with a verdict at 2:43 p.m.) (p. 432) In the charge to the jury the court states: "Now ladies and gentlemen of the jury, this Court has admitted certain evidence and statements allegedly made by the deceased victim after the injuries. I have determined that these statements should be admitted as evidence in this case. However, it is for you to determine the believability of these statements. In deciding this question, you may consider whether the Defendant (sic) was dying and whether he knew he was dying and whether the victim had lost all hope of recovering at the time the statements were made. (p. 410) In this charge, the Judge is actually giving the jury the authority to decide what the law is, and how to apply the law pertaining to dying declaration after he gave the instruction that he found the dying declaration to be admissible. The United States Court held that even an expert cannot instruct the jury on the law. ((U.S. v. Offil, CA4, 2011, 666 F.3d. 168, [4] 175) "To warrant reversal, a trial judge's (jury charge) must be both erroneous and prejudicial to the defendant." (State v. Commander, 2011, 398 S.C. 254, 270) For the reasons stated, there is no justification for the Court's admission of Schaffer's dying declarations, and the court erred in instructing the jury that said dying declarations were admissible, and erred when the court allowed the jury to make their own determination on the admissibility of the dying declarations, by considering whether the decedent knew he was dying or whether he had lost all hope of recovering, to the prejudice of the defendant, and erroneously admitted into evidence, (See *Crawford* below) with no evidence whatsoever that Schaffer knew he was dying. Schaffer had actually asked for help to continue living.

18, "First justifying admission of a dying declaration because it possesses sufficient reliability to eliminate the need for cross examination is contrary to the core holding of *Crawford* (Crawford v. Washington, 541 US. 36, 124 S.Ct. 1354) 'Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the

vagaries of the rules of evidence much less to amorphous notions of reliability ... Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because defendant is obviously guilty. That is not what the Sixth Amendment prescribes.' (Crawford at 1370-71) Even if the reliability of a testimonial statement could be assessed by a court, or by other means other than cross-examination, dying declarations are not inherently reliable, but rather suspect.

19, The government's case is based almost entirely on several statements that "John did it" attributed to Schaffer before he died. There is no evidence that Schaffer knew he was facing imminent death, or that he had a fear of lying before he faced his maker. There was no evidence that he (Schaffer) would refer to the defendant as "black John" when all, including Schaffer knew him as "John F." or as "John F. Kennedy", or "J.F.K." There was no evidence that Schaffer was sufficiently cognizant to have understood his circumstances and could make legally competent probative testimony. "To make out a dying declaration, the declaring must have spoken without hope of recovery and in the shadow of impending death. The record furnishes no proof of that indispensable condition. " (Sheppard v. United States, 2015, 290 U.S. 96, 99, 54 S.Ct. 22, 23) (See: Crawford v. Washington, 2004, 541 U.S. 36, 124 S.Ct. 1354, fn. 6) State v. Johnson, 26 S.C. 152, 1 S.E. 510, State v. Davis, 1927, 138 S.C. 532, 137 S.E. 139,) "Numerous academic authorities criticize the reliability of dying declarations for persuasive reasons. A dying declaration may not be reliable because perception, memory, comprehension, and clarity of expression are likely to be impaired in the dying person. See Charles Neeson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts,* 98 Harv. L.Rev. 1357. 1374 (1985) The experience of pain could affect the trustworthiness or accuracy of the declaration. See *Dying Declarations, 46 Iowa L.Rev. 356. 376 (1961)* Moreover, the original 'guarantee' of reliability, threat of divine punishment, may simply not apply to non-religious people. [P] The reliability argument fails. It is possible that (the decedent) might have colored his dying statements to falsely incriminate Defendant, believed Defendant killed him when Defendant actually did not (he was stabbed from the rear) or was otherwise confused about who his killer might have been. Without the benefit of cross-examination, a clear *Crawford* requirement grounded under the Sixth Amendment, there is no way to know. .... [P] Inability to test (Schaffer's) statements through cross-examination is fatal to the application of the dying declaration exception to the hearsay rule in this case. " (U.S. v. Jordan, 2005 WL 513501, 66 Fed. R. Evid. Serv. 790)

20, Admission of improper evidence, which requires confrontation, such as a "dying

declaration" that was not made with knowledge of impending death, is admitted as an abuse of discretion.... (U.S. v. Williams, 2011, CA4, 632 F.3d 129, 133 [3,4,5], citing Chapman v. California, 87 S.Ct. 824, 826, 386 U.S. 18, 22) and was not harmless constitutional error because there was essentially no other evidence of guilt. (Id. 133, 134 [6]) The spots on the pants, were never identified as blood, even though linked to the decedent possibly from the prior incident or from mucus or sputum, and which were erroneously argued to the jury as certain blood. "We find that this prejudice alone is enough to require that the conviction be vacated." (Id. p. 134) The error of admission the decedent's statement was "not harmless" (Chapman, Id. p. 24, 827), and qualifies as ineffective assistance of counsel, mandating reversal (Id. Fn. 8: Payne v. Arkansas, 356 U.S. 560 coerced confession; Gideon v. Wainwright, 372 U.S. 335, right to counsel; Tumey, v. Ohio, 273 U.S. 510, impartial judge) as well as questionable impartiality of the trial judge who should have known that a statement lacking a knowledge of impending death was inadmissible, and that it was improper to turn such a statement with charge to evaluate it, over to the jury.)

21, The nature of the false characterization of the evidence is clearly similar to that seen in the prior case of Karen McCall in Anderson County. See:

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UNITED STATES COURT OF APPEALS
FORTH CIRCUIT OF SOUTH CAROLINA

KAREN ANN MCCALL, 284499 — 12-7790
Petitioner

Against — 011-cv-02714-CMC-PJG

CATHERINE KENDALL,
Superintendent of Leath Correctional Institution
Respondent

15, The prosecutor repeatedly introduced "facts not in evidence". (A) There was no evidence that the pursuing police officer was shot, which the prosecutor told the jury, as the expert could not verify that the tiny metal fragment taken from his wound was unidentifiable. (N.T. p. 509, 716, 717) (B) The prosecutor incorrectly quoted a witness who said that: a good poker

player could **not** know better if a person is lying than a mental health professional, by twisting it to the opposite, essentially that a poker play could better tell if a person was lying than a mental health professional. (N.T. p. 653, lines 7-13, compare to closing argument p. 725, lines: 7-8 and 15-16.) "A 'prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.' (Giglio v. U.S. 150. The failure to correct false evidence is as reprehensible as its presentation, Washington v. State, 324 S.C. 232, 478 S.E.2d 833. The PCR judge erred in concluding that the State was not obligated to correct (witness's) false testimony, and failing to hold that this violation of petitioner's due process rights required that he be granted a new trial." (Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70, 2006 S.C. LEXIS 177, page 6)

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22 The use of false evidence by **Ms. Huey** also can be found in the trial of Angela Vaughn, cited as an Exhibit to this petition. Ms. Huey refers to the decedent persistently as the "victim" despite the fact that this is a jury question, to the prejudice of the defendant.

23, It is apparent that this County's prosecutors have historically applied a pattern of arguing to the jury "facts not in evidence" yet, not even facts, but fictitious evidence for which there is no rational basis in the fact finding process of the trial, and which therefore makes the evidence false, and a pattern of prosecutorial misconduct resulting in a fundamentally unfair trial.

24, Trial counsel was ineffective for failing to prevent, or effectively raise the question of the admissibility of the "dying declarations" . There was some questioning thereof, but on appeal, the issue was omitted to the prejudice of the defendant and with no rational trial strategy as the basis. Appeal was frivolously based on questions of the identification of the defendant in a photo lineup, after he was seen on the property by a witness who knew the defendant in person (Kimberly King: paragraph 3). Counsel failed to identify or object to the violations of the defendants rights described in this petition and there can be no rational strategy that explains counsel's shortcomings which resulted in the prejudice of a miscarriage of justice as the

defendant is not guilty. (Strickland v. Washington, 466 U.S. 668; Lomax v. State, 379 S.C. 93, 665 S.E.2d 164, 2008)

WHEREFORE, the government failed to meet its burden of proof, and trial and appellate counsel were ineffective under the Strickland standard. Defendant 's conviction must be reversed, and he, granted such other and further relief as is just and proper.

Affirmed as true under penalty of perjury,

John F. Kennedy, 358076
Perry Correctional Institution
430 Oaklawn Road
Pelzer, S.C. 29669

Dated:

J.F.K.:mm

To:
Clerk of the Courts
Anderson County Courthouse
P.O.B. 8002
Anderson, S.C. 29622-8002

(Attorney General of South Carolina, P.O.B. 11549, Columbia, S.C. 29211-1549)

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL DISTRICT

Angela M. Vaughn

2008-CP-04-2319

THE PROSECUTOR TAINTED THE TRIAL BY HERSELF AND HER WITNESSES PERSISTENTLY REFERRING TO THE DECEDENT AS THE "*VICTIM*" CREATING THE ATMOSPHERE THAT HE WAS MURDERED, IN VIOLATION OF THE DEFENDANT'S RIGHT TO HAVE THE JURY MAKE THIS DETERMINATION, AS OPPOSED TO THEIR POSSIBLE DETERMINATION THAT THE DEFENDANT ACTED IN SELF-DEFENSE AND THAT THE DECEDENT WAS ACTUALLY NOT A VICTIM, BUT AN ASSAILANT, THEREBY DEPRIVING THE DEFENDANT OF A JURY TRIAL.

3, The understanding of the State as articulated by **Ms. Huey** was: "The question does become whether this (shooting) was done in self-defense." (N.T. p. 238:2-3: at close of State case) At the beginning of trial Ms. Huey stated: "...(T)he Defendant is making a self-defense argument." (N.T. p. 44:3) Instead of referring to Mr. Grant as the "decedent", she adopts the strategy to refer to him as the "*victim*, " a blatant innuendo. Beginning with her first witness, Karen Elrod, Deputy Sheriff, the witness states: "And I saw the *victim* on the floor...." (N.T. p. 65:7-8) Since the State accepts this as a question of whether the defendant killed Mr. Grant in self-defense, the witness' use of the word "*victim*" constitutes a fact not in evidence. Whether the decedent is a *victim* is a jury question, and the witness violates the jury prerogative by presuming that the decedent is a *victim*. In fact the defendant has asserted that Mr. Grant was an assailant and the defendant was a victim, the gravamen of self-defense. Defense counsel did not object to this coup. Defendant was denied a jury trial on this question in violation of her right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution which guarantee her right to an "impartial jury."

4, Ms. Huey questions the witness: "Q Now, you briefly already mentioned where the *victim* was....As you entered the house, where was the *victim*?" (N.T. p. 66:23) Defense counsel did not object to the further use of a "fact(?) not in evidence" actually contradicting his

defense strategy that Mr. Grant was not the victim but the assailant. There being no logical trial strategy in this lack of objection, and to the prejudice of the defendant, counsel must be identified as Constitutionally ineffective. (Strickland v. Washington, 466 U.S. 668) Ms. Huey continues: "Did they (EMS) take the *victim* with them?" (N.T. p. 67:7) The word "victim" always refers to Mr. Grant, and is exclusively used by the government and its witnesses.

5, Now with the witness and the Assistant Solicitor on the same page, Ms. Huey continues on with her next witness, Mark Coyle, Sheriff Investigator, "Now, did you take pictures of... where the *victim* was?" (N.T. p. 73:8-9) Still no objection from defense counsel. Coyle uses the word "*victim*" again. (p. 77:2) Ms. Huey again uses the word "*victim*" at (p. 80:19), and Coyle uses the word "*victim*" at (p. 81:7). Continuing with the Officer's testimony the word "*victim*" is used again at: (pp. 83:18; 83:19; 84:3; 84:9; 84:22; 85:8; 85:13; 88:1; 91:7; 93:19; 94:1; 94:23) alternating imprecisely between officer and Asst. Solicitor.

6, The State called **Brent Woodward, M.D**. Forensic physician who is asked by Ms. Huey: "Did you have an occasion to perform an autopsy on the *victim* in this case?" (N.T. p. 105:13-14) There is no objection from defense counsel. Ms. Huey continues to ask questions, or solicit answers that refer to the "*victim*" at: (pp. 111:21; 112:17; 112:19; 112:21; 112:23; 113:10; 114:17; 114:22; 115:4; 115:23; 117:8) There was no use of the word "*victim*" on cross-examination by either person. On Re-Direct, Ms. Huey uses the word "*victim*" at: (pp. 121:24, 121:25; 122:5; 122:9; 122:14; 122:17). The word is not used on Re-Cross.

7, Prosecution witness Sharon Davenport is asked about the "*victim*" (p. 155:19)

8, At In camera conference the Judge uses the term "The alleged *victim*": (N.T. p. 179:12) but then continues: "*victim*" (N.T. p. 179:13) like "what the heck, everyone's doing it).

9, State witness Paul Sullivan is asked about the "*victim*" (N.T. p. 16). SLED Officer Tracy Thrower refers to "the *victim*" (N.T. p. 197:14).

10, Ila Simmons, SLED Forensics person is asked about the "*victim*": (pp. 203:10; 203:11; 205:4; 206:5).

11, Laurie Shaeker, SLED Toxicity person is asked about the "*victim*" (p. 216:23).

12, Steven Derrick, SLED something answers about the "*victim*" (pp. 228:7; 228:15; 228:23; 229:3; 229:5) and curiously is asked about the "decedent" (We knew you could do it Ms. Huey; p. 230:7) then the word "victim" is used again: (pp. 231:24; 232:1; 232:2; 232:4; 232:6, 233:9).

13, Defendant is able to find fifty-three (53) times that the decedent is referred to in front of the jury as "*victim*". There may be more. Only halfway through the testimony, the Court

decides that the decedent is a "victim". After 53 times, it is obvious that the jury would begin to think that Mr. Grant was the victim. This is highly prejudicial.

14, Black's Law Dictionary, Sixth edition defines "victim" as: "There person who is the object of a crime, as the victim of a robbery is the person robbed." Referring back to paragraphs 2 and 3, the defense position is that Mr. Grant was the aggressor not a victim, and that he was shot when the defendant felt threatened. Ms. Huey has skillfully inserted the word "victim" into the heart and soul of this trial and made it axiomatic that poor Mr. Grant was the victim, therefore the defendant was a murderer, when in fact, this is, in a fair trial, a jury question. Ms. Huey has effectively bullied the Court, particularly the jury into accepting that Mr. Grant was the victim, when there is no reason to deprive the jury of its responsibility to determine the facts of the case.

15, Ms. Huey closes in her argument to the jury: "Angela Vaughn is not the victim here. Ronald Grant is the victim." (N.T. p. 323:5-6) Well, after a trial that is no more than government propaganda, the jury accepts that Mr. Grant can only be the "victim" because that is all they ever heard, and defense counsel ineffectively failed to object. "A 'prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.' (Giglio v. U.S. (sic) 150. The failure to correct false evidence is as reprehensible as its presentation, Washington v. State, 324 S.C. 232, 478 S.E.2d 833.) Not only did the prosecutor invent the concept of Mr. Grant as the victim, but its witnesses were also so infected, so that that there was a unanimity of police authorities proclaiming Mr. Grant a victim, ergo the defendant "guilty" by powerful inference and taints the jury which can no longer be presumed to be impartial. (Irwin v. Dowd, 366 U.S. 717, 722, 723, 81 S.Ct. 1639, 1961; see also: My'Min v. Virginia, 500 U.S. 415, 1991)

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

March 25, 2016

The Attorney General,
United Stated Department of Justice,
Civil Rights Division,
950 Pennsylvania Avenue,
Washington, D.C. 20530

Re: JOHN F. KENNEDY, 2012 GS-04-2002
Anderson County S.C.

Dear Sirs:

Enclosed please find the petition for post-conviction relief by John F. Kennedy, soon to be filed with the Anderson County, S.C. Court.

Defendant: Mr. Kennedy was subjected to trial errors that consist of false evidence and judicially erroneous admission of a supposed dying declaration which bears no indicia of reliability, but is facially highly prejudicial.

The errors seen in this prosecutorial misconduct follow the same pattern as seen in the Anderson County prosecution of Karen McCall, and Angela Vaughn, suggesting that there are many other such abusive prosecutions in the interim.

I am suggesting that this matter be investigated by your office. Thanking you for your kind consideration, I am
very truly yours,

Mark Marvin
135 Mills Road
Walden, N.Y. 12586

John F Kennedy

RECEIVED
APR 06 2016
P.C.I. MAILROOM

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	TENTH JUDICIAL CIRCUIT
John Fitzgerald Kennedy, #358076, Applicant, v. State of South Carolina, Respondent.	Case No.: 2016-CP-04-0610 **RETURN**

FILED-CLERK'S OFFICE ANDERSON CO
2017 FEB 16 AM 11:00

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on March 15, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted by the September 2012 term of the Court of General Sessions for Anderson County for one count of Murder (2012-GS-04-02002). Applicant was represented by Andrew Potter, Esq. On December 2 to December 5, 2013, Applicant proceeded to trial before a jury. He was found guilty as indicted and was sentenced on December 5, 2013, by the Honorable J. Cordell Maddox to thirty years imprisonment for Murder.

Applicant filed a timely notice of appeal. An appeal was perfected by Robert M. Pachak, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction on May 20, 2015. State v. Kennedy, Op. No. 2015-UP-256 (S.C. Ct. App. 2015). Applicant filed a petition for rehearing, which was denied in an order filed June 24, 2015. Applicant then petitioned for certiorari from the state Supreme Court. The Court denied the petition for writ of certiorari in an order dated February 16, 2016, and the

Remittitur was returned on May 13, 2016.

Attached herewith and incorporated herein by reference are the records of the Anderson County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, Applicant's appellate documents, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

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

1. Ineffective Assistance of Counsel
    a. Ineffective Assistance of Trial Counsel
        - Failure to thoroughly investigate and pursue facts and circumstances regarding third-party guilt defense.
        - Failure to "properly challenge breaks in chain-of-custody upon correct grounds."
        - Failure to "identify specific U.S. Constitutional violations upon which Applicant bases his claims."
    b. Ineffective Assistance of Appellate Counsel
        - Failure to "raise and argue the trial court's ruling on the Batson challenge regarding defendant's right to be afforded an impartial jury comprised of a fair cross-section of peers and society."
        - Failure to "raise and argue other meritorious issues which, through contemporaneous objections, were preserved for review."
2. 14th Amendment Due Process violation
    - "Applicant suffered due process violations and was prejudiced by breaks in chain-of-custody and mishandling of clothing and blood evidence."
    - Applicant suffered "due process violations and was prejudiced by law enforcement's flawed investigations and mishandling of potential exculpatory evidence."

III.

Applicant claims ineffective assistance of counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

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 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668). Second, counsel's deficient performance must have prejudiced 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.

Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges due process violations on the basis of chain of custody and alleged prosecutorial misconduct. These allegations are direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised these issues on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

V.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an

evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

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By:______________________
ATTORNEYS FOR RESPONDENT

7/14, 2017

1 State of South Carolina
In the Court of Common Pleas
2 County of Anderson
3
4 John Fitzgerald Kennedy,)
)
5 Applicant,) 2016-CP-04-00610
)
6 -vs-) October 5, 2017
)
7 State of South Carolina,)
)
8 Respondent.)
) Transcript of Record
9 ______________________________)
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11
B E F O R E:
12
The Honorable R. Scott Sprouse, Judge
13
14 A P P E A R A N C E S:
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South Carolina Attorney General's Office
16 Attorney for the State
17 Rodney Richey, Esquire
Attorney for Applicant
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Exhibits

9

For the Applicant:

10

Marked	Description	I.D.	Admitted
1	Affidavit	10	20

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13 For the Respondent:

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Marked	Description	I.D.	Admitted

15 None offered.

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1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at 10:00 a.m.)
4 MS. McCALLISTER: This is John Fitzgerald Kennedy
5 versus the State of South Carolina, 2016-CP-04-0610.
6 Your Honor, Mr. Kennedy was indicted at the
7 September 2012 term of the Anderson County Grand Jury
8 for one count of murder. He was represented on that
9 charge by Andrew Potter.
10 On December 2nd through 5th, 2013, he proceeded to
11 trial before a jury and Judge Maddox. He was found
12 guilty as indicted and was sentenced on December 5,
13 2013, to 30 years in prison.
14 Your Honor, he did file a timely notice of appeal,
15 and appeal was perfected by Robert Pachak from the
16 South Carolina Office of Appellate Defense.
17 The South Carolina Court of Appeals confirmed his
18 conviction on May 20, 2015. He filed a petition for a
19 rehearing, which was denied in an order filed June 24,
20 2015. They then petitioned for certiorari to the South
21 Carolina Supreme Court, and the court denied the
22 petition in an order dated February 26, 2016, and the
23 remittitur was returned on May 13, 2016.
24 Your Honor, Mr. Kennedy actually filed this
25 application for PCR on March 15, 2016, so while his

1 appeal was still pending; however, his appeal has since
2 been resolved, and it is properly filed, and he is
3 represented by Mr. Richey in this matter. They are
4 both present in the courtroom here today, and I will
5 allow Mr. Richey to speak at this time.
6 MR. RICHEY: Thank you, Your Honor. May it please
7 the court. Your Honor, as I discussed earlier with the
8 court, I was requesting a continuance in this case. As
9 the court can see from the application, I think trial
10 counsel will confirm that there was an issue of
11 third-party guilt. As of about a week or two weeks
12 ago, my client informed me that a relative that met a
13 person at a store who had told them that they knew who
14 actually killed the person. Then about a week -- last
15 week he informed me that another relative had some
16 information that someone else did this.
17 Now, the names and all that I was not provided
18 with at all. But my client would ask me to request a
19 continuance to look into that matter.
20 THE COURT: To your knowledge, have any of these
21 individuals gone to law enforcement or the solicitor's
22 office or even -- I mean, you say they haven't been to
23 your office and you don't know their names?
24 MR. RICHEY: I don't know their names. It's from
25 what my -- all I know is within the last week, my

1 client called me and told me this information.

2 THE COURT: Mr. Richey, as I stated when we had

3 our conference earlier, I don't think you have enough

4 definite information for the court to grant a

5 continuance, so I'm going to order that the case go

6 forward.

7 MR. RICHEY: Thank you, Your Honor.

8 We call Mr. Kennedy.

9 **JOHN FITZGERALD KENNEDY,**

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 THE CLERK: If you would take the witness stand

12 and state your name for the record.

13 THE DEFENDANT: I'm John F. Kennedy. I'm here to

14 plead my innocence. I didn't actually commit the

15 crime.

16 MR. RICHEY: Sit down.

17 THE COURT: Make sure you pull that microphone up.

18 DIRECT EXAMINATION

19 BY MR. RICHEY:

20 Q Sir, you're John F. Kennedy?

21 A Yes, sir.

22 Q And, Mr. Kennedy, are you currently in the

23 Department of Corrections?

24 A Yes, sir.

25 Q And what are you there for?

1 A I'm incarcerated for a charge that I didn't
2 commit.
3 Q And that charge is murder; is that correct?
4 A Yes, sir.
5 Q And you filed an application for postconviction
6 relief, correct?
7 A Correct.
8 Q And it's your position that your trial attorney,
9 Mr. Potter, did not effectively represent you, correct?
10 A That's correct.
11 Q Just by way of background for the court, this was
12 a gentleman that was murdered that you lived behind
13 him, is that correct, in a place behind him, and at
14 some point he was pretty much beat to death and you
15 were accused of killing him, correct?
16 A That's correct.
17 Q And it's your position, at the time of this
18 murder, you were not the person that did this, correct?
19 A That's correct.
20 Q And did you discuss that with Mr. Potter?
21 A Yes, sir.
22 Q You told him you were completely innocent?
23 A That's correct.
24 Q Okay. And you want this court to know that you,
25 in fact, did not murder this gentleman, correct?

1 A That's correct.
2 Q And you allege a third party did this, correct?
3 A That's correct.
4 Q Third party being not you?
5 A That's right.
6 Q And did you have -- did you present any
7 information to Mr. Potter about this third party?
8 A Yes. Yes, sir, I did.
9 Q Okay. And what information -- when you gave him
10 the information, what did he do?
11 A He spoke with me and told me it would totally be
12 up to him to who he subpoenaed in my defense.
13 Q Okay. So did he subpoena the person that actually
14 done it?
15 A No, sir, he didn't.
16 Q Who was that that actually done it?
17 A To my recollection, from when they -- from when we
18 all communicated with the people before the crime was
19 committed, there were Julia Moore, Ron Curry, and John,
20 which his lover's name is Jamie Manning. When I met
21 him, I only knew him by John. I didn't know his last
22 name. But he was never investigated in any kind of
23 way. He failed to investigate the entire case.
24 Q And you said you did not know John's last name at
25 the time?

1 A No, sir. In which I told him to contact Jamie
2 Manning, and Jamie Manning could also give him the
3 information who John was because they lived together.
4 Q And -- and what basis did you have that John
5 actually killed this gentleman?
6 A Well, I don't have concrete evidence that they
7 actually did it, but I heard them speak on the fact
8 that what they were going to do. Being that they were
9 using drugs at the time, I kind of thought that they
10 were just talking.
11 Q Okay. And so, essentially, it was sort of like
12 the state in your case, you have circumstances to
13 believe that these people done this, correct?
14 A Yes. The deceased had already told me not to get
15 involved with these people because they were -- they
16 were dangerous, they were drug users, they were -- were
17 connivers, and I was there to only detail vehicles.
18 But after hearing those three or four people speaking
19 on the subject of harming the deceased himself, now,
20 Ms. Moore has stated that she was going to kill the
21 MF --
22 MS. McCALLISTER: Your Honor, I would object to
23 the hearsay at this point.
24 THE COURT: We can stay away from hearsay in the
25 questioning, Mr. Richey.

1 BY MR. RICHEY:
2 Q Okay. Well, let me ask you this question. Based
3 off what Ms. Moore said, do you believe that she was
4 responsible for killing or a participant?
5 A Yes. Yes, sir. They had gotten into a previous
6 fight in which she states in her statement --
7 MS. McCALLISTER: Your Honor --
8 MR. RICHEY: Don't tell me what she said. Okay?
9 (Off-record discussion between the attorneys.)
10 BY MR. RICHEY:
11 Q Okay. So you believe it was a group of people
12 that actually got -- that was involved in harming this
13 guy, harming the victim?
14 A Yes, sir.
15 Q And you told Mr. Potter that?
16 A I did.
17 Q And what was his reaction when you told him that?
18 A I asked him to investigate this matter, and at
19 that point, he say he could -- could not gain access to
20 these individuals. And I told him exactly where to go
21 and who to look for, but that was no longer pursued at
22 that point.
23 Q Was this he couldn't find them or just --
24 A He said that he couldn't find them. His
25 investigator he said couldn't find them, and I thought

1 that was kind of impossible not to be able to find
2 someone where you have total access.
3 Q You said investigator. He had an investigator on
4 the case?
5 A Yes, sir, he did.
6 Q Did you talk to that investigator?
7 A For briefly, yes.
8 Q Did you tell him everything you knew?
9 A I pretty much could only tell him so many things.
10 They gave me a limited time to speak with him.
11 Q Go ahead. I'm sorry.
12 A They gave me a limited time to speak with the
13 investigator, and the investigator stated he couldn't
14 find these individuals.
15 Q Okay.
16 MR. RICHEY: Can I approach the witness, Your
17 Honor?
18 THE COURT: Yes, sir.
19 BY MR. RICHEY:
20 Q Mr. Kennedy, you have this affidavit, correct?
21 A That's correct.
22 Q Okay. And I'm going to have this marked as
23 Applicant's 1.
24 (WHEREUPON, Applicant's Exhibit Number 1 was
25 marked for identification.)

1 BY MR. RICHEY:
2 Q Okay. I'm going to give this document to you. Do
3 you recognize that document?
4 A Yes, sir, I do.
5 Q And what is that?
6 A This is a statement from Ron Curry speaking
7 exactly what had occurred because I asked him -- he got
8 incarcerated, and they had told me, the guys in the
9 unit had told me he had been there --
10 Q Okay. Let's get away from what they told you.
11 But that document is a statement of what?
12 A Okay. That document -- this is a statement of
13 what actually occurred, why him and Julia Moore did
14 what they did. He also states that, which I have
15 papers stating that.
16 Q Okay. And I think the first part of this is
17 addressed to Mr. Potter, correct?
18 A Yes.
19 Q So do you have any doubt whether he received it or
20 not?
21 A Do I have any doubt that Mr. Potter never received
22 it?
23 Q Let me ask you this way. Did you and Mr. Potter
24 go over that, the document that you have?
25 A No. No.

1 Q Y'all did not talk about it?
2 A No, sir.
3 Q Did you -- so how was it presented to him?
4 A It was sent to him through the request, but he
5 came back with something from Sherrod Sutherland. Now,
6 Mr. Sutherland states in a statement that I gave --
7 Q Hold on. Let me go back.
8 A Okay.
9 Q Because I want you to tell me how Mr. Potter got
10 it. You say he got it through what? How did he get
11 it?
12 A Okay. We're speaking of this statement here?
13 Q Yes, sir. We're speaking of that.
14 A What you do is you give it to the staff, and the
15 staff would have --
16 Q Staff where?
17 A At Anderson, Anderson Sheriff's Department.
18 Q The jail, right?
19 A Yes.
20 Q Okay.
21 A You present it to the staff. And when I presented
22 it to the staff, I asked him, would he please go make
23 me some copies, and he did, and he said he would have
24 this delivered to Mr. Potter ASAP.
25 Q So he got it through the jail; is that correct?

1 A That's correct.
2 Q Okay. And when he got it, you don't recall
3 whether he came to the jail and discussed it with you?
4 A Never did.
5 Q Okay. So are you positive that he got it?
6 A He had to have because it was sent back in my case
7 file.
8 Q Okay. You recall there was a family member
9 recently that was confronted by an individual?
10 A Yes.
11 Q Does that family member, does she know any of the
12 folks that's in that statement?
13 MS. McCALLISTER: Your Honor, I would object. I'm
14 not sure that he can testify what a family member
15 knows.
16 THE COURT: You have to lay some foundation for
17 that.
18 MR. RICHEY: Okay.
19 THE COURT: Mr. Richey.
20 BY MR. RICHEY:
21 Q Is the family member that we're discussing, she's
22 from Anderson County? Does she live in Anderson?
23 A That's correct.
24 Q And was she around at the time this -- these
25 events happened?

1 A Not to my recollection, but I think so.
2 Q Well, did she ever come to your house where you
3 were staying?
4 A Right. That's correct.
5 Q Okay. And -- and at that house, did she observe
6 any of the individuals in that statement, from your
7 recollection?
8 A Not to my recollection, I don't think.
9 Q But you were told by her that she met a lady that
10 knew who killed -- killed the person, right?
11 A Yeah. She said the lady --
12 MS. McCALLISTER: Your Honor, I think he's --
13 MR. RICHEY: I'm not asking for the truth. I'm
14 not asking for the truth that the action happened.
15 THE COURT: Well, stay away from hearsay, but you
16 have put in the record that your client believes that
17 he has family members that know who actually committed
18 this offense, although no definite information was
19 provided to the court, so that is noted for the record.
20 BY MR. RICHEY:
21 Q Okay. So that -- you have some issues, but that's
22 the nuts and bolts, that you believe that the
23 third-party investigation was not properly
24 investigated, correct?
25 A That's true.

1 Q Okay. And you allege that the chain of custody
2 was improper; is that correct?
3 A That's true.
4 Q And why is that?
5 A I truly believe there was a flawed investigation
6 because after Julia and Ron were stopped in the
7 victim's car at the boat landing, the car was returned
8 back to the victim's sister. The car was not
9 investigated. The car was not done through DNA
10 analysis. The two victims never had identification to
11 even drive the car, neither did they have driver's
12 licenses. Mr. Schaffer used to always have me to drive
13 for him.
14 Q And can you tell me who Mr. Schaffer is?
15 A Excuse me?
16 Q Can you tell me who that is? Mr. Schaffer, who is
17 that?
18 A The deceased.
19 Q Go ahead. You said you had to drive for him?
20 A Yes, sir. He would ask me to drive for him to
21 look for his car that Julia and Ron had drove away in.
22 Him and Ron would always have arguments in the front
23 yard. They would argue, and Ron's grandmother at the
24 corner of Echo Circle would come up there and try to
25 resolve the matter, but Julia slapped her, and they got

1 into an altercation.
2 Q Let me ask you this. You also have raised an
3 issue against appellate counsel; is that correct?
4 A Yes, sir.
5 Q And you believe appellate counsel was deficient in
6 failing to argue a Batson challenge?
7 A That's correct.
8 Q Why do you believe that?
9 A Well, I feel my jury was -- the jury was unfair.
10 I had an all-white jury after they -- they -- after
11 they disqualified two other jurors from a matter that
12 happened maybe 17 years ago or ten years ago dealing
13 with a -- I think dealing with an auto theft or
14 something of some nature, and they was trying to focus
15 to say that this case may deal with theft of an auto,
16 but I was already by Mr. Schaffer told to drive the car
17 because I was detailing the car. Not just one car,
18 many cars.
19 Q When this car was found, there was not any -- we
20 use the word excessive evidence found that you actually
21 committed this crime; is that correct?
22 A Excuse me. I didn't understand you.
23 Q Okay. There was not a lot of evidence -- there
24 was hardly any evidence found in the car that connected
25 you to this murder; is that correct?

1 A That's correct.

2 Q You believe that appellate counsel's ineffective
3 because they failed to raise other meritorious issues;
4 is that correct?

5 A That's correct.

6 Q What are those issues?

7 A Well, third-party guilt, chain of custody, the
8 flawed investigation by the sheriff office. There are
9 many issues that he could have presented instead of the
10 issue that he did present was the photo array, and it
11 was frivolous.

12 Q Say that again.

13 A The photo array was basically frivolous.

14 Q So you believe he was ineffective for not raising
15 those issues?

16 A Yes, sir, I do.

17 Q And do you believe, if he had raised those issues,
18 that the outcome would have been different?

19 A Correct. Had he raised those issues, the outcome
20 of the trial truly would have been different because I
21 never committed the crime.

22 Q And you believe that if Mr. Potter had properly
23 investigated the third-party guilt, then the outcome
24 would have been different?

25 A That's true.

1 Q Okay. Answer the questions that the attorney
2 general has for you.
3 THE COURT: All right. Ms. McCallister, your
4 witness.
5 MS. McCALLISTER: Thank you.
6 CROSS-EXAMINATION
7 BY MS. McCALLISTER:
8 Q Mr. Kennedy, how many times did you meet with
9 Mr. Potter before your trial started?
10 A How many times?
11 Q Yes, sir.
12 A Not to my recollection, but I assume maybe three
13 or four times at the most.
14 Q Okay. And do you recall this affidavit that you
15 and Mr. Richey were discussing, do you recall when you
16 sent that affidavit to Mr. Potter?
17 A Yes, ma'am. It was sent to him 7/25/2012.
18 Q So between July 25th, 2012, and the time your
19 trial started, how many meetings did you have with
20 Mr. Potter?
21 A Ma'am, I can't recollect that. I don't know.
22 Q Was it -- did you have any meeting with Potter
23 between July 25th and the time your trial started?
24 A Not to my recollection.
25 Q You didn't meet at all? Your trial didn't start

1 until December 2nd, 2013. So for over a year, you
2 didn't meet?
3 A Well, I have many requests that I've sent out
4 telling him that I need to meet with him pertaining to
5 my case. Never was replied to a lot of times.
6 Q So the three or four times that you met with
7 Mr. Potter, those all would have occurred sometime
8 before July 25th, 2012; is that right?
9 A I do believe so. Not to my recollection that I
10 remember him coming. I remember him coming to size me
11 up, telling me his paralegal will come and size me up
12 for trial. And that never happened because I come to
13 the court, and that's when the proceedings start.
14 Q Okay.
15 MS. McCALLISTER: Your Honor, I think that's all
16 the questions I have at this time.
17 THE COURT: All right. Mr. Richey.
18 MR. RICHEY: No questions.
19 THE COURT: All right.
20 Thank you, sir. You can step down.
21 Did you admit that exhibit?
22 MR. RICHEY: Yes, I did.
23 THE COURT: I don't remember it being admitted. I
24 remember you marked it. I don't remember it being
25 admitted.

1 MS. McCALLISTER: No objection.
2 THE COURT: So Applicant's Exhibit Number 1 would
3 be admitted.
4 (WHEREUPON, Applicant's Exhibit Number 1 was
5 admitted into evidence.)
6 ROBERT M. PACHAK,
7 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:
8 THE CLERK: If you would take the witness stand
9 and state and spell your last name for the reporter,
10 please.
11 THE WITNESS: I'm Robert M. Pachak, P-a-c-h-a-k.
12 DIRECT EXAMINATION
13 BY MR. RICHEY:
14 Q Sir, where are you employed?
15 A The Commission of Indigent Defense, a division of
16 Appellate Defense.
17 Q So, essentially, you're a lawyer that does
18 appeals, correct?
19 A Yes.
20 Q Do you recall doing the appeal for John F. Kennedy
21 in this case?
22 A Yes. It was about three years ago, I believe.
23 Q Okay. And I think you were in court when
24 Mr. Kennedy testified; is that correct?
25 A Yes.

1 Q And there was an issue -- there were essentially
2 three issues that he articulated he felt like you
3 should have appealed, the first one being the Batson
4 motion, the second one being the chain of custody, and
5 the third one would be third party. Do you have any
6 recollection why those issues were not briefed?
7 A The Batson issue, the person that was struck had a
8 criminal conviction for petty larceny. And the court
9 upheld the strike. And I didn't see any, really, issue
10 to argue on that on appeal.
11 Q So you're saying that charge was -- I mean, he
12 could be excluded legally because of that charge?
13 A I think he could of legally because of the charge
14 but also because larceny was involved in the case, and
15 they didn't want a juror sitting on a case that had a
16 larceny conviction.
17 Q Okay. And as to the chain of custody, do you
18 recall why that issue was not briefed?
19 A No, I don't.
20 Q And what about third-party liability?
21 A That issue was raised by trial counsel, and the
22 court would not allow it under the United States
23 Supreme Court case of *South Carolina vs. Holmes*, and I
24 was in agreement with that holding.
25 Q Okay. You're saying based off that case, it

1 wasn't a viable issue; is that what you're saying?
2 A Correct.
3 Q What's the name of the case again?
4 A I believe it was *South Carolina vs. Holmes*,
5 H-o-l-m-e-s. I've got the cite for it if you need it.
6 Q Okay. And what's the cite?
7 A It was 574 U.S. 319.
8 Q Okay. The issues you raised about the photo
9 lineup, can you tell me why that issue was raised, and
10 what do you believe was and should have been the
11 result?
12 A Well, there were several objections to the issue
13 by trial counsel. I believe that the photo lineup put
14 Mr. Kennedy's character in issue by suggesting that he
15 had a prior crime, and under *State vs. Tate*, that's
16 supposed to be improper, photo lineup introduced into
17 evidence, and I argued that on appeal. I was not
18 successful. And then I petitioned the South Carolina
19 Supreme Court to try to go higher up, but they denied
20 my petition.
21 Q So the actual appeal was not whether he could be
22 identified by the photo, it was prejudicial to him?
23 A Correct, because it put his character in issue.
24 Q Based off your review of the following record, do
25 you believe there's any other issue that could have

1 been raised?
2 A No. I thought the issue I raised was the
3 strongest issue for the appeal.
4 Q And this was not an Andrews brief, correct?
5 A No, it was not. I did a merits brief on it.
6 Q Let me ask you this question. Do you believe that
7 an Andrews brief would have been better than this issue
8 because the whole record would have been reviewed?
9 A No, I don't.
10 Q Thank you, sir.
11 THE COURT: All right, Ms. McCallister.
12 MS. McCALLISTER: Thank you.
13 CROSS-EXAMINATION
14 BY MS. McCALLISTER:
15 Q Mr. Pachak, just by way of background, how long
16 have you been doing appellate work?
17 A For 28 years.
18 Q 28 years, okay. And can you describe a little bit
19 of your practice. When you have an appeal that's
20 received, how do you determine which issue you're going
21 to raise?
22 A Well, when I get the file, I look through the
23 file, see what all is in it. I see if there are any
24 exhibits that are needed for the appeal. I read the
25 transcript, I take notes as I read the transcript, and

1 in my notes I put where there is an objection or where
2 there is not an objection and what I think is a good
3 issue or not. And then from that point, I will do the
4 legal research on the issue that I think is worth
5 raising, and I will write a brief and submit it to the
6 court.
7 Q Okay. These issues of the Batson motion and the
8 chain of custody and the third-party guilt, was there
9 any -- did you feel that there was any merit to any of
10 those issues?
11 A I didn't think there was enough -- any merit that
12 would result in a conviction being overturned.
13 Q So in your analysis after reading through the
14 transcript and doing legal research, you felt like the
15 photo lineup was the most --
16 A I thought that was the strongest issue.
17 Q -- the strongest issue?
18 A Uh-huh.
19 Q Okay. And the other issues were not raised
20 because of any -- were they not raised because of any
21 issues with preservation?
22 A I don't remember about the chain of custody issue,
23 but the other issues, the Batson and the third-party
24 guilt, those were raised. I just didn't think they had
25 merit in them.

1 Q Okay.
2 MS. McCALLISTER: That's all the questions I have,
3 Your Honor.
4 MR. RICHEY: No questions.
5 THE COURT: Thank you, Mr. Pachak. You can step
6 down.
7 Any objection to this witness being excused?
8 MS. McCALLISTER: No.
9 MR. RICHEY: None.
10 Call Mr. Potter.
11 **ANDREW TROY POTTER,**
12 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:
13 THE CLERK: State your name and spell your last
14 name for the reporter, please.
15 THE WITNESS: Andrew Troy Potter, P-o-t-t-e-r.
16 DIRECT EXAMINATION
17 BY MR. RICHEY:
18 Q Mr. Potter, where are you employed? Let me ask
19 you this. Do you recall representing Mr. Kennedy?
20 A I do.
21 Q And at the time you represented Mr. Kennedy, where
22 were you employed?
23 A I was trial counsel with the Tenth Judicial
24 Circuit Public Defender's Office.
25 Q And he was assigned to you, correct?

1 A Correct.
2 Q Okay. And this was a murder case, correct?
3 A Yes.
4 Q Okay. And you have been in the courtroom, so I'm
5 going to get to the heart of the issue here with this
6 third-party guilt. Okay? When you talked to
7 Mr. Kennedy, did he inform you that someone else could
8 be the possible murderer?
9 A He kept talking about hearing third-hand or
10 fourth-hand other people being involved making
11 allegations, specifically like, "I killed that dude,"
12 or something like that. That's the reason why we
13 engaged the investigator, to see if we can track down
14 those folks and get some more information, see if
15 there's something viable there for a defense.
16 Q Okay. So when he was hearing this, was he
17 incarcerated or was he on the street?
18 A He was incarcerated.
19 Q So he was hearing all this at the jail?
20 A Yes. There seemed to be a lot of chatter at the
21 jail.
22 Q About this incident?
23 A From what I gather from my client.
24 Q Okay. Okay. Well, you didn't have any other
25 information of this chatter other than from

1 Mr. Kennedy?
2 A No. It was straight from Mr. Kennedy.
3 Q Okay. You hired an investigator; is that correct?
4 A Correct.
5 Q What was your -- what was the duties you asked him
6 to do?
7 A Help investigate the case. He went out. I know
8 he went out and spoke with Mr. Kennedy, got his story
9 in regards to all this other information referencing
10 the third-party guilt, and went to try to track down
11 folks and was unable to get specifically this, I guess,
12 Julia Moore, I think her name was or any type of
13 information from those folks.
14 Q Okay. Let me go back. You said so he gave you
15 the names of people; you got it from somewhere, right?
16 A Yes.
17 Q Okay. And once you got the names, the
18 investigator went out and tried to talk to these
19 people; is that what you're saying?
20 A Tried to track them down and get statements from
21 them.
22 Q And when he came back to you, he told you he was
23 unsuccessful?
24 A Correct.
25 Q Were these people in Anderson County?

1 A I guess. I don't know. That's what the
2 investigator is engaged to do is if they're in Anderson
3 County, find them. If they're not, find them.
4 Q Okay. Do you know what kind of methods he used to
5 find them?
6 A I would assume the usual methods to investigate,
7 locate witnesses.
8 Q Did you discuss with Mr. Kennedy any difficulties
9 you had in finding these witnesses?
10 A Either I spoke with him personally or I gave him a
11 letter or something of that sort indicating that what
12 my investigator found, didn't find, and all that.
13 Q And that was a big crux of the case, correct?
14 A Well, I can still argue third-party guilt.
15 Q Right.
16 A And that's what we did at trial. We just didn't
17 say it was she who did it. It was we could still argue
18 third-party guilt. Somebody else did this. This is a
19 case of mistaken identity. Assumptions were made by
20 the decedent. And that's what we argued.
21 Q And but -- and I'll say this. In a perfect world,
22 finding those people would have been the better route,
23 if you could have?
24 A Well, I guess I don't think Ms. Whomever would
25 have gotten up on the stand and said, "I did that. I'm

1 sorry. John didn't." So I felt comfortable arguing
2 the third-party issue to the jury, even though I did
3 not have a specific person to point to.
4 Q As regards to the chain of custody of the evidence
5 that was found in the car, do you believe that that was
6 a viable appellate issue?
7 A No.
8 Q What about the Batson issue?
9 A The Batson issue, we raised it. Again, it was a
10 race neutral reason for the strike, so I feel it was
11 not a viable issue on appeal.
12 Q What about the photo lineup, do you believe that
13 was a viable issue on appeal?
14 A I would have to defer to appellate counsel. He
15 felt it was viable and he raised it, so I would have to
16 defer to him.
17 Q Tell me, in your opinion during this case, how
18 strong was the evidence against Mr. Kennedy?
19 A It was a challenging case. The decedent was
20 carried to the hospital. He was conscious. He was
21 interviewed by a detective at the hospital, in other
22 words, a recording taken where he identified my client
23 as being the person who assaulted him, and that was a
24 challenge. Plus the fact was my client was seen coming
25 out of the back door of the house by a third-party

1 witness. He was sweating, nervous, and got in a car
2 and left the scene, went away from the scene and
3 parked, and then left the car, abandoned the car. So
4 there was a lot of circumstances that made the case a
5 challenge.
6 Q He was not seen -- he was seen, and I use the
7 phrase, in the area of the trailer. They did not see
8 him come out of the trailer; is that correct?
9 A I can't remember specifically. I know there was a
10 witness there and...
11 Q And in terms of his appearance, there was never
12 really any testimony given about why he was sweating
13 and disraveled?
14 A No. There wasn't, no.
15 Q So would it be safe to say that this issue of
16 third party was important because that was -- let me
17 say it this way. You were unable to contact those
18 folks?
19 A Correct.
20 Q But that evidence in itself could have helped him
21 if it was evidence tending to point to someone else?
22 A I don't know. I mean, we argued third-party
23 guilt. We argued that John was not responsible for
24 this, and I don't know -- again, I don't think whether
25 I could point the finger to one person or to someone

1 else would have benefitted him. We did argue the
2 third-party guilt. We argued that to the jury, and...
3 Q Was that -- was there any investigation done as to
4 the cause of the death? I mean --
5 A I read the autopsy report, looked at the photos of
6 the autopsy, got an opportunity to cross-examine
7 Dr. Woodard on the stand.
8 Q Do you believe that it was necessary to hire an
9 outside expert to look at the autopsy report?
10 A No.
11 MR. RICHEY: Thank you. Answer any questions the
12 AG may have.
13 CROSS-EXAMINATION
14 BY MS. McCALLISTER:
15 Q Just going back to your last answer there, can you
16 explain a little bit why you didn't believe it would be
17 necessary to hire an expert in this case?
18 A In regards to the cause of death?
19 Q Yes, or -- yes, starting with -- let's start with
20 cause of death.
21 A Well, in regards to the cause of death, he was
22 beaten. If I remember correctly, beaten by a pan, a
23 cast iron pan. And it wasn't an issue of whether he
24 died as a result of something else.
25 Q Okay.

1 A There wasn't -- I mean, he was -- there was no
2 issue that I could see there that could be raised as a
3 defense on behalf of my client.
4 Q So the issue was who inflicted the injuries, not
5 what the injuries were; is that fair to say?
6 A Correct.
7 Q In terms of like DNA evidence or DNA expert, did
8 you ever consider hiring someone in that capacity?
9 A No.
10 Q Can you explain?
11 A It wasn't an issue we felt needed to be explored.
12 Q You said, I think, when you were summarizing the
13 evidence, that one of the main pieces of evidence
14 against Mr. Kennedy was that the victim gave,
15 essentially, a dying declaration at the hospital, is
16 that correct, that identified him as the perpetrator?
17 A Correct. He identified him as the one who
18 assaulted him. And the argument to the jury was
19 somebody else did this, John was the first person who
20 came upon the scene and found him like that. And one
21 of the arguments was essentially a punch-drunk person
22 doesn't have full understanding of the faculties, that
23 the first person he sees is John. John comes upon the
24 scene, finds him assaulted, and automatically assumes
25 John was the person. That's why he identified John.

1 That was the argument we made to the jury.
2 Q That's how you explained how it could still be
3 third party even though he was identified?
4 A Correct. Exactly.
5 Q Do you recall objecting to chain of custody issues
6 during the course of the trial?
7 A I don't have any independent recollection if I did
8 or didn't.
9 Q Is that something that you would normally look at
10 to make sure that there's no issue there?
11 A We -- yes. Yes.
12 Q Okay. Do you have -- do you believe that you did
13 that in this case?
14 A Yes.
15 Q Looked at that as an issue?
16 A I did.
17 Q Do you recall how many times you met with
18 Mr. Kennedy in preparing this case?
19 A Numerous times. There were multiple meetings at
20 the detention center. There were multiple letters sent
21 to him, responses to his letters, so there was a number
22 of face-to-face meetings and a number of communication
23 between he and I by way of letter.
24 Q Okay. I believe you said you used an investigator
25 as well?

1 A That's correct.
2 Q Is that someone that was with your office or --
3 A Independently hired.
4 Q Independently hired, okay.
5 A Yes.
6 Q And that person went and met with Mr. Kennedy as
7 well?
8 A Yes.
9 Q Okay. How many times -- can you give me a
10 ballpark figure how many times you think you met over
11 the course of the representation?
12 A How many times who met with him?
13 Q You and Mr. Kennedy met.
14 A Face-to-face, a minimum, at least ten.
15 Q Okay. And you were aware of the existence of that
16 affidavit that Mr. Kennedy has brought up today; is
17 that correct?
18 A Yes.
19 Q And did you receive that?
20 A I believe I did.
21 Q And did you -- what did you do with that, if
22 anything?
23 A Whatever I -- I did what you -- it was part of the
24 analysis on how to prepare the case for trial. What
25 specifically I did with it, I can't recall.

1 Q Okay. The names that are listed in that affidavit
2 that he's brought up here today, Ron Curry and Julia
3 Moore, were you aware of those people?
4 A I was aware.
5 Q Were those some of the people that you were trying
6 to track down?
7 A That's some of the folks the investigator was
8 trying to track down.
9 Q Do you recall if you met with Mr. Kennedy after he
10 sent that documentation to you?
11 A I met with him multiple times after that.
12 Q And did you explain to Mr. Kennedy that you were
13 having difficulty locating the people that he was
14 requesting you to locate?
15 A Yes. I explained to him what the investigator
16 found, what the investigator didn't find and all that.
17 MS. McCALLISTER: Beg the court's indulgence, Your
18 Honor.
19 I think that's all the questions I have.
20 THE COURT: Any redirect?
21 MR. RICHEY: One moment, Your Honor.
22 No other questions for the witness.
23 THE COURT: Thank you, Mr. Potter. You can step
24 down.
25 THE WITNESS: May I be excused?

1 THE COURT: Any objection to this witness being
2 excused?
3 MR. RICHEY: None.
4 THE COURT: You are excused.
5 THE WITNESS: Thank you, Judge.
6 MR. RICHEY: That's all, Your Honor.
7 THE COURT: Anything further from the State?
8 MS. McCALLISTER: No, Your Honor.
9 THE COURT: Let me hear a brief summation from
10 each attorney.
11 Mr. Richey.
12 MR. RICHEY: May it please the court, Your Honor.
13 This case was a third-party incident, and the role that
14 we're going to take at this point, as I've discussed
15 this with my client, is we're going to have some time
16 by getting an order together, the order being signed,
17 that if we find this information, we'll submit a 59(e)
18 motion.
19 THE COURT: Ms. McCallister, anything else for the
20 record?
21 MS. McCALLISTER: No, Your Honor. I mean,
22 obviously the State believes that he has not proved his
23 case on these allegations. Thank you.
24 THE COURT: Well, I've heard the testimony, and
25 it's a large transcript, a lot of materials. I'm going

1 to take this under advisement. I want to read through
2 the transcript just to see what that says and the
3 material submitted, so I'll have my law clerk e-mail
4 you a decision.
5 MR. RICHEY: Thank you, Your Honor.
6 MS. McCALLISTER: Thank you, Your Honor.
7 (WHEREUPON, proceedings concluded at 10:49 a.m.)
8 ***END OF REQUESTED TRANSCRIPT OF RECORD***
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1 Certificate of Reporter

2

3 I, Diane L. Marcengill, Official Court Reporter

4 for the Tenth Judicial Circuit of the State of South

5 Carolina, do hereby certify that the foregoing is a

6 true, accurate, and complete transcript of record of a

7 portion of the proceedings had and evidence introduced

8 in the trial of the captioned case, relative to appeal,

9 in the Circuit Court for Anderson County, South

10 Carolina, on the 5th day of October 2017.

11 This transcript may contain quoted material. Such

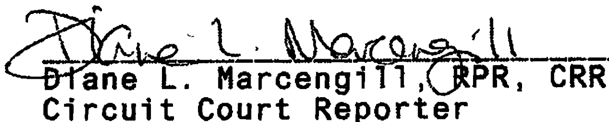
12 material is reproduced as read by the speaker.

13 I do further certify that I am neither of kin, counsel,

14 nor interest to any party hereto.

15 July 24, 2018

16

17 

Diane L. Marcengill, RPR, CRR

18 Circuit Court Reporter

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1 Certificate of Reporter

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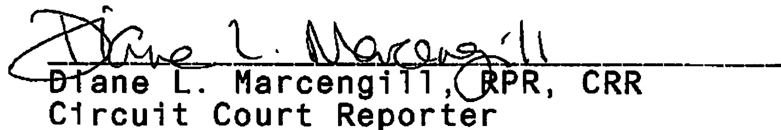
17 
18 Diane L. Marcengill, RPR, CRR
Circuit Court Reporter
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OFFICE OF THE SHERIFF

ANDERSON COUNTY SC
DETENTION DIVISION

Inmate Request

Inmate's Name: GLC-2012003929 Cell: ______ Date: 07-25-12

Note: This request is to be used only when the Officer assigned to your cell is unable to facilitate your request. Do not submit multiple requests about the same issue or submit the same request to several staff members at the same time. Do not attempt to use this form as a grievance or medical request as it will not be answered.

Request Submitted To: Andrew T. Potter; Public Defender

Request: The witness (Raw Court) to the incident approached the cell conversing about the events leading up to the incident. He said that the woman (Julia moore), wanted to spend some money with him and she had a large amount of cash. He noted that the woman (Julia moore) Purchased him Approx/or about 2 grams of cocaine (Powder); and they went to a motel/Hotel and did whatever for the night.

Inmate's Signature: [signature] Docket: 2012003929

Officer Receiving: ______

Officer's Signature: ______

Response: ______

Staff Member Responding: ______

Staff Member's Signature: ______

FILED-CLERK'S OFFICE
ANDERSON SC
2017 OCT -9 AM 9:10
COMMON PLEAS AND GENERAL SESSIONS

EXHIBIT
Applicant
1

Page #2

S.L.C(12) after spending large sums of cash. The alleged*
Suspect (Julia moore) gave the witness (Ron Curry)
Apprx./or About $[illegible] in cash. He also noted that
they: (Julia moore + Ron Curry) were gone in
the Plaintiff car for Apprx (#2) days.
On the day leading up to the incident, He
noted that they were at the lake that morning.
But no specific location). The two subjects
julia and Ron were getting High.
Ron noted that julia kept stating "If I see him,
I will kill that motherfucker"!; "I swear I
will"! Stated and noted by suspect of Interest
(Ron Curry). After that was said he stopped his
story. He (RC) said It was alleged that julia
Tried to put him in the situation by spending
money with him! It was also alleged and noted
by (R.C) that she (Julia moore) emptied the
bank Account of the now deceased Plaintiff.
He also noted (R.C), that he was caught in the
deceased Plaintiffs car with julia moore as the
vehicle operator. Also he noted that julia moore
is still staying in the deceased plaintiffs house, even
after the incident!

-S.L.C[12]

Page #3

I (docket#) 201200392[illegible]*, Don't have any knowledge
of events th[illegible] occurred, besides what was
Shared with m[illegible] by the Defendant (R.C)
I don't have [illegible]ior relationships/friendships,
with none of the Defendents, suspects, nor plaintiff,
that's listed on [illegible]is case.
I 20120039[illegible]9, haven't recieved any offers from
Defendent (J.F.K[illegible], of any monetary statues or real estate
Pay-offs for this written document. I was only witness
to the conversa[illegible]tion held between (Ron Curry & John Kennedy).
I do Soley Sw[illegible]ar, that this document is the truth
and/or not fabrica[illegible]ed or falsified.
I have read th[illegible] statement to J.F.K, and he
has agreed th[illegible] this statement is truthful.
This statemen[illegible] is to be given to Attorney Andrew T. Potter,
Public Defende[illegible]
If this doc[illegible]ment is found to be falsified or
used illegally, [illegible]wsuits may ~~[illegible]~~ acquire.
witness: Santonio [illegible]. Carson B' X Date: July 25, 2012
Witness [signature] X Date: July 25, 2012
witness D#: 20[illegible]2003929 X Date: July 25, 2012

(Sign) Defendant: [signature] X Date: July 25, 12
(Print) Defendant: JO[illegible]N F. KenNedy X Date: July 25, 12
Defendant: D# 20[illegible]2002013 X Date: July 25, 12

A TRUE COPY
APR 10 2018
CLERK OF COURT
FILED-CLERK'S OFFICE
ANDERSON SC

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS OF THE TENTH JUDICIAL CIRCUIT
John F. Kennedy, #358076,	)	Case No.: 2016-CP-04-0610
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of Applicant's post-conviction relief (PCR) application filed June 16, 2016. Respondent made its Return on February 14, 2017. An evidentiary hearing into the matter was convened on October 4, 2017, at the Anderson County Courthouse. Rodney Richey, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Andrew Potter, Esquire, and Applicant's appellate counsel, Robert M. Pachak, Esquire, testified for the State.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the September 2012 term of the Court of General Sessions for Anderson County for one count of murder (2012-GS-04-02002). Applicant was represented by Andrew Potter, Esquire (Counsel). On December 2-5, 2013, Applicant proceeded to trial before the Honorable J. Cordell Maddox and a jury. He was found guilty as indicted. On December 5, 2013, Judge Maddox sentenced Applicant to thirty years' imprisonment.

Applicant filed a timely notice of appeal. An appeal was perfected by Robert M. Pachak, Esquire (Appellate Counsel), of the South Carolina Office of Indigent Defense – Division of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction on May 20, 2015. State v. Kennedy, Op. No. 2015-UP-256 (S.C. Ct. App. 2015). Applicant filed a petition for rehearing, which was denied by an order filed June 24, 2015. Applicant then petitioned for a writ of certiorari in the South Carolina Supreme Court, which was denied in an order dated February 16, 2016, and the Remittitur was returned on May 13, 2016.

SUMMARY OF FACTS ADDUCED AT TRIAL

On March 30, 2012, seventy-six-year-old Claud Schaffer Scott (Victim) sold a van to a woman named Margaret Conwell around lunchtime. Tr. pp. 338-40. Conwell wrote Victim a $1500 check in exchange for the van. Tr. p. 340. Police then obtained surveillance stills from the bank where Victim cashed the check. Tr. pp. 340-41. Those stills showed Victim and Applicant in the parking lot of People's Bank around 1:09 p.m. Tr. pp. 341, 456-57. The two then entered the bank, and Applicant sat in the lobby while Victim cashed the check. Tr. pp. 341-42, 458-63. Applicant and Victim left the bank around 1:15 p.m. Tr. p. 342-43, pp. 464-66. Police never recovered the $1500 Victim received from that check. Tr. p. 343.

Later that evening, Kimberly King, a family friend and neighbor, went to look in on Victim because he had been feeling poorly when she was at his home earlier that day. Tr. pp. 146-47, 150-51. When King arrived at Victim's home around 5:30 p.m., she found the front door was closed and locked, which was unusual as the door was normally open wide or, if it was closed, unlocked. Tr. pp. 151-52. King began knocking on Victim's door. Tr. p. 152. Applicant, who was living in a camper behind Victim's home, came out from the back of the house and told King that Victim was asleep and did not want to be bothered. Tr. pp. 148, 152-

53. King noticed Applicant "was real sweaty and just looked weird." Tr. p. 152. King told Applicant she was "going in anyway" and asked if the back door was locked. Tr. p. 153. According to King, Applicant said, "no" but then "he fl[ew] around to the back" and locked the back door to prevent her from entering. Tr. p. 153.

Applicant then asked King to go with him to the store, but she refused. Tr. pp. 153-54. Applicant got into a blue car belonging to Victim and drove off. Tr. p. 153. Surveillance video from a Bi-Lo parking lot about eight miles from Victim's home shows Victim's blue Mercury Mystique enter the parking lot at approximately 6:04 p.m., and a black male parks the car and then runs away on foot. Tr. pp. 333-37, 467-68. According to Investigator Brent Simpson, the lead investigator on this case for the Anderson County Sheriff's Office, it takes about fifteen or sixteen minutes to drive from Victim's home to that Bi-Lo. Tr. p. 337.

Meanwhile, King went back around to the front of Victim's house and started beating on the door. Tr. pp. 153-54. King heard Victim say, "[G]o away. I don't want to be bothered now. Go away." Tr. p. 154. King identified herself and told Victim to open the door. Tr. p. 154. Victim complied, then immediately collapsed in the doorway. Tr. p. 154-55. King could tell Victim had been beaten very badly, and she called 9-1-1. Tr. pp. 154-55. She told the 9-1-1 dispatcher that Applicant had just left Victim's trailer and specifically identified him as "John F. Kennedy, [who] calls himself JFK" to the 9-1-1 dispatcher. Tr. p. 157. King also gave a statement that evening to Investigator Stan Ashley and identified the person she saw leaving Victim's trailer as "John Fitzgerald Kennedy, called himself JFK." Tr. p. 159. King picked Applicant's photo from a lineup that evening as well. Tr. pp. 159-60.

Another neighbor, David Evans, came over to assist King before emergency personnel arrived. Tr. pp. 157-58, 172-75. Evans testified he knelt down beside Victim and asked what happened, and Victim responded, "John, the black guy, hit me." Tr. p. 177-78.

Paramedics arrived and transported Victim to the hospital. Tr. pp. 196-98. Multiple police officers responded to the hospital, including Brandon Dunn, who overheard Victim tell emergency room staff that "John did it." Tr. p. 201, 204. Detective McKindra Bearden spoke to Victim at the hospital. Tr. pp. 206-07. Bearden testified, "I said, do you know who done it? And he said, Josh. And I said, Josh? And he goes, no, John. I had misunderstood him, but he did correct me. He said John done it." Tr. p. 208.

Investigator Simpson also met with Victim at the hospital and took Victim's statement. Tr. p. 329. Simpson recorded the entire statement using his cell phone. Tr. p. 329. In the recording, Victim identifies "John" as the man who beat him. Tr. pp. 112-14, 331. After giving his statement to Simpson, Victim went unconscious and never regained consciousness. Tr. pp. 331-32. Victim passed away from his injuries around 7:20 a.m. on March 31, 2012. Tr. p. 332.

Applicant turned himself in on April 1, 2012. Tr. p. 346. At that time, police collected the clothing Applicant was wearing and sent it to the lab at the South Carolina Law Enforcement Division (SLED) for testing. Tr. pp. 346-47. SLED forensic scientist Catherine Leisy analyzed two cuttings from Applicant's shorts and found the presence of blood. Tr. p. 311. She also developed DNA profiles from the cuttings and found that the DNA matched that of Victim. Tr. pp. 311-12. According to Leisy's testimony, there was a one in two hundred and fifty quadrillion chance of randomly selecting an individual unrelated to Victim with a DNA profile matching the DNA found on the shorts. Tr. pp. 311-12. Leisy also analyzed swabs from a skillet

found at the scene. Tr. pp. 310-11. Those swabs tested positive for blood, and the DNA matched that of Victim. Tr. pp. 310-11.

ALLEGATIONS

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

1. Ineffective Assistance of Trial Counsel
   a. Failure to thoroughly investigate and pursue facts and circumstances regarding third-party guilt defense.
   b. Failure to "properly challenge breaks in chain-of-custody upon correct grounds."
   c. Failure to "identify specific U.S. Constitutional violations upon which Applicant bases his claims."
2. Ineffective Assistance of Appellate Counsel
   a. Failure to "raise and argue the trial court's ruling on the Batson[1] challenge regarding defendant's right to be afforded an impartial jury comprised of a fair cross-section of peers and society."
   b. Failure to "raise and argue other meritorious issues which, through contemporaneous objections, were preserved for review."
3. 14th Amendment Due Process violation
   a. "Applicant suffered due process violations and was prejudiced by breaks in chain-of-custody and mishandling of clothing and blood evidence."
   b. Applicant suffered "due process violations and was prejudiced by law enforcement's flawed investigations and mishandling of potential exculpatory evidence."

In its Return, the State moved for summary dismissal of Applicant's Due Process claims on the ground that such claims are direct appeal issues which are not proper in a PCR

[1] Batson v. Kentucky, 476 U.S. 79 (1986).

proceeding. That motion was not ruled on prior to the evidentiary hearing and is addressed below.

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 also had before it the records of the Oconee County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the application, the State's Return, and the trial transcript. 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, Applicant bears the burden of proving the allegations in his 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, Applicant must prove "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. Butler, 286 S.C. at 442, 334 S.E.2d at 814. 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. A PCR 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 117, 386 S.E.2d at 625. First, Applicant must prove 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). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

1. Ineffective Assistance of Trial Counsel

Applicant alleges Counsel was ineffective for failing to properly investigate and pursue a third-party guilt defense, for failing to properly challenge the chain-of-custody of the State's evidence, and for failing to identify specific violations of Applicant's Constitutional rights.

"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 trial counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (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).

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).

Applicant testified his position is that he did not commit this murder, and he told Counsel this. Applicant testified he gave Counsel the names of potential witnesses Julia Moore, Ron Curry, and John and Jaime Manning, but to Applicant's knowledge, Counsel did not do any investigation. Applicant testified he did not have concrete evidence implicating anyone in that group, but he had heard them discussing what they were going to do to Victim. Applicant testified he believed they were involved.

Applicant further testified Counsel told him he could not get in contact with any of those people, even though Applicant told him where to go and who to look for. Applicant testified Counsel told him it was his (Counsel's) decision as to who to subpoena to testify. Applicant also testified he spoke briefly to an investigator and gave him the same information, but the investigator told him he could not find any of these people.

Applicant introduced a document purporting to be an affidavit from Ron Curry, which Applicant testified he sent to Counsel while he was in jail awaiting trial. Applicant testified he knew Counsel had received it because it was in the documents sent back to Applicant when he requested a copy of his file after the trial. Applicant testified Counsel never mentioned the affidavit or discussed it with him. On cross-examination, Applicant testified he met with Counsel three or four times, all of which were before July 25, 2012, which was the date he sent the affidavit to Counsel.

Applicant testified he felt the chain-of-custody for the DNA evidence introduced at trial was improper because Julia Moore and Ron Curry were stopped in the car by police, and the car

was later returned to Victim's sister. According to Applicant, no DNA testing was ever conducted on the car.

Counsel testified he discussed the third-party guilt issue with Applicant multiple times, including meetings after Counsel received the purported affidavit from Ron Curry. Counsel explained all of Applicant's information was third- or fourth-hand from other people who were talking about the case. Counsel testified, according to Applicant, there was a lot of talk about this incident in the jail, but Applicant was the only person who ever said so.

Counsel testified he hired an investigator to help him speak with Applicant and gather information on the third parties. Counsel testified the investigator got the names from Applicant and attempted to get statements but was unsuccessful. In addition, Counsel testified he felt it was unlikely anyone would admit to being involved if they were called as witnesses. Counsel testified he explained to Applicant the difficulty he had with locating the witnesses, either in person or by letter. Counsel also testified he still felt he could argue third-party guilt without having a specific person to name as the perpetrator.

Counsel testified he did not believe the chain of custody issue was viable on appeal. The record reflects Counsel made the appropriate objections, all of which were overruled on the basis the State had established a substantial chain. Tr. pp. 291-94. Counsel also testified he made a Batson motion, and the State gave a race-neutral reason for striking the juror. The record reflects that issue was argued at the close of jury selection and was preserved for appeal. Tr. pp. 44-45.

Counsel further testified the evidence against Applicant was "challenging," particularly because Victim identified Applicant while he was still conscious at the hospital. Counsel testified he explained to Applicant the concept of a dying declaration and how that could be used

at trial. Counsel also testified Applicant had been seen coming out of the house, and he had no way to explain his appearance.

Counsel testified he prepared for trial by reading the autopsy report, reviewing the files, and preparing cross-examination for the State's witnesses. Counsel testified he argued third-party guilt, and in his opinion, he did not think locating the witnesses would have helped his argument. Counsel also testified he did not believe the DNA testing of the car discussed by Applicant was necessary in this case.

This Court has reviewed the trial court record and has heard the testimony of both Applicant and Counsel. The Court finds Counsel's testimony on these issues to be credible, while also finding Applicant's testimony is not credible. The Court finds Counsel was not deficient in his investigation of the third-party guilt issue as he hired an investigator to attempt to track down the witnesses named by Applicant, and when he was unable to do so, he communicated that fact to Applicant. Further, Counsel still presented and argued a third-party guilt defense to the jury using the information and witnesses he had available. The Court also finds Counsel appropriately handled the chain-of-custody issue at trial by making timely objections, which were overruled. The Court does not find any constitutional violations which Counsel failed to identify or protect on the record for appeal.

Therefore, this Court finds no deficiency in Counsel's representation, and the Court notes even without the forensic evidence, the State's case against Applicant was overwhelming – namely, Victim's dying declaration naming Applicant as the perpetrator and Kimberly King's testimony regarding Applicant's behavior immediately prior to her discovery of Victim's injuries. Applicant's allegations of ineffective assistance of counsel are hereby denied and dismissed.

2. <u>Ineffective Assistance of Appellate Counsel</u>

Applicant also alleges Appellate Counsel was ineffective for failing to brief meritorious issues. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). When analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Id. at 616, 524 S.E.2d at 836. Thus, Applicant must show (1) Appellate Counsel's performance was deficient, and (2) Applicant was prejudiced by Appellate Counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Applicant testified he felt he had a valid Batson issue for appeal because his jury was all white. Applicant testified two jurors were disqualified "over things that happened ten-plus years ago." Applicant also testified he wanted Appellate Counsel to raise the issues of third-party guilt, chain of custody, and flawed investigation by the Sheriff's Office. Applicant testified the photo lineup issue actually raised by Appellate Counsel was "frivolous." Applicant testified he believed the outcome on appeal would have been different had Appellate Counsel raised the other issues, though he did not offer any evidence other than his conclusory assertion.

Appellate Counsel testified he had been practicing law for twenty-eight years, and represented Applicant through his position as an appellate defender with the South Carolina Commission on Indigent Defense. Appellate Counsel explained his practice for determining

which issue or issues to raise is to read the transcript and take notes regarding preserved issues, then conduct legal research, and write the brief.

Appellate Counsel testified he could not recall any issues regarding chain of custody. He also testified both the Baston issue and the issue of third-party defense were preserved and could have been raised, but he felt there was no merit to those issues. Appellate Counsel explained the juror struck by the State had a conviction for petit larceny, which was an issue in Applicant's case. He explained, in his opinion, the juror was legally excluded. Additionally, Appellate Counsel testified he agreed with the trial court's analysis of the third-party guilt issue. Appellate Counsel opined he did not think the testimony proffered by Counsel was proper under the Holmes[2] standard, which was cited by the trial court in denying Counsel's request to question the investigator regarding Ron Curry and Julia Moore. Tr. pp. 348-57.

Appellate Counsel further testified he chose to file a merits brief, which is more favorable for Applicant than a brief pursuant to Anders.[3] Appellate Counsel testified he raised the strongest issue Applicant had. Appellate Counsel explained he chose the photo lineup issue because Counsel made the appropriate objections, and he felt its admission prejudiced Applicant because it improperly put Applicant's character in issue by implying he had a previous criminal history.

In Smith v. Robbins, the United States Supreme Court explained that appellate counsel "who files a merits brief need not (and should not) raise every non-frivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." 528 U.S. 259, 288 (2000). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to

[2] Holmes v. South Carolina, 547 U.S. 319 (2006).
[3] Anders v. California, 386 U.S. 738 (1967).

appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

This Court has reviewed the trial record and finds Appellate Counsel was not deficient. Appellate Counsel articulated sound strategic reasons for why he chose not to raise the Batson and third-party defense issues requested by Applicant. See Thrift v. State, 302 S.C. 535, 539-40, 397 S.E.2d 523, 526 (1990) ("The testimony of petitioner's appellate attorney that she reviewed the requested charge and the charge as given and consciously decided not to brief the issue, clearly supports the PCR judge's finding that appellate counsel was not ineffective."). Further, Counsel testified he did not believe the chain-of-custody issue had any merit, and based on this Court's review of the transcript, this Court agrees. Appellate Counsel also explained his reasoning for raising the photo lineup issue. Appellate Counsel filed a merits brief, and the Court of Appeals found the issue was preserved and indeed ruled on its merits. Applicant has not provided any evidence whatsoever to meet his burden of showing the issues not raised were "clearly stronger than those actually raised on appeal." This allegation is therefore denied and dismissed.

3. Due Process Violations

Applicant also alleges he "suffered due process violations and was prejudiced by breaks in chain-of-custody and mishandling of clothing and blood evidence. . . and was prejudiced by law enforcement's flawed investigations and mishandling of potential exculpatory evidence." To the extent these claims can be construed as distinct from Applicant's allegations of ineffective assistance of trial counsel, this Court finds they should be dismissed as they raise direct appeal issues which are not proper in PCR.

Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). "Errors in a[n Applicant's] trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Id. "In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party's motions or objections. In PCR, the focus usually is upon alleged errors made by trial or plea counsel." Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000). Therefore, when an applicant asserts the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, he generally must frame the issue as one of ineffective assistance of counsel. Id. (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (holding issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Richardson v. State, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993) (explaining that defendant who pleads guilty upon advice of counsel may only attack the voluntary and intelligent character of plea by showing that advice he received from counsel was not within range of competence demanded of attorneys in criminal cases)).

Applicant could have raised these issues at trial or on appeal, and his failure to do so has waived these allegations as grounds for relief. Notwithstanding the procedural bar, this Court finds Applicant has not presented any evidence to substantiate these claims, and therefore deems them abandoned. Therefore, these allegations are denied and dismissed.

CONCLUSION

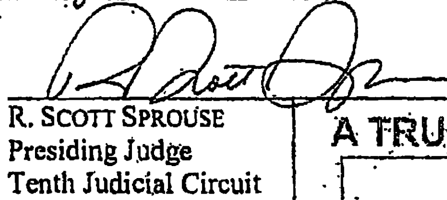
Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel and Appellate Counsel were not deficient, nor was Applicant prejudiced by either counsels' representation. 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 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, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

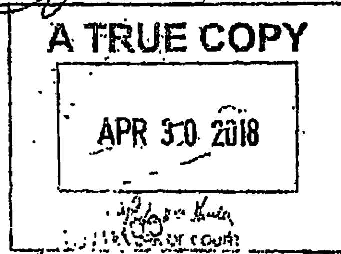
1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 18 day of April, 2018.



R. SCOTT SPROUSE
Presiding Judge
Tenth Judicial Circuit

Walhalla, South Carolina



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