ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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DEC 27 2018

S.C. SUPREME COURT

December 21, 2018

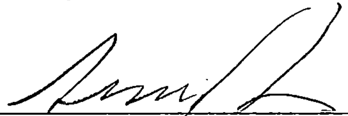
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Sylvester King v. State
2018-CP-23-3013

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Greenville County Clerk of Court

330 E. COFFEE ST.• GREENVILLE/SC • 29601
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

2018-CP-23-3013

Sylvester King, ... Appellant,

v.

The State, ... Respondent.

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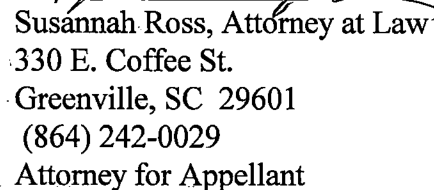
S.C. SUPREME COURT

NOTICE OF APPEAL

Sylvester King appeals the Honorable Alex Kinlaw, Jr.'s Order of Dismissal filed November 7, 2018, and denial of the Applicant's Motion to Alter or Amend filed December 14, 2018.

This 21 day of December 2018.



Susannah Ross, Attorney at Law
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Other Counsel of Record:
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STATE OF SOUTH CAROLINA	**IN THE SUPREME COURT**
COUNTY OF GREENVILLE	
SYLVESTER KING, APPELLANT,	
VS.	**CERTIFICATE OF SERVICE BY MAIL**
THE STATE OF SOUTH CAROLINA, RESPONDANT.	

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DEC 27 2018

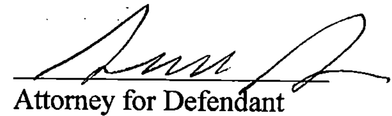
S.C. SUPREME COURT

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Mr. Christian Saville
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211



Attorney for Defendant

This 21 **day of** December **2018**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT

Sylvester Keejaun King, #366399
Applicant,

v.

State of South Carolina,

Respondent.

2018-CP-23-3013

ORDER OF DISMISSAL

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Paul Wickensimer CCC GVL SC

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S.C. SUPREME COURT

This matter comes before the Court by way of an application for post-conviction relief filed on May 24, 2018, by Sylvester Keejaun King, (Applicant). Respondent made its Return on September 4, 2018. An evidentiary hearing into the matter was convened on October 24, 2018, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Susannah C Ross, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Alex Kornfeld, Esquire also testified. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was indicted by the Greenville County Grand Jury during the August 2014 Term for one count of Murder and one count of Possession of a Weapon during the Commission of a Violent Crime (2014-GS-23-7457). Applicant was represented by Alex Kornfeld, Esquire. The State was represented by Assistant Solicitors Judith M. Munson, Esquire and Brittany Scott, Esquire, both of the Thirteenth Judicial Circuit Solicitor's Office. On November 30 – December 2, 2015, Applicant proceeded to a trial by a jury before the Honorable Victor C. Pyle, Jr., Circuit Court Judge. Applicant was found guilty of both charges on December 2, 2015. (Tr. 417). Judge Pyle sentenced Applicant to life confinement for the murder conviction and five years confinement for the possession of a weapon during the commission of a violent crime conviction. (Tr. 422).

Applicant timely served and filed a Notice of Appeal. On appeal, Applicant was represented by Robert M. Dudek, Esquire, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. Applicant's appeal was perfected with the filing of a Final Brief of Appellant. In his Brief, Applicant asserted two arguments. First, he contended the court erred by allowing Sheriff's Deputy Suber to testify the decedent's son, who was a prime suspect in the murder, told him that he believed his mother's boyfriend [Applicant] was the murderer because he kept saying they were "hiding from him," since this testimony was not admissible as an excited utterance, and it was inadmissible prejudicial hearsay. Second, he argued the court erred by allowing Greenville Sheriff's Investigator Peeples to testify that she heard someone at Applicant's place of business allegedly told someone else that Applicant had had "called into work," and told someone at work that "he

was a victim of a home invasion where he was injured," since this testimony was inadmissible prejudicial hearsay. The State, through Assistant Attorney General Alphonso Simon Jr. filed its Final Brief of Respondent. The South Carolina Court of Appeals issued an opinion affirming the convictions on May 9, 2018. (Attachment No. 6). The Remittitur was issued on May 25, 2018.

FACTUAL HISTORY

On March 16, 2014, Appellant Sylvester Keejuan King ("King") stabbed his ex-girlfriend, Janice Hackett, to death in her home in Greenville. The victim suffered three separate incised wounds; one to the front portion of her right wrist, one to the front portion of her right shoulder, and one to the left upper shoulder in the back. (Tr. 322). She also had eight separate stab wounds. One was a superficial stab wound that went through the skin of her upper neck and stopped before it hit the bone of the skull. (Tr. 322). Another wound was to the midline of her upper back. This wound hit her seventh cervical vertebrae in the back. (Tr. 322-23). The victim suffered two separate stab wounds right above the clavicle. (Tr. 323). She was also stabbed once on the left shoulder.. (Tr. 323). On the right side of her head, she suffered another superficial stab wound that did not penetrate the skull. (Tr. 324). There were also two stab wounds to the right side of her neck. (Tr. 324). The pathologist testified that the two neck wounds were the two most potentially fatal wounds. (Tr. 325). The victim died as a result of multiple stab wounds of the head and neck. (Tr. 330).

A. King and the victim had previously dated.

King and the victim were, at one time, in a relationship. (Tr. 93). According to Raquan Lewers, the victim's son, King and the victim lived together for a year or two. (Tr. 96). At one point, the two broke up. (Tr. 96). They got back together, and moved in together again. (Tr. 97). While Lewers was held in a juvenile detention facility, King and the victim broke up again. (Tr. 99). The victim moved away, and according to Lewers, she did not want King to know

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where she lived. (See Tr. 100). She did allow King's son, who would live with the couple along with Lewers when they were living together, to visit after the two ended their relationship. (Tr. 100).

During the defense case, King's sister, Sentoria Wilson, testified that she was aware that King and the victim were in a relationship at some point in time. (Tr. 340). She recalled seeing Hackett at family functions and events. (Tr. 340-41). Wilson never saw King be violent towards the victim or any other woman, but she also recalled that sometimes her nephew, King's son, would say that King and the victim would "be into it" sometimes.[1] (Tr. 341).

B. On March 16, 2014, the victim returned home from a weekend trip with a new boyfriend.

Lewers recalled that his mother had been out of town that weekend, but she just returned to her Greenville home from vacation on the day she was killed.[2] (Tr. 102). She had just started dating someone new. (Tr. 102). Lewers testified that she arrived home around the time the sun started to go down. (Tr. 102-03). He went with her to a Redbox, and to pick up some food from a seafood restaurant. When they returned home, the victim went to bed. (Tr. 103).

C. Lewers spends time with his girlfriend and her friend outside of the victim's home.

Lewers called his girlfriend, Quinna Fernandez, and told her to come over after his mother went to bed. (Tr. 103). Fernandez got a ride from her friend, Shakia Prease. (Tr. 62, 80). Fernandez indicated that Prease picked her up around 10:20 pm. (Tr. 63). The two drove over to the victim's and Lewers' house. (Tr. 62, 80).

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[1] Wilson stated that her nephew did explain what he meant when he was saying "into it," but she assumed he was talking about arguing. (Tr. 341-42).

[2] Lewers also testified that his father, Keith Lewers, had stopped by the house earlier in the day because Lewers was sick. (Tr. 103). Lewers' father got Lewers some soup and other supplies. (Tr. 103).

When the two arrived, Lewers walked out of the house and got into Prease's car. (Tr. 63, 80-1, 104). Prease was in the driver's seat, Fernandez sat in the front passenger seat, and Lewers got into the back seat. (Tr. 81). The three talked and played on their phones. (See Tr. 64-5, 104). After about fifteen to twenty minutes, Lewers went back inside the house to connect Fernandez's phone to a charger. (Tr. 64, 82, 104). Lewers informed his mother that he was about to have company, and he shut her bedroom door. (Tr. 104). He noted that she was asleep at that time. (Tr. 104-05). Lewers went back outside. (Tr. 105). Lewers did not lock the carport door when he left because he knew they would be right back. (Tr. 110, 114).

When he returned to the car less than two minutes later, the three continued hanging out in the car for another fifteen to twenty minutes. (Tr. 64, 74). During that time, both Lewers and Fernandez saw a car drive by slowly. (Tr. 65, 107). Lewers saw the car as creeping along, and then it pulled off real fast. (Tr. 107). Both described the vehicle as being a black car that looked like a Crown Victoria. (Tr. 65-66, 107, 114). Prease did not see the car, but she did recall Lewers and Fernandez talking about the car. (Tr. 82).

After hanging out in the car for a while, the three went to a nearby Citgo gas station to purchase some cigars.[3] (Tr. 66, 73, 82, 105). Fernandez went inside, purchased some cigars and obtained an employment application, and returned to the car. (Tr. 66). Lewers then asked Fernandez and Prease to take him to the Greenville Arms, a nearby apartment complex, to make a marijuana sale. (Tr. 67, 74, 82, 105). They drove to the complex. Id. While parked in the parking lot, Lewers got outside and sold marijuana to someone he knew. (Tr. 67, 75, 83). Lewers got out and walked behind the car. (Tr. 83, 88). Lewers took two to three minutes to make the sale. (Tr. 83-4, 88, 105). After the sale was completed, the three drove back to Lewers' home, the victim's residence. (Tr. 67, 84, 106).

[3] They planned to use the cigars to smoke marijuana. (Tr. 67, 74, 84, 106).

Prease, Fernandez and Lewers sat in the car in the driveway and talked for a while. (Tr. 67). Prease thought they were back for about five minutes before Lewers went inside to retrieve Fernandez's phone. (Tr. 84). Lewers recalled going into the house to get Fernandez's phone. (Tr. 106). Fernandez recalled Lewers stated he was going to go inside to check on his mother, the victim. (Tr. 67). He was also going to let her know that the three would be coming inside of the house. (Tr. 67). Prease noted that Lewers went through the garage/carport door to enter the house, and he came out the same door. (Tr. 85).

D. Lewers finds his mother's body in her bed.

When he went, he saw blood all over the door. (Tr. 106). As he walked in, he started calling his mother's name, and he got scared. (Tr. 106). He followed the blood, which he was hoping was juice, to her room. (Tr. 106; see Tr. 112). Lewers went into the victim's room, and he tried to wake her up. (Tr. 106). He noted that he touched her, and that he shook her, but she did not physically move her position in the bed. (Tr. 106-07).

Lewers ran back outside and pulled on the door of the car, trying to get Prease and Fernandez out of the car. (Tr. 67-8, 84, 85, 107). Prease and Fernandez both indicated this was within a minute of Lewers going inside the house. When he returned to the car, he pulled at the passenger side door. (Tr. 67-8, 84, 85). Fernandez recalled Lewers "was like my mama gone, she dead." (Tr. 68, ll 3-4). Prease testified that "[h]e was saying my mom is dead. My mom is dead." (Tr. 85, ll 15-6). Prease and Fernandez initially thought he was joking, but Lewers indicated he was not kidding. (Tr. 85). Fernandez then stated she wanted to go see Lewers' mother. (Tr. 69).

Prease and Fernandez then got out of the car, and the three then went inside the house. (Tr. 85). Lewers, Prease and Fernandez entered the house through the carport door. (Tr. 69). Lewers went in first, and Prease and Fernandez followed. (Tr. 69, 85). Fernandez noted the

door was wide open. They walked through the kitchen, and they went straight to the victim's bedroom. (Tr. 69). Prease recalled there was blood immediately when they walked in the carport door. (Tr. 85). She observed a trail of blood; there was blood all on the wall, and there was a bloody hand print on Lewers' bedroom door. (Tr. 86). The three walked into the victim's bedroom and saw her. (Tr. 86).

Fernandez testified that one of the victim's knees was up, and the other was down. (Tr. 69). They were in the room for two minutes. Fernandez recalled she kept saying call 911. (Tr. 70). Both Fernandez and Prease confirmed they did not touch the victim or take anything from the house. (Tr. 70, 86).

Fernandez and Lewers both went to Lewers' bedroom. (Tr. 71). Lewers called the police first. (Tr. 72, 76). After speaking with them, he called his grandmother. (Tr. 72, 76). While Lewers was speaking with his grandmother, Fernandez called the police from her phone. (Tr. 72, 76).

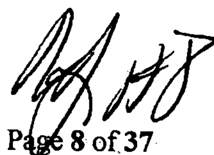
Initially, three Greenville County Sheriffs' Deputies arrived on the scene in response to the 911 call. (Tr. 45-6; see Tr. 300-01). The deputies knocked on the front door and announced they were with the sheriff's department. (Tr. 47, 301-02). In response, Lewers, Fernandez, and Prease came out of the front door of the house. (Tr. 47, 302). Deputy Suber testified that Lewers indicated to him his mother was inside. (Tr. 302). The three teenagers were checked for weapons and were secured by the deputies. (Tr. 47, 302). Suber testified that while Lewers was being secured, Lewers expressed that he believed King was the one who killed his mother, and he did not know how King knew where they lived. (Tr. 303-04; Defense Exhibit 3).

After the teenagers were secured, the deputies went into the house and cleared the residence. (Tr. 48-9, 304). Both Deputy Horne and Deputy Suber saw the victim lying in her bed, deceased, and covered in blood. (Tr. 49, 304-05).

Investigator Michael Fortner with the Greenville County Sheriff's Office arrived at the crime scene just a little after midnight on March 17. (Tr. 237-39). When he arrived, Lewers, Fernandez and Prease had already been transported to the Law Enforcement Center to be interviewed. (Tr. 240). The victim's body was still at the scene. (Tr. 240). Fortner, the forensics team, and Deputy Coroner Dill entered the house and did a walkthrough to identify potential evidence that needed to be collected. (Tr. 241-42). He noted there were large amounts of blood on the floor and the walls, on the floor of the kitchen, on the door, on several appliances in the kitchen, and in the hallway leading to the victim's bedroom. (Tr. 242). Fortner also noted the victim's bed was saturated in blood. (Tr. 243).

After the walkthrough, the forensics team processed the house. (Tr. 243). Fortner contacted other investigators to check on the progress with the interviews with Lewers, Fernandez, and Prease. (Tr. 243). Fortner also walked around the house looking for a possible weapon. (Tr. 243). No weapon was found.

Law enforcement did canvas the neighborhood to see if anyone heard or saw anything that night. (Tr. 50, 245). No witness came forward. (Tr. 50, 245). Fortner testified that he received information regarding Lewers' statements to law enforcement, and they initially thought he may be a suspect. (Tr. 245). Law enforcement was later able to rule him out as a suspect. (Tr. 246).



E. King tells one of his girlfriends that he was injured in a fight outside of a liquor house in Greenville.

Sheila Martin, one of King's girlfriends at the time of the stabbing, lived in Anderson at the time. (Tr. 132-33). She owned a Mazda 626, and she allowed King to borrow her car while his car was in the shop.[4] (Tr. 133-35). King and Martin spoke earlier in the day on March 16, 2014. King had indicated he was hanging out with his cousins, but he also advised Martin that he would come over to her residence later in the day. (Tr. 138).

King did not arrive at Martin's residence until almost 2 a.m. (Tr. 138). At that point, Martin was not expecting him, and King had not called to say he was still coming. (Tr. 138-39). When she opened the door, King came and walked to Martin's bedroom. (Tr. 139). When Martin went into the bedroom, King was laying on the floor, face down. (Tr. 139). When she turned him over, he told her he had been in a fight. (Tr. 140). His hand was bandaged up in a shirt. Martin took the shirt off of the hand, and saw a really deep cut on King's wrist. (Tr. 140). The cut was still bleeding, and there was a lot of blood. (Tr. 140). King's explanation was that he and his cousin got into a fight with four guys at a liquor house. (Tr. 141). King also told her that he messed up her car, and there was blood all in the front seat.[5] (Tr. 143). Martin tried to get King to call the police, and she attempted to re-bandage the wound and apply pressure to stop the bleeding. (Tr. 141-42).

[4] King had told Martin that he was trying to prevent his baby mama from knowing where he lived, so he asked if he could borrow her car while his was in the shop. (Tr. 134). Martin drove King's rental car during that period. (Tr. 133-35).

[5] Martin confirmed her Mazda was bloody. There was blood on the seat, the steering wheel, and base floorboard. (Tr. 151). Martin attempted to clean it, but she could not get the blood out. (Tr. 151). Martin also indicated King had left a pair of tennis shoes in the rental car. (Tr. 153, 154).

F. **King tells an Anderson City Police officer that he was injured during a robbery outside of a liquor house in Anderson.**

Martin then took King to the emergency room at the Anderson County hospital. (Tr. 142-43). At the hospital, King was re-bandaged twice. (Tr. 145). King also spoke with law enforcement about his injuries. Officer Daniel Stipe of the Anderson City Police Department was the officer who responded to the Anderson County Hospital. (Tr. 188-89). Stipe testified that King indicated he was at a liquor house in Anderson. (Tr. 190). While there, he encountered some guys that were disrespectful to him and to his girlfriend, Ms. Martin. (Tr. 190-91). They left, and while they were walking back to his car, four guys approached and told him that he needed to give up his jewelry. (Tr. 191). King claimed that a gold necklace and two gold rings valued at $1080 were taken from him. (Tr. 191). King could not give a written statement because of his injury. (Tr. 191).

According to Martin, King told the officer at the hospital that he claimed he was robbed, and he stated Martin was present when the robbery occurred. (Tr. 146-47). Martin did note that when she asked King about the incident later, King maintained he and his cousin were jumped by four people because his cousin allegedly stepped on one of the guy's shoes. (Tr. 147-48). Martin did not recall King telling her anything about a robbery. (Tr. 148).

G. **King runs away from a potential encounter with law enforcement.**

After Martin and King left the hospital, they went back to Martin's home. (Tr. 147). She left King at her home, and she to get King a cell phone from a Family Dollar. (Tr. 148). While there, Martin received a call from law enforcement. (Tr. 149). When she returned home, Martin told King about the phone call she received. (Tr. 149). In response, King said he had to go. (Tr. 149). The two then drove around to different places. (Tr. 149-50). When they were heading back to Martin's residence later that day, officers were on Martin's street. (Tr. 151). King asked

Martin to go around and to not return to her residence, but Martin refused because her daughter was home. (Tr. 151). In response, King jumped out of the moving car. (Tr. 152). Martin did not know what he did after he jumped out of the car. (Tr. 152).

Craig Hawkins, who was with the Greenville County Sheriff's Office Warrants Division, found King at a residence in Spartanburg on March 26, 2014. (Tr. 200-01). The apartment belonged to Kumiko Mitchell, another of King's girlfriends. (Tr. 201). King was arrested that morning and transported to the Greenville County Law Enforcement Center. (Tr. 203-05).

H. Law enforcement investigation continues.

Investigators sought to speak to several other potential suspects, including Lewers' father, the victim's current boyfriend, and King. (Tr. 246-47). Fortner eventually spoke with King by phone, and the two made arrangements for King to speak with investigators. (Tr. 247-48, 249). King did not show up at the arranged time. (See Tr. 248). Fortner testified that law enforcement searched King's house in Greenville, and they found keys to the Mazda he borrowed from Sheila Martin. (Tr. 261). Nothing else of evidentiary value was found at the house. (Tr. 262-67).

The victim's DNA was found in a swab from the kitchen closet doorknob, swab from son's bedroom doorknob, a swab from victim's bedroom doorknob, swab of suspected blood from top steps to rear kitchen door, suspected swabs from Samsung cell phone on the stool in the victim's bedroom, swabs from buttons of Samsung cell phone on the stool in victim's bedroom, suspected blood swabs from Samsung Verizon phone, swab from touchscreen of Samsung Verizon phone, suspected blood swabs from the charger of Samsung Verizon phone, and fingernail clippings from the victim's hands. (Tr. 225-26). King's DNA was found on the exterior side knob of the rear kitchen door; on the rear passenger door handle of the vehicle that was located in the carport; on the ground near the rear passenger door by the car under the car

port; on a swab on the exterior carport window; from the interior of the rear door on the driver's side of a car; on the rear door frame on the driver's side of the car; on the floor mat from the front passenger side of the car; from the interior of the front windshield of the car; from the top of the steering column, from the front of the steering wheel; on the turn signal shifter; on the vehicle's carpet. (Tr. 226-27). King's DNA, the victim's DNA, and a third individual's DNA was found on the sole of King's tennis shoes that were recovered from the vehicle at Martin's residence. (Tr. 235).

I. King claims he is also a victim in his statement to law enforcement.

King gave a statement to law enforcement. In his statement, he admitted he knew the victim and that they had broken up. (Tr. 259). He claimed that on the night of the stabbing, she had picked him up at his house in Greenville and took him to her house. (Tr. 259). The two laid down to go to bed. According to King, he noticed the bedroom door come open, and an individual was standing there. (Tr. 259). That individual said something to the effect of "oh, hell no;" and at that time, the individual produced a knife and started attacking King and the victim with the knife. (Tr. 259). That was how King explained his hand was cut. (Tr. 259). King described the assailant as a black male who was kind of muscular. (Tr. 259). King asserted the assailant was larger than King. (Tr. 260).

King further told law enforcement that he tried to defend himself and the victim. (Tr. 260). He jumped up and ran out of the house thinking the victim was following him. (Tr. 260). King then ran down the street, where he claimed to flag down a man in a white pickup truck. (Tr. 260). King claimed he paid the man $20 for a ride to his house in Greenville. (Tr. 260).

ALLEGATIONS

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

10(a) Ineffective assistance of counsel for failure to discharge his duty of due diligence to investigate the evidence, facts, and witness(es) in the case

10(b) Ineffective assistance of counsel for failure to provide a proper defense for pysical[sic] evidence in the case.

10(c) Ineffective assistance of counsel for his abandoment[sic] of his client during trial.

11(a)(1) Counsel failed to properly and fully investigate the case

11(a)(2) Counsel failed to properly and fully prepair[sic] Petitioner for testimony in the case.

11(a)(3) Counsel failed to adequately investigate the alleged crime scene or the allegations so as to be prepaired[sic] to present testimony through direct and cross-examination of relevant evidence to the matter.

11(a)(4) Counsel failed to interview or call as a witness a number of people who would have relevant information in this matter.

11(a)(5) Counsel failed to request a preliminary hearing so Petitioner could more adequately be informed about case.

11(a)(6) Counsel failed to spend adequate time with Petitioner reviewing discovery with him.

11(a)(7) Counsel failed to challenge the testimony of the State's witness(es) and failed to adequately object and preserve objections to portions of the witness(es) testimony, and failed to cross-examine the witness(es) on their testimony

11(a)(8) Counsel failed to move for a pretrial motion for a Directed verdict.

11(a)(9) Counsel failed to move for a Directed Verdict at the end of the State's case, or at the end of the entire case.

11(a)(10) Counsel failed to move for a pretrial motion to suppress the evidence from the case.

11(a)(11) Counsel failed to challenge or move to quash the indictment, before the jury is sworn, that indictment is not sufficient.

11(a)(12) Counsel failed to provide a valid defense for trial.

11(a)(13) Counsel failed to request a competency hearing, to evaluate the Petitioner, and see if he was incompetent at the time of his trial.

11(a)(14) Counsel failed to move for a fast and speedy trial. Petitioner, lost certain witness(es) that could of testified on his behalf, pursuant to the 21 month delay for trial.

11(a)(15) Counsel failed to object to the State's hearsay, and circumstantial evidence being admitted at trial.

11(a)(16)(A)(B)(C) Ineffective Assistance of Counsel: This is the only venue I am aware of for these type of claims.

In an amended application dated October 4, 2018, Applicant further alleged he is being held in custody unlawfully for the following reasons:

(1) failing to make a hearsay objection to Investigator Shawnee Peoples statement, "I was advised that that day he called into work and he told his job that he was the victim of a home invasion where he was injured"; (R. p. 159, l. 2)

(2) failing to request jury voir dire as to whether any of the jurors had been victims of a violent attack; (p. 14)

(3) failing to object to witness Raquan Lewers testimony that he believed his mom was trying to get away from Mr. King; (R. p. 96, l. 22)

(4) failing to point out that at the time of the stabbing Mr. King and the victim had been separated for four years, not the year or two witness Raquan Lewers said; (R. p. 96)

(5) failing to fully investigate and clarify for the jury whose phones were found at the scene and used to call 911, DNA evidence, and shoe print evidence; (R. 415)

(6) advising Mr. King not to testify;

(7) failing to secure or advise Mr. King of a plea offer; and

(8) failure to object to the jury instruction, "I charge you to abide by your oath and return a verdict that speaks the truth." (R. p 412, l. 18)

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he was represented by Trial Counsel on his charges. He testified

during the course of Trial Counsel's representation he met with him five times for a total of five minutes each time. Applicant testified Trial Counsel failed to investigate his case or call witnesses. He testified he reviewed his discovery himself but that Trial Counsel did not review it with him. Applicant testified Trial Counsel did not discuss the DNA evidence in his case with him and Trial Counsel told him the DNA evidence was not that important in the case. He testified the victim's son testified that he saw Applicant's car that night but the car that was described was not his car, and Applicant testified Trial Counsel should have shown the jury what his car looked like. Applicant testified he did not testify at his trial because Trial Counsel told him not to and any of his prior record could be used if he did. He testified he remembered telling the trial judge he did not want to testify in his defense but that he was not prepared for the colloquy. He testified he wanted to go to trial. Applicant testified he did not get a preliminary hearing in his case. He testified there was a shoe print found but that the State did not bring out evidence of whose print it was at trial and that the print did not match his shoes. Applicant testified the issue of his shoes was only brought up one time at trial. He testified he did not have a handle on the evidence in the case because Trial Counsel did not properly investigate and wanted more time with Trial Counsel. Applicant testified Trial Counsel should have had a suppression hearing to keep out the DNA evidence and his clothes. He testified Trial Counsel did not move to quash his indictment or make a motion for a speedy trial. Applicant testified Trial Counsel failed to move for a directed verdict and did not come up with a valid defense.

On cross-examination, Applicant testified he met with Trial Counsel five times during the course of his representation and each meeting only lasted five minutes. He testified Trial Counsel sent him his discovery right before trial and that he did not talk about any defenses to his case with him. Applicant testified he did not know his rights. He testified he gave Trial Counsel the

names of people to call to interview about the incident. Applicant testified he was at the victim's house that night in which there was involved in altercation where a man stabbed him and the victim. He testified Trial Counsel had an investigator on his case but that the investigator did not go over anything in his case.

Trial Counsel's Testimony

Trial Counsel testified he had practiced law in South Carolina since 2010 and all of that time had been devoted to criminal law. He testified he was appointed to represent Applicant and that Applicant was charged with stabbing the victim who was his former lady friend to death. Trial Counsel testified he met with Applicant at least ten times during the course of his representation. He testified during those meetings he discussed the indictments and the possible punishments Applicant was facing, Applicant's constitutional rights and the State's burden of proof. Trial Counsel testified the court signed an order for funds so he could hire an investigator for Applicant's case. He testified he gave Applicant a paper copy of his discovery and also reviewed it with him. Trial Counsel testified he discussed the DNA evidence with Applicant and that the victim and Applicant's blood were found in the home. He testified in terms of investigation, Applicant did not offer him much information about the case. Trial Counsel testified Applicant told him some man attacked the victim and him while they were at the victim's house and he was able to get away. He testified Applicant told him he got a ride from some unknown Mexican man driving a white Ford ranger after the attack. Trial Counsel testified Applicant could not give him a name of the man or other vital information for his case.

Trial Counsel testified there was never any true plea offers from the State other than Applicant pleading "straight" up to the charge. He testified Applicant was not interested in that offer. Trial Counsel testified one of Applicant's other lady friends, Ms. Martin testified at trial.

He testified she stated to the jury that Applicant showed up at her house after the incident and they went to the hospital. Trial Counsel testified Ms. Martin told the jury that Applicant told her he was stabbed at liquor store after being robbed.

Trial Counsel testified he objected to the comment by Investigator Shawn Peoples during trial about a statement Applicant made. He testified he objected on the ground of lack of foundation but that he was overruled by the trial judge who he knew had a propensity to overrule objections quickly and try to move a trial along. Trial Counsel testified during voir dire he did not ask if any member of the jury panel had been a victim of a violent crime and maybe should have asked. He testified he did not object to the victim's son's testimony concerning his mom and Applicant as he did not feel it was that prejudicial and that sometimes objecting to things highlights them more for a jury to consider. Trial Counsel testified he tried to show the jury that maybe the victim's son or his dad had something to do with the murder of the victim as the son had money from a civil suit when he was younger whom the victim was the conservator over. He testified he did not think the information about phones being found at the scene was prejudicial to Applicant's case. Trial Counsel testified the DNA evidence showed the victim's and Applicant's DNA were found at the house that night. He testified an unknown third person's DNA was also found. Trial Counsel testified this third unknown person's DNA was potentially helpful in the case to the trial theory that someone had attacked the victim and Applicant. He testified he advised Applicant not to testify as there were too many inconsistencies in his story and his story would not be credible to the jury. Trial Counsel testified he should have objected to the trial judge's jury instruction about returning a verdict that speaks the truth but that he believed the trial judge ultimately articulated the burden of proof properly to the jury.

On cross-examination, Trial Counsel testified there was a letter from the State about a

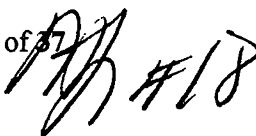
plea offer for murder for a sentence of forty years. He testified he had the discovery that contained information about the shoe print that was found but no conclusion could be drawn from it. Trial Counsel testified the jury had a questions about the DNA evidence and a cell phone.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

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

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, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing.

Ineffective Assistance of Counsel

Failure to Make a Hearsay Objection

Applicant alleges Trial Counsel was ineffective for failing to make a hearsay objection to Investigator Shawnee Peoples statement concerning Applicant in which she said: "I was advised that that day he called into work and he told his job that he was the victim of a home invasion where he was injured" (Tr.p.207). This court finds that Trial Counsel was not ineffective regarding this allegation. Trial Counsel testified he objected on the ground of lack of foundation but that he was overruled by the trial judge who he knew had a propensity to overrule objections quickly and try to move a trial along. This court finds Applicant cannot demonstrate deficiency or sufficient prejudice regarding this allegation because the statement was admissible because it was not hearsay. The statement was not offered from the truth of the matter asserted. Instead, it

was merely offered to show why Peeples proceeded to call local hospitals to see if King was treated for any alleged injuries. As such, the statement was properly admitted by the trial court.

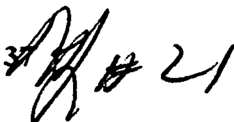
Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (internal citations omitted). "Additionally, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." Brown, 317 S.C. at 63, 451 S.E.2d at 894 (citing United States v. Love, 767 F.2d 1052 (1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 849, 88 L.Ed.2d 890 (1986). Evidence explaining why law enforcement is in a particular area has been held to be relevant information for the jury to consider. State v. Johnson, 318 S.C. 194, 197, 456 S.E.2d 442, 444 (Ct. App. 1995) (citing State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct.App.1992)).

Here, the Applicant's statement to his employer that he was injured in a home invasion was not entered for the truth of the matter asserted. The testimony presented by Peeples after the reference to the statement shows the intent of introducing the statement was to explain why Peeples took certain actions in the investigation. Peeples testified that after hearing the statement, she called local hospitals to see if King sought treatment for the injuries he would have suffered in the home invasion. (Tr.p.207). After learning that King also had an address in Anderson County, Peeples contacted the hospital in Anderson County to see if he was treated for injuries. (Tr.p.207). After confirming he was treated, Peeples obtained an order for production of records for the medical records for the treatment and contacted the Anderson City Police Department to obtain a copy of the police report that was generated from King's hospital visit. (Tr.p.208). She also contacted the hospital's security department to obtain video footage of King's visit at the hospital. (Tr.p.208).

The State did not use the statement in any other manner during the trial. It was not utilized in closing argument, and no other witness referred to the statement. In light of the limited use of the statement only to explain why Peeples contacted local hospitals regarding King, the record supports a finding the statement was not hearsay and was properly admitted at trial. See Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (finding statements made regarding unrelated crimes did not constitute hearsay when "officers were explaining their actions in pursuing the defendants and the statements were not offered for their truth."); see also State v. Thompson, 352 S.C. 552, 559, 575 S.E.2d 77, 81 (Ct. App. 2003) (finding officer's testimony regarding statement by bystander was not hearsay because it was not entered for the truth of the matter asserted, but "rather to explain and outline the officers' investigation and their reasons for going to the Thompsons' home."). Because of this, this court finds Applicant has failed to meet his burden to show Trial Counsel was ineffective. Therefore, this court finds this allegation must be denied and dismissed with prejudice.

Failure to Request Jury Voir Dire

Applicant alleges Trial Counsel was ineffective for failing to request jury voir dire as to whether any of the jurors had been victims of a violent attack. Trial Counsel testified during voir dire he did not ask if any member had been a victim of a violent crime and maybe should have asked. This court finds Trial Counsel was not ineffective in this regard as Applicant has failed to demonstrate sufficient prejudice from Trial Counsel not asking this question. This Court further finds Applicant has failed to show that Trial Counsel's failure to ask this question prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This court would also note that during jury voir dire, the trial judge informed the jury of the charges Applicant was facing and that he



was being tried for stabbing the victim. (Tr.p.12). The trial judge went on to inquire of the jury if they were aware of any bias or prejudice with respect to Applicant, to the State or to the subject matter of the case why they could not give Applicant and the State a fair and impartial trial based on the law and evidence to be presented. (Tr.p.13-14). One juror stood and the judge questioned her and she indicated she could be fair juror. (Tr.14). Because of this, this court finds Applicant has failed to meet his burden to show Trial Counsel was ineffective. Therefore, this allegation is denied and dismissed with prejudice.

Failure to Object to Witness' Testimony

Applicant alleges Trial Counsel was ineffective for failing to object to witness Raquan Lewers' testimony that he believed his mom was trying to get away from Applicant. (Tr.p. 96). Trial Counsel testified he did not object to the victim's son's testimony concerning his mom and Applicant as he did not feel it was that prejudicial and that sometimes objecting to things highlights them more for a jury to consider. This Court finds Applicant has failed to prove Trial Counsel was ineffective. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

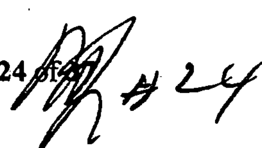
Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Here, this Court finds Trial Counsel offered a valid strategy for not objecting to the comment made by the witness. Because of this, this court finds Applicant has failed to meet his burden to show Trial Counsel was ineffective. Therefore, this allegation is denied and dismissed with prejudice.

Failure to Point out Information to the Jury

Applicant alleges Trial Counsel was ineffective for failing to point out that at the time of the stabbing, Applicant and the victim had been separated for four years, not the year or two witness Raquan Lewers said (Tr.p.96). This Court finds Applicant has failed to prove Trial Counsel was ineffective. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Here, this Court finds Applicant has failed to demonstrate sufficient prejudice. This Court further finds Applicant has failed to demonstrate that had Trial Counsel pointed out an alleged discrepancy in time, there is a reasonable probability that, but for this, the result of the proceeding would have been different. Therefore, this Court finds this allegation is denied and dismissed with prejudice.

Failure to Investigate/ Interview or Call Witnesses

Applicant alleges Trial Counsel was ineffective in failing to investigate his case and for not interviewing or call witnesses at his trial. First, to show ineffective assistance for failure to investigate, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant has failed to show what beneficial information could have been discovered had Trial Counsel done more investigation. Even so, Trial Counsel testified credibly that he reviewed all of the discovery and met with Applicant on numerous occasions. Moreover, Trial Counsel testified he hired a private investigator through funds approved by court order to investigate Applicant's case. Notwithstanding, this court finds Applicant has failed to produce any information that Trial Counsel would have found had he done more investigation. This Court finds Trial Counsel's investigation was reasonable. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Trial Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Trial Counsel's performance. This Court concludes Applicant has not met his burden of proving Trial Counsel



failed to render reasonably effective assistance. The allegation is denied and dismissed with prejudice.

Next, Applicant alleges Trial Counsel was ineffective in failing to interview and call certain witnesses during his trial. Applicant testified he gave Trial Counsel the names of people to call to interview about the incident. Trial Counsel testified Applicant told him some man attacked the victim and himself while they were at the victim's house and he was able to get away. Trial Counsel testified Applicant told him he got a ride from some unknown Mexican man driving a white Ford ranger. Trial Counsel testified Applicant could not give him a name of the man or other vital information for his case. This Court finds Applicant has failed to show that Trial Counsel was ineffective for either not interviewing or calling witnesses for his trial. First, this Court notes any claims surrounding the failure to present testimony from a witness assumes the testimony from the witness would have been favorable to the defense and therefore affected the outcome of the trial. However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Applicant failed to

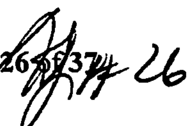
produce the testimony of any witnesses, sufficient prejudice cannot be demonstrated by Applicant.

Secondly, this Court finds Trial Counsel's testimony on the issue more credible than that of Applicant. Trial Counsel testified Applicant did not provide him with the names of any potential witnesses and therefore he did not know about them. Trial Counsel cannot be expected to interview a witness he does not know exists. Therefore, Applicant has failed to prove Trial Counsel was deficient or that he was prejudiced by any alleged deficiency. The allegation is denied and dismissed with prejudice.

Failure to Advise not to Testify

Applicant alleges Trial Counsel was ineffective for failing to advise Applicant not to testify a trial. Applicant testified he did not testify at his trial because Trial Counsel told him not to and that his prior record could be used if he did. Applicant testified he remembered telling the trial judge he did not want to testify at in his defense but that he was not prepared for the colloquy. Trial Counsel testified he advised Applicant not to testify as there were too many inconsistencies in his story and his story would not be credible to the jury.

This Court finds Trial Counsel's performance was not deficient and Applicant has failed to demonstrate sufficient prejudice by the alleged deficiency. This Court finds Trial Counsel's testimony on this point credible and finds he provided advice well within professional norms on the decision to not testify. Further, this Court finds Applicant was advised he could take the stand to testify on his behalf and be potentially impeached with any prior record. (Tr.p.332-334). Further, when Applicant was asked by the trial judge if any one used any force or made any threats including his attorney in making a decision to not testify, Applicant answered no. (Tr.p.334). Finally, when asked by the trial judge if the decision to not testify was made freely



and voluntarily, Applicant answered in the affirmative. (Tr.p.334). Because of this, Applicant has failed to prove Trial Counsel was deficient or that he was prejudiced by any alleged deficiency. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Failure to Secure or Advise of a Plea Offer

Applicant alleges Trial Counsel was ineffective for failing to secure or advise Applicant of a plea offer. Trial Counsel testified there was never any true plea offers from the State other than Applicant pleading "straight" up to the charge and that Applicant was not interested in that offer. Trial Counsel testified there was a letter from the State about a plea offer for murder for a sentence of forty years. This court finds Trial Counsel's testimony credible regarding this allegation. Furthermore, this court finds credible Applicant's testimony that he wanted to go to trial. Because of this, this court finds Applicant has failed to prove that Trial Counsel was deficient regarding this allegation and also failed to demonstrate sufficient prejudice. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Failure to Object to Jury Instruction

Applicant alleges Trial Counsel was ineffective for failing to object to the jury instruction, "I charge you to abide by your oath and return a verdict that speaks the truth". (Tr.p.412). This Court finds Applicant has failed to meet his burden as to this allegation. Trial Counsel testified he should have objected to the trial judge's jury instruction about returning a verdict that speaks the truth but that he believed the trial judge ultimately articulated the burden of proof properly to the jury.

On this issue, our State Supreme Court has cautioned "[j]ury instructions **on reasonable doubt** which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to the defendant.'" State v. Aleksey, 343 S.C. 20,

26-27, 538 S.E.2d 248, 251 (2000) (emphasis added). However, the Aleksey court went on to hold because the "truth-seeking" instruction in that case was "given in the context of the jury's role in determining the credibility of witnesses" there was "not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt." Id. at 28-29, 538 S.E.2d at 252. The court cautioned the circuit courts to abandon the truth-seeking language in future charges, but held that the instruction as a whole in that case was a correct statement of law and found no basis for reversal on that ground. Id.

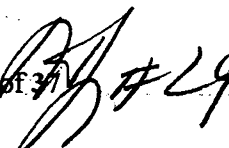
The recent opinion in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), revisited the Aleksey decision and held a preliminary instruction using the phrases "search for the truth," "true facts," and "just verdict" were delivered in error but caused no prejudice warranting reversal where the instruction appeared in the preliminary remarks to the jury and, again, did not speak to the State's burden of proof. Beaty, 423 S.C. at 33, 813 S.E.2d at 506. The Beaty court held "the disputed comments can be distinguished from Aleksey because they were a mere statement to the jury and not a charge on the law." Id. at 34, 813 S.E.2d at 506. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in Aleksey. Id.

This Court finds that the jury instruction Applicant alleged do not form the basis for a grant of post-conviction relief. The limited nature of this phrase imparted no duty upon counsel to object in light of the Aleksey decision, which existed at the time of trial, and the failure to object to this limited phrase did not rendered Trial Counsel's performance deficient. Further, the lack of objection to the charges excerpted above did not prejudice applicant because the trial court's issuance of any language pertaining to the jury's role at trial did not address the burden of proof the jury was to apply to its deliberations. The relevant case law makes it clear the

instruction did not prejudice applicant because it spoke only generally to the jury's role as the factfinder. The instruction was not anywhere near the burden of proof instruction and did nothing to shift the burden from the State. There is no reasonable possibility of a different outcome had counsel made an objection to the instruction. Accordingly, pursuant to Aleksey and Beaty, this Court finds applicant has failed to demonstrate ineffective assistance of counsel. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Failure to Request a Preliminary Hearing

Applicant testified in a cursory fashion regarding Trial Counsel's failure to request a preliminary hearing. This court finds Applicant has failed to prove ineffective assistance of counsel regarding this allegation. Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a), SCRCrimP. If a defendant makes a timely request for a hearing, one should be held within ten days. Rule 2(a)-(b), SCRCrimP. However, the hearing "shall not be held, however, if the defendant is indicted by a grand jury or waives indictment before the preliminary hearing is held." Rule 2(b), SCRCrimP; see also State v. Hawkins, 310 S.C. 50, 54-55, 425 S.E.2d 50, 53 (Ct. App. 1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held). Furthermore, a defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). This Court finds that Trial Counsel's performance was reasonable according to professional standards. It is clear there was probable cause to support the charges. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice, as a preliminary hearing would not have resulted in dismissal of the charges, and therefore, there is no likelihood that the result of the



proceeding would have been different. Furthermore, this Court finds Applicant also cannot demonstrate sufficient prejudice as he was directly indicted for the charges. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Failure to Quash Indictment

Applicant testified in a cursory fashion regarding Trial Counsel's failure to quash his indictment. Applicant is not entitled to relief upon this claim of ineffective assistance of trial counsel. Applicant has failed to show Trial Counsel was deficient in not moving to quash the indictment and he also cannot show he was prejudiced.

> In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances. See State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353-54 (2006); Gentry, 363 S.C. at 103, 610 S.E.2d at 500; State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993); State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991); State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 312 (Ct.App.2002) (citing State v. Adams, 277 S.C. 115, 126, 283 S.E.2d 582, 588 (1981); State v. Reddick, 348 S.C. 631, 637, 560 S.E.2d 441, 444 (Ct.App.2002)); see also Evans, 363 S.C. at 507-09, 611 S.E.2d at 516-17 (noting all the surrounding circumstances must be weighed to make an accurate determination of whether the defendant was prejudiced by a lack of notice and an insufficient indictment). Accordingly, the sufficiency of an indictment is examined objectively, from the viewpoint of a reasonable person, and not from the subjective viewpoint of a particular defendant. Means, 367 S.C. at 383, 626 S.E.2d at 353-54. Further, whether the indictment could be more definite or certain is irrelevant. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500. As repeatedly noted by our appellate courts:
>
>> An indictment is sufficient if the offense is stated with [enough] certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.
>
> See Means, 367 S.C. at 383, 626 S.E.2d at 353-54; Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500; State v. Ham, 259 S.C. 118, 191 S.E.2d 13 (1972); State v.

> Walker, 366 S.C. 643, 661, 623 S.E.2d 122, 131 (Ct.App.2005); State v. Adams, 354 S.C. 361, 374, 580 S.E.2d 785, 792 (Ct.App.2003); Guthrie, 352 S.C. at 108, 572 S.E.2d at 312.

State v. Tumbleston, 376 S.C. 90, 97–98, 654 S.E.2d 849, 853 (Ct. App. 2007).

Here, Applicant's indictments were sufficient to apprise him of the charges he faced. The murder indictment stated,

> That SYLVESTER KEEJAUN KING did in Greenville County, on or about the 16th day of March, 2014, unlawfully and with malice aforethought kill JANICE HACKETT by means of by means of stabbing her, and that JANICE HACKETT died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

It outlined the elements of murder, provided the time and place Applicant was alleged to have committed the murder, and identified the means by which Applicant killed the victim. Similarly, the possession of a weapon during the commission of a violent crime indictment was sufficient. It stated,

> That SYLVESTER KEEJAUN KING did in Greenville County, on or about the 16th day of March, 2014, possess or visibly display a knife during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

It outlined the elements of unlawful possession of a weapon during the commission of a violent crime, provided the time and place Applicant was alleged to have committed the crime and identified the violent crime committed, and referenced the statute at issue. Applicant has not identified any insufficiency of either portion of the indictment. Thus, he cannot show that Trial Counsel was deficient. Further, Applicant has not identified how he was prejudiced. Altogether, he is not entitled to relief upon this claim. Therefore, this claim for relief is denied and dismissed with prejudice.

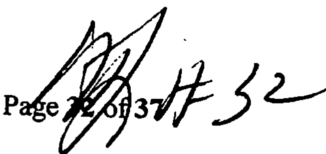
Failure to Move for a Speedy Trial

Applicant testified in a cursory fashion regarding Trial Counsel's failure to move for a speedy trial. This Court finds this allegation to be without merit and finds Applicant has failed to show Trial Counsel was deficient, and that he was prejudiced by this alleged deficiency. In this claim, Applicant asserts Trial Counsel should have moved for a speedy trial. He asserts there was a twenty-one month delay, and he lost witnesses as a result of the delay. This Court finds Applicant cannot show Trial Counsel was deficient, or that he was prejudiced by Trial Counsel's decision not to file a motion for a speedy trial.

First, Applicant fails to show that Trial Counsel was deficient in not filing a motion for a speedy trial. "A criminal defendant is guaranteed the right to a speedy trial." State v. Cooper, 386 S.C. 210, 216, 687 S.E.2d 62, 66 (Ct.App.2009), citing U.S. Const. amend. VI; S.C. Const. art. I,§ 14; State v. Pittman, 373 S.C. 527, 548, 647 S.E.2d 144, 155 (2007). However, "[t]here is no universal test to determine whether a defendant's right to a speedy trial has been violated." Cooper, 386 S.C. at 216, 687 S.E.2d at 66 (citing State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)). "[T]he determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." Pittman, 373 S.C. at 549, 647 S.E.2d at 155; see Cooper, 386 S.C. at 217, 687 S.E.2d at 66.

> A reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); see also State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. Barker, 407 U.S. at 533, 92 S.Ct. 2182.

Cooper, 386 S.C. at 216-17, 687 S.E.2d at 66.



In reviewing a speedy trial claim, analysis begins "with the 'triggering mechanism' of a speedy trial claim, which is the length of the delay." State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012).[6]

> The clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused," and therefore we are to include the time between arrest and indictment. United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). The Supreme Court was quick to remind in Barker, however, that even the length of time necessary to trigger the full inquiry "is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530–31, 92 S.Ct. 2182. Thus, a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case. Id. at 531, 92 S.Ct. 2182; see also id. at 531 n. 31, 92 S.Ct. 2182 (suggesting that a delay of nine months could have been presumptively prejudicial in a case that depended on eyewitness testimony (citing United States v. Butler, 426 F.2d 1275, 1277 (1st Cir.1970))).

Langford, 400 S.C. 421 at 442, 735 S.E.2d 471 at 482.

In Applicant's case, twenty months elapsed between the date of Applicant's arrest and his trial. While this time was lengthy, it was not outside the parameters of cases in which a lengthy delay was not considered to constitute a violation of the right to a speedy trial.[7]

Barker provides not only should the reason for the delay be considered, but also that those reasons should be examined as to relative justification:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense

[6] In Langford, this Court noted the other factors should not be examined until there was some delay that was presumptively prejudicial. Id. at 442, 735 S.E.2d at 482 (quoting Barker).

[7] See Langford, supra (twenty-three month delay reviewed in armed robbery, first degree burglary and kidnapping case); Pittman, supra (reviewing three year delay between arrest and trial in murder case); Waites, supra (reviewing two year four month delay in assault and battery of a high and aggravated nature and pointing and presenting a firearm); Cooper, supra (reviewing forty-four month delay on murder re-trial). See also State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997) (reviewing three years and five months delay in aimed robbery and murder case); State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), affirmed by State v. Kennedy, 348 S.C. 32, 558 S.E.2d 527 (2002) (reviewing two year and two month delay in grand larceny, first degree burglary and financial transaction card fraud case); State v. Smith, 307 S.C. 376, 415 S.E.2d 409 (Ct.App. 1992) (reviewing three year delay in murder case).

> should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker v. Wingo, 407 U.S. at 531. Here, there was no discussion regarding the delay in Applicant's trial on the record. This Court would note the Clerk of Court records reflect Trial Counsel was still likely conducting his investigation through August 2015, which was when he obtained funding for an investigator. This may have caused some of the delay in the case being called to trial.

"[T]he defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." Barker, 407 U.S. at 528. Multiple assertions of the right will weigh heavily in a defendant's favor. See, for example, United States v. Bass, 460 F.3d 830, 837 (6th Cir. 2006)("Between his arraignment and trial, Bass filed three motions to dismiss based upon speedy trial grounds: (1) in January 1999, two months after the arraignment; (2) in March 2000; and (3) in March 2002. Accordingly, Bass asserted his right to a speedy trial, and this factor weighs in his favor.").

As already noted, the delay itself is not dispositive of whether a violation has occurred. Neither is the time at issue dispositive of prejudice. Pittman, 373 S.C. at 551, 647 S.E.2d at 156) (rejecting Pittman's argument "that the delay of his trial was so lengthy that it not only meets the requisite finding of delay, but also that the delay is presumptively prejudicial"). Other courts have examined similar delays and declined to find presumptive prejudice.[8] The Supreme Court in Barker specifically noted the damage that may very well be done to the prosecution's case:

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[8] See United States v. Blanco, 861 F.2d 773, 778 (2nd Cir. 1988) (rejecting general assertion of prejudice in ten year delay between indictment and trial where defendant at fault in delay and where "delay can just as easily hurt the government's case"); United States v. Tchibassa, 452 F.3d 918, 925-927 (D.C.Cir. 2006) (finding no presumptive

JB #34

A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-in-crimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Barker, 407 U.S. at 521.

In reviewing all of the factors, Applicant cannot show he would have been entitled to relief based upon an assertion of his right to a speedy trial. There was no evidence the delay was the result of any attempt from the State to hinder Applicant's ability to present a defense. Applicant has presented no argument or evidence reflecting he suffered any prejudice as a result of the delay in his trial. He has not identified any witness that was unavailable because of the delay, nor has he indicated what information those witness(es) could provide. Since there is no merit to this claim, Applicant cannot show that trial counsel was deficient. Further, Applicant cannot show that he was prejudiced. See, e.g., Werts v. Vaughn, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); see also Almon v. U.S., 302 F.Supp.2d 575, 586 (D.S.C.2004) ("There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable."). Therefore, this claim is denied and dismissed with prejudice.

Failure to Suppress Evidence

Applicant testified in a cursory fashion regarding Trial Counsel's failure to suppress evidence. This court finds this allegation to be without merit and finds Applicant has failed to

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prejudice where defendant more at fault than government in eleven year delay). Accord United States v. Mendoza, 530 F.3d 758, 764-765 (9th Cir. 2008) (noting that if government had "exercised due diligence," for speedy trial claim on delay of eight years, defendant would have had to have shown "specific prejudice to his defense" rather than assessing presumptive prejudice).

show Trial Counsel was deficient, and that he was prejudiced by this alleged deficiency. This Court finds Applicant has failed to show upon what grounds Trial Counsel should have argued to suppress the evidence he claimed formed the basis for suppression. In a post-conviction relief action, the 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, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. Here, this Court finds Applicant has failed to meet his burden. Therefore, this claim is denied and dismissed with prejudice.

Failure to Move for Directed Verdict

Applicant testified in a cursory fashion regarding Trial Counsel's failure to move for a directed verdict. This court finds Trial Counsel was not ineffective. Contrary to Applicant's assertions, Trial Counsel did move for a directed verdict at the end of the State's case. (Tr. 331-32). The motion was denied by the trial court. Id. Trial Counsel also renewed the motion at the close of the defense's case. (Tr. 354). Again, the trial court denied the motion. Id. Since Trial Counsel moved for a directed verdict at the end of the State's case and at the end of the entire case, Applicant's claim in this allegation is without factual support. Therefore, this claim is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his

application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

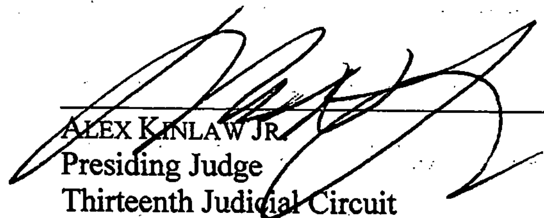
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 day of November, 2018.



ALEX KINLAW JR.
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Copy mailed to
Attorney Ross and A.G.
on 11 / 7 / 2018.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
SYLVESTER KING, APPLICANT. v.	)	MOTION TO ALTER OR AMEND THE JUDGMENT
THE STATE OF SOUTH CAROLINA, RESPONDENT.	)	CASE # 2018-CP-23-3013

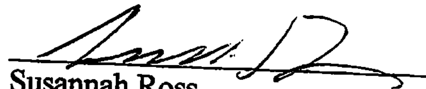
COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on November 7, 2018. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case. Specifically, he argues that the Order of Dismissal in its argument regarding the issue that trial counsel failed to fully investigate and clarify for the jury whose phones were found at the scene, DNA evidence, and shoe print evidence, states no evidence was presented at the PCR hearing of what investigation would produce. (Order p. 24) Under cross examination, Mr. Kornfeld admitted that at trial he brought out evidence in cross examination that a shoe print had DNA from the Applicant, the victim, and an unknown third party contributor. (R. p. 235, l. 13) In fact, that sample was inconclusive. That is why the State did not use it. This was the only evidence the jury heard of shared DNA, and it was not supported by the actual DNA records. Thus the Applicant argues counsel's error in bringing forth damaging DNA evidence reflected a failure to investigate the issue.

The Applicant also wishes to clarify that his allegation was that counsel failed to advise the Applicant *to* testify. He argues that each allegation set fourth caused to undue prejudice. He further argues that if each allegation did not amount to ineffective assistance of counsel standing alone, the cumulative error prejudiced him to the degree that "there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989).

For the foregoing reasons, the Applicant requests this Court to alter its Order of Dismissal and grant Applicant relief.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
330 E. Coffee St,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 16 day of November 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
~~COUNTY OF GREENVILLE~~	)	THIRTEENTH JUDICIAL CIRCUIT
SYLVESTER KING,	)	ENTERED COMPUTER
Applicant,	)	CASE NO.: 2018-CP-23-3013
vs.	)	
	)	**ORDER TO ALTER OR AMEND THE JUDGMENT**
THE STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

'18 DEC 14 AM10:35
Paul Wickensimer COC GVL SC

This matter comes before the Court pursuant to Rule 59(e) motion, to alter or amend the judgment. The Applicant's Post-Conviction relief was denied on October 24, 2018 after this Court careful reviewed the entire record, including the testimony presented at the evidentiary hearings.

In a post-conviction relief action, the 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, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. This Court found that the Applicant failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel.

Finding no legal basis to support Applicant's motion, this Court hereby denies Applicant's Motion to Alter Judgment.

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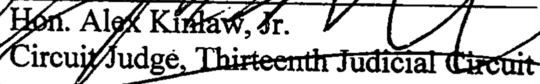
Copy mailed to
Attorney Ross / A.G
on 12 14 18

IT IS SO ORDERED.

Dated: 12/4/18
Greenville, SC



Hon. Alex Kinlaw, Jr.
Circuit Judge, Thirteenth Judicial Circuit

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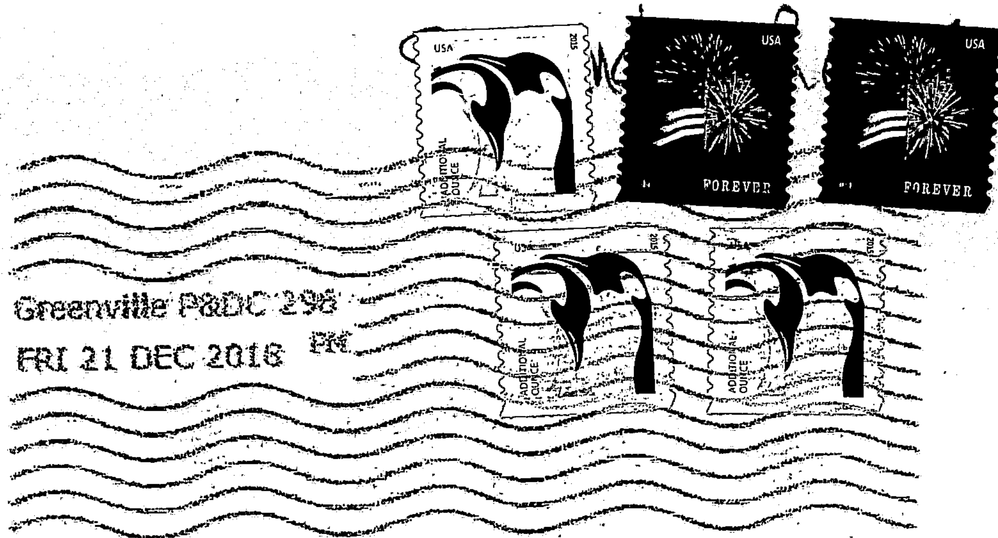
:AST COFFEE ST.
ᴺVILLE SC 29601



Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
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