LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

February 25, 2019

RECEIVED

FEB 27 2019

S.C. SUPREME COURT

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

RE: Derrick McDonald, SCDC # 328344, vs. State of South Carolina
Appeal of Case No. 2015-CP-28-443

Dear Mr. Shearouse,

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

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

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

Respectfully,

Kristy Goldberg

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

Derrick McDonald, SCDC # 328344
Kershaw Correctional Institution
4848 Goldmine Highway
Kershaw, South Carolina 29067

Kershaw County Clerk of Court
ATTN: Lynn Lyons
Post Office Box 1557
Camden, South Carolina 29021 - 8557

1720 MAIN STREET • SUITE 303 • COLUMBIA, SOUTH CAROLINA 29201
PHONE (803) 667-6633 • FACSIMILE (803) 799-4059

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

RECEIVED
FEB 27 2019
S.C. SUPREME COURT

Case No. 2015-CP-28-443

Derrick McDonald, SCDC # 328344, ... Appellant

v.

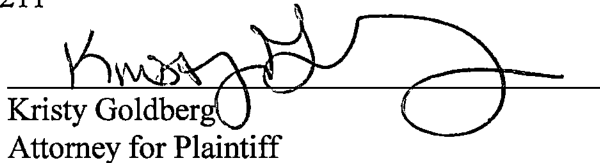
State of South Carolina, ... Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on February 25, 2019 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Megan Jameson
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 27 2019
S.C. SUPREME COURT

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2015-CP-28-443

Derrick McDonald, SCDC # 328344, ... Appellant

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Derrick McDonald hereby appeals from the Order of the Honorable Clifton Newman presiding Judge for the 5th Judicial Circuit, filed February 20, 2019 and received by counsel for the Applicant on February 22, 2019 in the matter of Derrick McDonald v. State of South Carolina, Case No. 2015-CP-28-443.

February 25, 2019

Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:
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STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Derrick McDonald, SCDC No. 328344,

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2015-CP-28-0443

ORDER GRANTING RESPONDENT'S MOTION TO RECONSIDER PURSUANT TO RULE 59(e), SCRCP AND DENYING POST- CONVICTION RELIEF

FILED FOR RECORD
2019 FEB 20 PM 2: 2?
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter comes before this Court by way of an application for post-conviction relief filed on May 8, 2015, and amended October 11, 2017, by Derrick McDonald (Applicant). An evidentiary hearing was held on December 12, 2017, before this Court. Applicant was present and represented by Kristy Goldberg, Esquire. The State was represented by Assistant Attorney General Jessica Kinard of the South Carolina Attorney General's Office. Following the hearing, the Court took the matter under advisement and requested proposed orders from both parties. Thereafter, on April 2, 2018, the Court issued an order granting post-conviction. This order was filed on April 5, 2018, and received by Respondent on April 6, 2018.

Thereafter, on April 16, 2018, Respondent served its Motion to Reconsider, Alter, or Amend pursuant to Rule 59(e), SCRCP, asking this Court to reconsider its prior rulings granting relief. Applicant, through counsel, served his return to Respondent's motion on May 8, 2018. Thereafter, all parties convened for a hearing on Respondent's motion on May 17, 2018. Applicant was present and represented by Counsel Goldberg. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson. After hearing argument from both parties, this Court instructed counsels to file post-hearing memorandums addressing any additional

ATTEST True, Correct & Certified Copy of Original on File in this Court
Janet C. Hasty
Clerk of Court Kershaw County

arguments. Both parties submitted memorandums as instructed by the Court.

After thoroughly reviewing the record once again, including the Supreme Court's denial of the Applicant's appeal, along with the motions, returns, and memorandums submitted, and the testimony and evidence presented at the evidentiary hearing, this Court grants Respondent's motion to reconsider its prior order granting post-conviction relief. As a result, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to relief on any of the grounds raised, and accordingly, denies the application in full.

PROCEDURAL HISTORY

On Tuesday, December 12, 2006, the victim, Joshua Zoch, was murdered in his home. On the same day, Kershaw County Sheriff's Deputies obtained an arrest warrant for Applicant for Zoch's murder. During its February 2007 term, the Kershaw County Grand Jury indicted Applicant for murder (2007-GS-28-0015) and first-degree burglary (2007-GS-28-0016). Applicant was represented by J. Marcus Whitlark, Esquire, and Nathan J. Sheldon, Esquire. The case was prosecuted by Deputy Solicitor John Meadors and Assistant Solicitors Joanna McDuffie and Ron Moak from the Fifth Circuit Solicitor's Office.

On May 6, 2008, Applicant appeared in the Kershaw County Court of General Sessions before the Honorable G. Thomas Cooper, Jr., circuit court judge, and proceeded to a joint jury trial with co-defendants Christopher Whitehead and Robert Cannon. On May 13, 2008, the jury convicted Applicant as indicted. The trial court sentenced Applicant to thirty-five years' imprisonment for each conviction, with the sentences to be served concurrently.

A timely notice of appeal was filed on Applicant's behalf and an appeal was perfected by Chief Appellate Defender Robert M. Dudek, Esquire, of the South Carolina Commission on

Indigent Defense-Office of Appellate Defense. On appeal, Applicant argued trial court erred in admitting the statement of his non-testifying co-defendant Robert Cannon, given to a law enforcement officer during the course of the investigation, without adequately redacting portions of Cannon's statement implicating Applicant because it denied him of his right to confront and cross-examine Cannon. State v. McDonald, 400 S.C. 272, 273, 734 S.E.2d 167, 167 (Ct. App. 2012), aff'd as modified, 412 S.C. 133, 771 S.E.2d 840 (2015). Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions, finding "that the neutral phrase 'another person' inserted into Cannon's statement avoided any Bruton violation. The redacted statement only implicates the statement's maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon's redacted statement into evidence." Id. at 279, 734 S.E.2d at 170. Applicant filed a petition for rehearing on September 27, 2012. By order dated November 30, 2012, the Court of Appeals denied the petition for rehearing.

Applicant then filed a petition for writ of certiorari, which the South Carolina Supreme Court granted. Following briefing and oral argument, the Supreme Court affirmed Applicant's convictions, finding the admission of co-defendant Cannon's statement using the phrase "another person" to refer to co-defendant and two other male individuals violated Applicant's rights under the Confrontation Clause, but the error was harmless beyond a reasonable doubt. State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015). In reaching this decision, the Supreme Court found:

> [W]e find that the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt.

> We first note the presence of strong evidence of guilt, apart from the erroneous admission of Cannon's confession. On the evening of the murder, Whitehead informed a co-worker that he intended to go over to Victim's home to fight him. Later that evening, around 10:00 p.m., Defendants arrived at the Sonic, with Cannon donning a ski mask. The shift manager told the Defendants to leave. An on-duty employee then observed Defendants leave together. That employee testified that Whitehead drove a four-door sedan with a noticeably loud muffler sound. Investigators obtained a receipt from the Wal–Mart on Two Notch Road in Columbia, which confirmed that a ski mask and purple latex gloves were purchased at 10:43 p.m. on the night of the murder. At approximately 11:30 p.m., near the time of Victim's murder, Victim's neighbor took his dog outside and heard "a lot of knocking noise[s], loud, like somebody kicking something or slamming doors." About ten minutes later, the neighbor heard "a lot of noise" and "a lot of people getting excited." He then heard a loud muffler sound and observed headlights in the road. A short time later, at about 1:30 a.m., McDonald showed up at a co-worker's house and was visibly upset. The co-worker testified that, although McDonald did stay at his house from time to time, this was the first time McDonald had showed up so late. In addition, the morning after the murder, Whitehead showed up to work at the Sonic with a scratch under one of his eyes and a limp. He began acting strange and lied to his manager about the source of the injuries, claiming that he fell at work. Several days later, he walked out of work during a shift and told his manager that he's "got problems" and was "about to move to Aiken." **We find this evidence of guilt, independent of Cannon's confession, compelling.**
>
> Beyond the independent evidence of guilt, McDonald gave a confession that was entirely consistent with Cannon's confession. McDonald's confession detailed going to the restaurant with Whitehead and Cannon, purchasing a ski mask and gloves from Wal–Mart, arriving at Victim's home, kicking in the door, hitting Victim repeatedly in the body and head with a baseball bat, and stealing various items from Victim's home. The properly admitted evidence at trial aligns with the details McDonald provided in his confession. In addition to the corroboration of the purchase at Wal–Mart, part of a purple latex glove was found at the crime scene. Victim's girlfriend further testified that Victim kept a baseball bat at his home, which investigators also found at the crime scene.

Id. at 142–43, 771 S.E.2d at 844–45 (emphasis added). The Supreme Court concluded, "Given the

extensive evidence of guilt, we conclude that the Bruton violation was harmless beyond a reasonable doubt. " Id. at 143, 771 S.E.2d at 845. The Remittitur was issued on May 8, 2015.

On May 8, 2015, Applicant filed the instant post-conviction relief application subject to this action.

CURRENT POST-CONVICTION RELIEF ACTION

In his original application, Applicant alleged he was being held in custody unlawfully based on allegations of ineffective assistance of trial counsel and ineffective assistance of appellate counsel.

In his amended application, Applicant alleged he was being held in custody unlawfully based on the following allegations:

a) Ineffective assistance of counsel for failure to object when the Court analyzed the factual determinations and reached a decision in the Jackson v. Denno hearing using an incorrect burden.

b) Ineffective assistance of counsel for failure to object when the Court instructed the jury that they would be conducting a "search for the truth."

c) Ineffective assistance of counsel for failure to file or argue a Motion to Sever.

d) Ineffective assistance of counsel for failure to present compelling argument regarding the photographs of Christopher Whitehead's car which was already entered into evidence.

e) Ineffective assistance of counsel for failure to properly preserve Crawford issues for appellate review during trial.

f) Ineffective assistance of counsel for failure to sufficiently and effectively argue under Bruton that admission of the co-defendant's statement violated the Applicant's rights under the Confrontation Clause.

g) Ineffective assistance of counsel for failure to ensure that the Court properly provided a limiting instruction under Bruton and failure to object when the insufficient instruction was given.

h) Ineffective assistance of counsel for failure to object when the Court allowed the jury during deliberations to review the transcripts of testimony of three trial witnesses.

i) Ineffective assistance of counsel for failing to ensure that the Applicant was present during all critical stages of trial.

j) Ineffective assistance of counsel as counsel was ineffective for failing to present evidence before the jury.

k) The cumulative effect of trial counsel's errors constitute ineffective assistance of counsel.

An evidentiary hearing was held on December 12, 2017, before this Court. Applicant was present and represented by Kristy Goldberg, Esquire. The State was represented by Assistant Attorney General Jessica Kinard of the South Carolina Attorney General's Office. At the start of the hearing, Applicant expressly withdrew allegation (d), but proceeded forward on all other allegations as set forth in his amended application. At the evidentiary hearing, testimony was taken from trial counsel and Applicant. Following the hearing, this Court took the matter under advisement and requested proposed orders from both parties. Both parties submitted proposed orders as instructed by this Court.

Thereafter, on April 2, 2018, this Court adopted Applicant's proposed order and granted relief on all ten grounds. This order was filed on April 5, 2018, and received by Respondent on April 6, 2018.

On April 16, 2018, Respondent served its Motion to Reconsider, Alter, or Amend pursuant to Rule 59(e), SCRCP, asking this Court to reconsider its prior rulings granting relief. Applicant, through counsel, served his return to Respondent's motion on May 8, 2018. Thereafter, all parties convened for a hearing on Respondent's motion on May 17, 2018. Applicant was present and represented by Counsel Goldberg. Respondent was represented by Senior Assistant Deputy

Attorney General Megan Harrigan Jameson. After hearing argument from both parties, this Court instructed counsels to file post-hearing memorandums addressing any additional arguments. Both parties submitted memorandums as instructed by this Court.

GRANT OF RECONSIDERATION AND AMENED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After a thorough review of the record once again and consideration of the arguments presented by both parties, this Court grants Respondent's motion to reconsider its prior order granting post-conviction relief pursuant to Rule 59(e), SCRCP. Additionally, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to relief on any of the grounds raised, and accordingly, denies the application in full. Specific findings as to each of the ten grounds follow:

Respondent moved this Court to reverse its earlier decision and deny post-conviction relief contending that Applicant failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984). After careful consideration, this Court agrees and finds Applicant has not and cannot meet his requisite burden of relief as to any of the ten grounds of ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland, 466 U.S. 668; Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (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 [it]

cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U .S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. at 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very

adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet the requisite burden of establishing that any constitutional ineffectiveness of counsel merits granting Post Conviction Relief. Each allegation is addressed fully below:

Applicant cannot establish counsel was ineffective for failing to object to the trial court's standard of review used during the Jackson v. Denno hearing

Applicant asserts trial counsel was constitutionally ineffective for failing to object to the trial court's ruling during the Jackson v. Denno hearing. Specifically, Applicant complains that the trial court employed an incorrect standard in determining whether his statement was admissible and impermissibly shifted the burden of proof. Upon review of the record as a whole, this Court finds the trial court did use the correct standard when determining the admissibility of Applicant's statement, and this allegation must therefore be denied and dismissed with prejudice.

Applicant gave a detailed confession to the crime. Like Cannon's statement, his statement was also redacted before introduction. (State's Exhibit 104). The statement referenced going to the local Wal-Mart and buying a ski mask and a box of purple gloves; one of them called "Zach" to see if someone was home; all of them kicked in a sturdy back door; one person "picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch"; another person dragged victim off the couch; he repeatedly hit victim with his fists then hit him in the back of the head using the victim's bat; they were searching for drugs and money; another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. He also claimed someone else left the house with "plastic bags of stuff" and gave him some "DVD's and stuff." (Tr. p. 773, line 15 - p. 775, line 21). In particular, as to the beating, Applicant confessed as follows (again, as reflected in the redacted statement read at trial):

> I first grabbed a bat that was against the wall and I started hitting Josh in the body. Then another person tried to stop me to ask Josh a question about where the money and dope was, and I couldn't stop the bat. I couldn't stop the bat and I hit Josh in the back of the head. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. That's when another

> person and another person started kicking and stomping Josh. ... The last thing I saw another person pushing the tree over on Josh...

(Tr. p. 775, lines 2-9). Further, at the time of his arrest, when driving to the sheriff's department and before giving his detailed statement, Applicant volunteered to officers, "This is the way we came that night." (Tr. p. 954, line 4 - p. 955, line 3).

Prior to the admission of Applicant's statement, the trial court conducted a hearing pursuant to Jackson v. Denno to determine the admissibility of Applicant's statement to law enforcement. During the Denno hearing, the trial court heard testimony from three law enforcement investigators, Applicant, Applicant's mother, and Applicant's brother. The trial court was also presented with Applicant's signed waiver of rights. After hearing all testimony and evidence presented and listening to argument from counsel, the trial court noted it had considered everything presented by the State, including the State's evidence of waiver, as well as everything presented by the defense, and found Applicant was fully advised of his rights and knowingly and voluntarily waived those rights to give a statement to law enforcement. See Tr. 252-59.

The record establishes the trial court employed the correct standard and did not employ the wrong standard or impermissibly shift the burden onto Applicant. "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, he has a right to an attorney, and an attorney will be appointed to him prior to any questioning if he desires one and cannot afford one. Id. at 479. Once those warnings are

given to a suspect and the suspect is afforded an opportunity to exercise his rights, the suspect may knowingly and intelligently waive those rights and make a statement. Id.

Significantly, if a defendant is advised of his constitutional rights and then chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence the defendant knowingly, intelligently, and voluntarily waived his rights. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990); see Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (instructing the prosecution must establish the accused understood his rights in order for the accused's waiver of those rights to be valid). In determining whether a valid waiver of rights occurred, the particular facts and circumstances surrounding the case must be examined, including the background, experience, and conduct of the accused. North Carolina v. Butler, 441 U.S. 369, 374-375 (1979). Importantly, a valid waiver of rights can be established through proof of express written or oral statements **or** can be inferred from the actions and words of the person interrogated. Id. at 373; see Berghuis, 560 U.S. at 384 ("An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence." (citation omitted)); State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) ("An express waiver is unnecessary to support a finding that the defendant has waived the right to remain silent or the right to counsel guaranteed by Miranda.").

However, even if a defendant validly waives his rights and makes a statement, a confession or statement by a defendant is nonetheless not admissible unless voluntarily made. State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). The reason for the prohibition against the use of an involuntary confession is that "coerced confessions" have been recognized to be "inherently untrustworthy." Dickerson v. United States, 530 U.S. 428, 433 (2000); see also Jackson v. Denno, 378 U.S. 368, 385-386 (1964) ("[T]he Fourteenth Amendment forbids the use of involuntary

confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' and because of 'the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' " (citations omitted)).

Importantly, "[t]he process for ascertaining whether a statement is voluntary is bifurcated because the process involves determinations by both the trial judge and the jury." State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008). Pursuant to the bifurcated process, the trial judge must first determine in an evidentiary hearing whether the State proved the statement was voluntarily made by a preponderance of the evidence and then, if the trial judge finds the State met its burden, the statement is submitted to the jury where its voluntariness must be proven beyond a reasonable doubt. Id. When considering the voluntariness and admissibility of a defendant's statements, the trial judge should examine the totality of the circumstances under which the statements were made, including the characteristics of the accused and the details of the interrogation, to determine whether the State has met its burden of proof. State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980). Factors to be considered in the totality of the circumstances analysis include: (1) the age of the accused; (2) the educational level and intelligence of the accused; (3) the accused's knowledge of his constitutional rights; (4) the length of the accused's detention; (5) the nature of the questioning and whether it was repeated and prolonged; and (6) the presence or absence of the use of punishment, including deprivation of food or sleep. Schneckloth

v. Bustamonte, 412 U.S. 218, 226 (1973). Ultimately though, the "ultimate test" of voluntariness involves determining whether the confession was "the product of an essentially free and unconstrained choice by its maker" or was the product of an overborne will and critically-impaired capacity for self-determination. Id. at 225-226; see State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) ("The question is whether the defendant's will was overborne when he confessed."); see also Miller v. Fenton, 796 F.2d 598, 604 (3rd Cir. 1986) ("We emphasize that the test for voluntariness is not a but-for test: we do not ask whether the confession would have been made in the absence of the interrogation. Few criminals feel impelled to confess to the police purely of their own accord, without any questioning at all.").

At the outset of the Denno hearing, it may have appeared that the Court was placing the burden on the Defense to prove a lack of waiver by a preponderance of evidence, rather than requiring the State to prove a voluntary waiver by a preponderance of the evidence. However, the trial court more fully explained and used the correct standard at the conclusion of the Denno hearing, with Judge Cooper making the following findings:

> So based on that analysis of this case, I have carefully considered all the evidence that's been offered by the State and the defendants and am convinced by a preponderance of the evidence—and that's my standard, and I so find that before the alleged statements were obtained from the defendants—and this applies to both defendants—the defendants were fully advised of their rights under the Fifth and Sixth Amendments to the Constitution of the United States, and that the defendants were advised of the Constitutional safeguards required by Miranda vs. United States (sic) as follows :
>
> The defendants were advised prior to any interrogation that they had the right to remain silent. The defendants were advised prior to any interrogation that if they waived their right to remain silent and made a statement such statement could and would be used against them in a court of law, that the defendants were advised prior to any

interrogation that they had the right to employ or select and attorney of their own choice, that if they did not have the money, resources or funds to employ an attorney that the court would appoint and provide an attorney for them; and, if so, if they so desired, without cost or expense to them, and that they had the right to have their attorney present with them at all times during all interviews and interrogations, that the defendants were advised prior to any interrogation that they had the right to consult with their attorneys before interrogation, that they were advised prior to any interrogation they had a right to interrupt and terminate the interrogation at any time.

They had further the right to stop answering questions at any time during the interrogation, that they were advised prior to any interrogation that even if during the interrogation they desired an attorney, the interrogation would cease until an attorney was provided for them and they were given the opportunity to consult with their attorney prior to further interrogation, that the defendants knowingly and intelligently waived their rights under the Fifth and Sixth Amendments to the Constitution of the United States and the Constitutional safeguards required by Miranda vs. Arizona, and that the alleged statements given by the defendants were freely and voluntarily given, without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without threat of injury, and without compulsion or inducement of any kind; and that such alleged statements were the voluntary product of the free and unconstrained will of the defendants .

This Court finds all of the foregoing conclusions by a preponderance of the evidence; and I, therefore, find the statements are admissible into evidence. All right, counsel. Are you ready for the jury?

(Trial Tr. p. 257-259).

Based on a review of the record, and specifically upon the conclusions of the trial court listed above, the trial court employed the correct standard for determining the admissibility of Applicant's statement. Therefore, as the trial court employed the proper standard, trial counsel cannot be deemed deficient for failing to object when no objection was warranted.

Moreover, this Court's finds Applicant can likewise not establish the requisite prejudice for relief based on the purported error of trial counsel for failing to object, as the Supreme Court already found there was compelling evidence of Applicant's guilt **independent** of his statement to law enforcement and Cannon's statement. McDonald, 412 S.C. at 143, 771 S.E.2d at 845. Therefore, there is no reasonable likelihood the result of the proceeding would have been different absent counsel's alleged deficiency for failing to object.

Applicant cannot establish counsel was ineffective for failing to object to the trial court's use of the phrase "search for the truth"

Applicant asserts trial counsel was constitutionally ineffective for failing to object to comments from the trial court to the jury that indicated their role was to seek the truth. Applicant argues trial counsel was deficient for failing to object to these comments because they unconstitutionally shifted the burden of proof and were not preserved for appellate review based on counsel's failure to object. However, this Court finds Applicant cannot meet his burden of establishing any constitutional ineffectiveness of counsel.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge. State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018).

Recently, the South Carolina Supreme Court again considered the use of "truth seeking" language by the trial court in State v. Beaty. Id. The Beaty Court concluded:

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

Id.

In both Aleksey and Beaty, the South Carolina Supreme Court determined that while the trial court's use of "truth seeking" language was improper, the error was not significant enough to warrant reversal of the convictions. The same holds true in Applicant's case. Initially, it is important to note that at the time of Applicant's trial in 2008, the jury instruction given by the trial court was widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. Therefore, as this charge was commonly used and was proper at the time of Applicant's trial, trial counsel was not deficient for failing to object to this charge.

Moreover, when these "truth seeking" comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Applicant. Because the jury instructions as a whole were proper, Applicant cannot establish any resulting prejudice and this Court's findings otherwise are improper. See Brown v. Stewart, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001) (internal citations omitted) ("In reviewing jury charges for error, we construe the court's charge as a whole

in light of the evidence and issues presented at trial. If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury's verdict.")

Finally, this Courts also finds that Applicant cannot establish the result of his trial, or appeal, would have been different but for counsel's failure to object based on the overwhelming and compelling evidence establishing Applicant was guilty of the charged offenses. See McDonald, 412 S.C. at 142, 771 S.E.2d at 844 (finding the constitutional violation stemming from the admission of Cannon's statement without proper redaction was harmless based on the overwhelming and compelling evidence establishing Applicant's guilt).

Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Applicant cannot establish counsel was ineffective for failing to request a severance

Applicant argues trial counsel was constitutionally ineffective for failing to move for a severance of Applicant's trial from his co-defendants. In support of this argument, Applicant argues his constitutional rights were violated by the admission of the non-testifying codefendant's statement incriminating him, which he asserts would not have happened if his trial was severed from his co-defendants.

This Court finds Applicant cannot establish any constitutional ineffectiveness from this allegation based the overwhelming and compelling evidence of his guilt independent of Cannon's statements. When reviewing Applicant's case on direct appeal, the Supreme Court held the trial court's redaction of co-defendant Cannon's statement with the phrase "another person" was "insufficient to satisfy the demands of the Confrontation Clause" under Bruton and its progeny.

McDonald, 412 S.C. at 141, 771 S.E.2d at 844. Moreover, the Supreme Court held, "[t]he presence of a limiting instruction is not curative here, as it was not in Bruton, for 'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" McDonald, 412 S.C. at 142, 771 S.E.2d at 844. Despite finding Applicant's constitutional rights were violated by the trial court's redaction of his non-testifying co-defendant's statement, the Supreme Court held, "the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt." Id. In reaching this determination, the Supreme Court noted the "independent evidence of guilt" aside from Cannon's statement or McDonald's confession, was compelling:

> On the evening of the murder, Whitehead informed a co-worker that he intended to go over to Victim's home to fight him. Later that evening, around 10:00 p.m., Defendants arrived at the Sonic, with Cannon donning a ski mask. The shift manager told the Defendants to leave. An on-duty employee then observed Defendants leave together. That employee testified that Whitehead drove a four-door sedan with a noticeably loud muffler sound. Investigators obtained a receipt from the Wal–Mart on Two Notch Road in Columbia, which confirmed that a ski mask and purple latex gloves were purchased at 10:43 p.m. on the night of the murder. At approximately 11:30 p.m., near the time of Victim's murder, Victim's neighbor took his dog outside and heard "a lot of knocking noise[s], loud, like somebody kicking something or slamming doors." About ten minutes later, the neighbor heard "a lot of noise" and "a lot of people getting excited." He then heard a loud muffler sound and observed headlights in the road. A short time later, at about 1:30 a.m., McDonald showed up at a co-worker's house and was visibly upset. The co-worker testified that, although McDonald did stay at his house from time to time, this was the first time McDonald had showed up so late. In addition, the morning after the murder, Whitehead showed up to work at the Sonic with a scratch under one of his eyes and a limp. He began acting strange and lied to his manager about the source of the injuries, claiming that he fell at work. Several days later, he walked out of work during a shift and

> told his manager that he's "got problems" and was "about to move to Aiken."

Id. at 142–43, 771 S.E.2d at 844–45. The Supreme Court found "this evidence of guilt, independent of Cannon's confession, **compelling**." Id. (emphasis added). In light of this finding from our Supreme Court and this Court's thorough review of the record, this Court finds Applicant cannot establish any requisite prejudice (i.e., that the result of his trial would have been different but for counsel's purported error). Therefore, this allegation must denied and dismissed with prejudice.

Applicant cannot establish counsel was ineffective for failing to properly preserve Crawford issues

Applicant asserts trial counsel was ineffective for failing to adequately argue that Cannon's statement was inadmissible pursuant to Crawford, thereby failing to preserve this issue for appellate review. However, as discussed above, the Supreme Court already determined the constitutional deprivations stemming from the improper admission of Applicant's statement were harmless based on the compelling evidence establishing Applicant's guilt independent of Cannon's confession. Accordingly, this Court finds Applicant cannot establish any requisite prejudice and this allegation must denied and dismissed with prejudice.

Applicant cannot establish counsel was ineffective for failing to sufficiently and effective argue that Cannon's statement was inadmissible under Bruton

Applicant argues trial counsel was ineffective for failing to effectively argue that Cannon's statement was inadmissible under Bruton. The record clearly establishes an argument was made on this ground and the issue was preserved for appellate review as a published opinion was issued on this every ground. However, Applicant argues trial counsel was constitutionally ineffective for failing to effectively argue the Bruton issue and asserts that if different arguments had been made,

the statement may have been suppressed. This Court finds Applicant cannot establish the requisite prejudice necessary for relief, as the Supreme Court already determined the constitutional deprivations stemming from the improper admission of Applicant's statement were harmless based on the compelling evidence establishing his guilt independent of Cannon's confession. The Supreme Court already reviewed and expressly rejected Applicant's assertions that he was denied a fair trial based on the erroneous admissions, finding that "overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt." McDonald, 412 S.C. at 142, 771 S.E.2d at 844.

Moreover, Applicant's argument that counsel waived Applicant's Bruton rights when the questions he asked nullified the prior attempt by the trial court and State at redaction of the statements and protection of the defendants with wholly without merit, as our appellate courts did not deem counsel's conduct to have constituted a "waiver" of Applicant's Bruton arguments and ruled on the merits of this claim, finding the constitutional error harmless in light of the compelling and overwhelming evidence of Applicant's guilt.

This Court finds Applicant cannot meet his requisite burden as to this issue, which is denied and dismissed with prejudice.

Applicant cannot establish counsel was ineffective for failing to ensure the trial court properly provided a limiting instruction under Bruton

Applicant argues trial counsel was ineffective for failing to ensure the trial court properly gave limiting instructions immediately following the introduction of Cannon's statement, constituting deficient performance. Applicant asserts that if counsel had preserved this issue for appellate review, the appellate courts may have found that failure to give a limiting instruction at the time the statements were admitted was an error by the trial court. This Court notes that this

argument is incompatible with the Supreme Court's ruling in McDonald and applies the wrong standard for determining prejudice. When addressing this very issue on appeal, the Supreme Court held, "[t]he presence of a limiting instruction is not curative here, as it was not in Bruton, for 'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" McDonald, 412 S.C. at 142, 771 S.E.2d at 844. Accordingly, it is clear that any limiting instruction would not have been enough to cure this constitutional error, which was nonetheless harmless in light of the compelling independent evidence of Applicant's guilt. This Court finds Applicant cannot meet his requisite burden as to this issue, which is denied and dismissed with prejudice.

Applicant cannot establish counsel was ineffective for failing to object to the Court's decision to review a transcript of the testimony of three trial witnesses

During deliberation, the jury asked to hear additional testimony. After a discussion amongst all parties and the court, the court informed the jury that it would take several days to produce transcripts for these three witnesses. The jury responded, "We do not feel we can be fair and do justice to each defendant on each charge without these transcripts." (Trial Tr. p. 1471). Thereafter, the trial court decided to allow for a recess to allow the court reporter adequate time to prepare the transcripts. (Trial Tr. p. 1472). When the jury returned following the recess, the jury asked for the trial court to re-instruct them on the law and the court re-instructed the jury in full. (Trial Tr. 1472-93). The jury then continued deliberations with the use of the transcripts of the requested witnesses' testimony. Applicant argues trial counsel was ineffective for failing to object to the trial court's decision to allow the jury to review transcripts of the testimony of three

witnesses because the transcripts unduly emphasized the evidence and under minded his trial strategy. This Court finds Applicant cannot meet his burden of proof as to this allegation.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after the beginning of deliberations." State v. Carlson, 363 S.C. 586, 601, 611 S.E.2d 283, 291 (Ct. App. 2005) (quoting State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980)). The extent of the review is within the trial judge's discretion, which is to be exercised in the light of the jury's request. Id.

Whereas it is not advisable for a trial court to provide the jury with transcripts of individual witnesses for fear the transcripts unduly emphasize that evidence over other evidence, the trial court did not abuse its broad discretion in providing the jury with transcripts of the full testimony of three witnesses when the jury informed the court, "We do not feel we can be fair and do justice to each defendant on each charge without these transcripts." (Trial Tr. p. 1471). State v. Gulledge, 277 S.C. 368, 372, 287 S.E.2d 488, 490 (1982). As the trial court properly provided these transcripts, trial counsel's purported failure to object cannot be deemed deficient. Moreover, Applicant cannot establish that he was prejudiced by this purported deficient performance in light of the overwhelming and compelling evidence of Applicant's guilt. See McDonald, 412 S.C. at 143, 771 S.E.2d at 845. Accordingly, this allegation is denied and dismissed with prejudice.

Applicant cannot establish counsel was ineffective for failing to ensure Applicant was present at all critical stages of trial

Similar to the allegation addressed directly prior, Applicant asserts trial counsel was ineffective for failing to ensure he was present in the courtroom when the trial court was determining how to respond to the jury's request to re-hear the testimony of three witnesses.

"A criminal defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. A defendant's exclusion, or absence, will be reviewed in light of the whole record." State v. Shuler, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001) (internal citations omitted) (noting a Jackson v. Denno hearing on defendant's statements is critical, but defendant's presence would not have contributed to the fairness of the procedure). The South Carolina Supreme Court "has defined a critical stage as one at which procedural steps are taken or at which events transpire that are likely to prejudice the ensuing trial." State v. Hardy, 283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985) (citing State v. Williams, 263 S.C. 290, 210 S.E.2d 298, 300 (1974)). Whereas the better practice is to be certain that a criminal defendant is present for all stages of a trial, this court does not find that the Defendant's presence to address the jury's request was so critical that it contributed to the fairness of the procedure. However, even if a defendant is not present during a "critical stage of trial," this error is subject to a harmless error analysis. Shuler, 344 S.C. at 626, 545 S.E.2d at 816; Williams, 292 S.C. 231, 355 S.E.2d 861. Although the right to be present is a substantial right, **no presumption of prejudice arises from a defendant's exclusion**. Shuler, 344 S.C. at 626, 545 S.E.2d at 816.

In the present case, Applicant's rights were not infringed, as a conference outside the jury's presence as to how to respond to a jury question is not a "critical stage." Moreover, Applicant's presence would not have made a difference in the fairness of the proceeding. Accordingly, trial counsel cannot be deemed deficient. Additionally, Applicant cannot establish that he was prejudiced by this purported deficient performance in light of the overwhelming and compelling

evidence of Applicant's guilt. See McDonald, 412 S.C. at 143, 771 S.E.2d at 845. This allegation is denied and dismissed with prejudice.

Applicant cannot establish counsel was ineffective for failing to present a defense

Applicant argues trial counsel was ineffective for failing to present a defense on Applicant's behalf. Specifically, Applicant argues trial counsel should have presented evidence to the jury that Applicant's statement to law enforcement was not given freely, knowingly, and voluntarily, much like the witnesses he presented at the Denno hearing including Applicant.

At the evidentiary hearing, both Applicant and trial counsel testified that in retrospect, they now wish Applicant had testified in his own defense. These hindsight reflections come nearly a decade after the trial and only upon the convictions of Applicant and sentence of thirty-five years imprisonment. However, counsel testified at the time of trial, he made a strategic decision not to present evidence, including the testimony of Applicant. Moreover, the record reveals Applicant made the decision not to testify on his behalf after engaging in a thorough colloquy with the trial court. See Trial Tr. 1292-94, 1315.

"The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made." Edwards v. State, 392 S.C. 449, 456–57, 710 S.E.2d 60, 64 (2011) (citing Strickland, 466 U.S. at 689). Accordingly, PCR courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). To achieve the goal of "eliminat[ing] the distorting effects of hindsight," PCR courts must be wary of attorneys' statements at an evidentiary hearing second-guessing earlier strategic decisions against calling witnesses and instead "focusing

[its] attention on what [Applicant]'s counsel knew at the time he made his decisions." Edwards, 392 S.C. at 458, 710 S.E.2d at 65.

Here, trial counsel testified as to his strategic decision not to present Applicant or any other witnesses during Applicant's trial. This Court must give the adequate weight required to trial counsel's strategic decision not to present a defense, and accordingly, finds that counsel was not deficient. Moreover, Applicant cannot establish that he was prejudiced by this purported deficient performance in light of the overwhelming and compelling evidence of Applicant's guilt. See McDonald, 412 S.C. at 143, 771 S.E.2d at 845.

Applicant cannot establish that the cumulative effect of counsel's errors constitutes ineffective assistance of counsel

Applicant argues that in addition to the nine individual grounds raised, he is also entitled to post-conviction relief based on the cumulative effect of trial counsel's deficiencies. However, this argument must fail, as this Court has already concluded Applicant failed to meet his requisite burden of deficiency for each ground raised.

"When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). However, "whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); see also Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657 S.E.2d , 771, 779 n.3 (2008). Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed

individually, rather than collectively" and, therefore, does not recognize a cumulative error analysis. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998).

As discussed above, our Supreme Court recently stressed the importance of the PCR court's role in making specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. Id. (internal citations omitted).

This Court finds a cumulative error analysis would be inappropriate in the present case, particularly because Applicant has not met his burden of establishing deficiency as to any of the nine enumerated grounds and the Supreme Court's findings in McDonald outlining the overwhelming and compelling evidence of his guilt.

CONCLUSION

Based on all the foregoing, this Court grants Respondent's motion to reconsider, alter, or amend its previous order granting post-conviction relief pursuant to Rule 59(e), SCRCP, and substitutes this order in placed of its previously issued order.

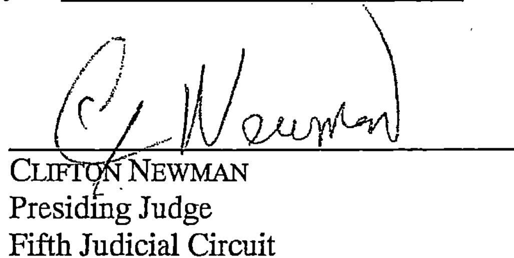
This Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes either party wishing to secure appellate review of this Order must file and serve a notice of appeal within thirty days from the receipt of this Order. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

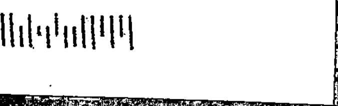
1. Respondent's motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP is granted;
2. This Order is substituted for this Court's prior order granting post-conviction relief;
3. Post-conviction relief is denied and dismissed with prejudice; and
4. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 13th day of February, 2019.



CLIFTON NEWMAN
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina



The Honorable Daniel E. Shearouse
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