

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001629

Sammie Lee Gerrick, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Appendix – Volume III

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1 Q Okay. And when I say, "Did your husband know you put
2 the note in the car," let me rephrase that. Did he know
3 the -- the -- the root was the note, the can of "Law Stay
4 Away," the twig, and the penny; is -- is that right?

5 A Right.

6 Q Okay. And did Sammie know about anything associated
7 with that root?

8 A No, sir.

9 Q Okay. Has anybody -- well, withdraw that. Did Mr.
10 Williams ever interview you about the knowledge of -- your
11 knowledge of the root?

12 A Not that I -- not that I can recall.

13 Q Okay. If you had been asked to explain your
14 involvement with the root, either to Judge Early in a pre-
15 trial motion or to the jury, would you have done that?

16 A Yes.

17 Q Okay. And can you explain what a "root" is?

18 A It's -- it's like, you have to do so many things, you
19 know, and it'll work. You know, you have to do this, and
20 do that, and it's something that I believe in.

21 MS. COLEMAN: Your Honor, I object to this line of
22 questioning. This is lay testimony over the -- the root,
23 which I submit is kind of a specialized area of expertise -
24 -

25 MR. GROSE: Well, she -- she can testify about what

1 she understands it means.

2 THE COURT: Over -- overruled.

3 MS. COLEMAN: Thank you.

4 Q And -- and is that a belief that you hold in roots?

5 A Yes, sir. That's something that I believe in.

6 Q Okay. Is that a belief that your husband shares?

7 MS. COLEMAN: Objection.

8 A Not that I know of.

9 MS. COLEMAN: Calls for speculation.

10 THE COURT: Sustained. She can't testify to what
11 somebody else believes. She can explain her -- her
12 beliefs.

13 Q That's -- that's all I have. Please answer any
14 questions the Attorney General might have.

15 MS. COLMAN: Thank you, Mr. Grose.

16 CROSS-EXAMINATION

17 BY MS. COLEMAN

18 Q Ms. Gerrick, you -- you testified at trial, right?

19 A Yes.

20 Q Were you ever asked at trial to testify about your
21 conversations with your husband?

22 A No.

23 Q Okay. And you invoked your spousal privilege, right?

24 A Invoke?

25 Q You -- you told the Court that you were not going to

1 be testifying about your conversation with your husband?

2 A Correct.

3 Q Okay. So the jury didn't hear anything about what
4 your husband told you about the crime; is that right?

5 A No.

6 Q Okay. Okay. Was the root that we're talking about --
7 the root capsule and the "Law Stay Away," that was found in
8 the center console of your husband's truck, right?

9 A Yes.

10 Q But you're saying that you put it there?

11 A Yes.

12 Q Did you write the note?

13 A Yes, I did.

14 Q Okay. Is that your handwriting on the note?

15 A Say again?

16 Q Is that your handwriting on the note?

17 A Yes.

18 Q Okay. Because you wrote it.

19 Did you -- you've testified today about the
20 investigators intimidating you to testify. Did you ever
21 report this to anyone before the trial?

22 A No.

23 Q Why not?

24 A Because I was scared --

25 Q Okay. You didn't ---

1 A -- of losing my daughter.

2 Q Okay. So you didn't raise it to the judge before
3 trial or anything?

4 A No.

5 Q Okay.

6 MS. COLEMAN: Beg the Court's indulgence.

7 (Brief pause.)

8 Q Ms. Gerrick, did you meet with the Assistant Attorney
9 General who prosecuted this case, Mr. Waters, before the
10 trial?

11 A Mr. Waters, Mr. Waters ...

12 Q From the Attorney General's Office?

13 A Was it two -- I think it was two gentlemen at the
14 time? Was it two gentlemen?

15 Q Mr. Waters prosecuted the case at trial, and there
16 were two of them, yes.

17 A Okay. Yes.

18 Q But he was the main prosecutor. You met with him?

19 A Well, they came -- they kept calling me that day, and
20 finally I answered my phone. I told them I wouldn't talk
21 to them unless I -- I went to my father-in-law [sic] house.
22 And then, I think, to my recollection, the -- the two pro
23 -- the prosecutors, I think it was Barnwell County Sheriff,
24 they all came, you know, to my father-in-law house because
25 I wouldn't meet them at my house 'cause I was scared.

1 Q Okay. How many times did you meet with them?

2 A Let's see. To my recollection, I think it was twice I
3 believe.

4 Q Did you ever report to him any of the intimidation?

5 A No.

6 Q Okay. Is this the first time that you've told anyone
7 about the intimidation, today?

8 A Yes.

9 Q Who exactly was the -- the officer or the investigator
10 that threatened you?

11 A I'm sorry. Say it again?

12 Q Who did you say was the officer that threatened you?

13 A Mr. Dowling.

14 Q Okay. Was there anyone else that made threats to you?

15 A No, ma'am.

16 Q Okay. Nothing further. Thank you.

17 MR. GROSE: Just a couple of real quick follow-ups.

18 RE-DIRECT EXAMINATION

19 BY MR. GROSE:

20 Q I believe you testified earlier that the investigators
21 did not advise you about the spousal privilege; is that
22 correct?

23 A Yes, sir.

24 Q And if you had known about it then, would you have
25 exercised it?

1 A No, sir.

2 Q Would you have talked to them?

3 A If I'd have known about that address?

4 Q About the privilege?

5 A No, sir.

6 Q Would you have given an interview?

7 A No, sir.

8 Q Okay. And they asked you about being scared to report
9 that to Judge Early. Do you remember that question?

10 A Yes.

11 Q Would you even know how to go about reporting that to
12 a Circuit Court Judge?

13 A No, sir.

14 Q Thank you.

15 RE-CROSS EXAMINATION

16 BY MS. COLEMAN

17 Q Did the Court advise you -- at the trial of your right
18 to invoke this privilege?

19 A (No response.)

20 Q Can you remember Judge Early telling you of your
21 privilege?

22 A Privilege. I think -- yes.

23 Q Okay. And you didn't tell him then that they had
24 intimidated you?

25 A No, ma'am.

1 Q Okay. Thank you.

2 MS. COLEMAN: Nothing further.

3 THE COURT: Anything further from this witness?

4 MR. GROSE: No, sir.

5 THE COURT: (To the witness) Thank you, ma'am. You
6 may step down.

7 MR. GROSE: I'll just add, now, she's probably gonna
8 stay. It's up to her. I would ask that her -- be
9 officially excused so her counsel can leave.

10 THE COURT: Mr. -- Mr. Wise, you can be excused.

11 MR. WISE: Okay.

12 (The witness exits the witness stand).

13 MR. GROSE: I will call Mr. Williams.

14 DAN WILLIAMS, having been first
15 duly sworn, testifies as follows:

16 CLERK OF COURT: Please have a seat in the witness
17 chair, and state your full name.

18 THE WITNESS: Dan Williams.

19 DIRECT EXAMINATION

20 BY MR. GROSE:

21 Q Mr. Williams, were you -- did you represent Sammie
22 Gerrick at trial?

23 A I did.

24 Q All right. And do you recall how you became involved
25 in his case?

26 A I was court appointed a year -- a year and a half

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1 earlier I believe.

2 Q Okay. And when I -- when I look at the Judicial
3 website, it looks like there might've been some other court
4 appointed lawyers before you?

5 A The -- the Public Defender had that case at first, and
6 there was a guy named "Nick McCarley" who may have been
7 representing him. I'm -- I'm not clear on that.

8 Q Okay. And did it come to you because they had a
9 conflict?

10 A I -- I believe so, yeah.

11 Q Okay. And when the Attorney General announced the
12 case, she said that the Solicitor's Office had a conflict.
13 Did you recall her saying that?

14 A Nick McCarley went to work for the Solicitor's Office
15 during that time at some point, and then Sammie raised the
16 issue of conflict; and they indicated, out of an abundance
17 of caution to cause a issue, that they would send the case
18 to the Attorney General.

19 Q Okay. And that's part of the process with how you
20 ended up with the case; is that correct?

21 A I think I had the case before then.

22 Q Okay.

23 A So I -- I don't know that the -- the two were related.

24 Q All right. Now --

25 A Well, hold on. Grant Gibbons called me and told me he

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1 knew something about Sammie from years ago when he was with
2 the Solicitors Office, and he didn't feel comfortable with
3 his office taking the case.

4 Q Okay.

5 A So ...

6 Q Grant's the circuit defender.

7 A That's correct.

8 Q Okay. And I know we can probably spend all day
9 answering this question, but can you just summarize what
10 the State's theory of the case was?

11 A Yeah. Sammie had -- was locked up in Bamberg. He had
12 called Tyrone Donaldson, the victim, and another fella,
13 about getting him out of jail. They -- he needed, I think,
14 \$6,000 for his bail.

15 They went over -- they came up with the money. Tyrone
16 went over there and got him and brought it back.

17 According to, I think, Maurice Williamson, they were
18 gonna get their money back right away.

19 Tyrone and Sammie were seen together a couple of
20 times. Basically, the State said that they went into the
21 woods, they dug a hole and looked for -- looking for a safe
22 that Sammie said he had money buried in, and that Sammie
23 killed him there.

24 Q Okay. And -- and the theory was is that Sammie was
25 killed -- I mean, that Tyrone was killed at a particular

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1 location.

2 A That's correct.

3 Q Okay. And then, of course, there was evidence that
4 Tyrone was buried in a shallow grave.

5 A That's correct.

6 Q Okay. Now, Charlene Gerrick testified a few minutes
7 ago. Do you recall the issue of the root being -- or the
8 root being an issue at trial?

9 A I do.

10 Q Okay. And what is your recollection of what the root
11 was?

12 A The root was some shading, some other stuff found
13 wrapped up in a piece of brown paper in Sammie's truck that
14 had words written on it, and a -- I think a Bible verse
15 written on it. And it said, "Save me Jack Early. Save me
16 Jack Early." I think three times. There was something
17 about saving him from murder and from something else.

18 Q Okay. I'm gonna just -- if I could just approach.
19 (Hands a document to the witness) This is from the closing
20 on page 732 of the transcript. Does that sort of help
21 refresh your memory a little bit about -- I know that's not
22 a direct quote, but about what the statement said?

23 A That's correct. It said (as read): "Jack Early set
24 me free now." I think, three times. (As read): "So shall
25 it be," three times. (As read): "Save me from murder and

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1 revoke bond."

2 Q Okay. And I believe that you did make a motion to
3 exclude the root from evidence, didn't you?

4 A I did.

5 Q Okay. And why did you want to keep out that evidence?

6 A Well, I was concerned that it might be considered some
7 kind of confession of wrongdoing.

8 Q Okay. And in fact, the prosecutor, Mr. Waters, was
9 arguing that it was evidence of a consciousness of guilt, I
10 believe, under the case law.

11 A That's correct.

12 Q Okay. And certainly, from what we just looked at, it
13 was something that Mr. Waters used in his closing argument.

14 A It appears so.

15 Q Okay. Now, the -- the note mentioned Judge Early by
16 name, didn't it?

17 A It did.

18 Q Okay. Did you ever consider whether it might be
19 prejudicial for a judge to preside over a case when there
20 was evidence of a root that named the judge?

21 A I -- I didn't think the judge would give it any
22 account. You know, criminal victims say things about
23 judges all the time, and that's not reason for them to
24 recuse themselves. So --

25 Q Well ---

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1 A -- it didn't concern me.

2 Q Well, and -- and my -- my question is not so much
3 whether it -- it would have an effect on Judge Early, but
4 did you consider what kind of effect it might have on the
5 jurors?

6 A You know, it's been four or five years ago, and I
7 don't -- I don't remember exactly, but I didn't see that
8 being the real issue. I saw the real issue being the
9 admission of it in the first place.

10 Q Okay. And ---

11 MS. COLEMAN: Excuse me. Can you repeat that? I'm
12 sorry. You trailed off. I couldn't hear what you said.

13 A I -- I think I said it's been four or five years ago,
14 but I didn't see that as being the real issue. I saw the
15 real issue being the admission of the root ---

16 Q Okay.

17 A --- in and of itself.

18 MS. COLEMAN: Okay.

19 A The -- the -- of the root in and of itself.

20 MS. COLEMAN: Thank you.

21 Q All right. And so, at the time, you didn't consider
22 whether or not the jurors could've drawn any inference
23 about -- or from the admission of that evidence, about what
24 Judge Early might've thought about the case?

25 A Again, it's been four or five years ago, but I can't

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1 honestly tell you today that I did.

2 Q Okay.

3 MR. GROSE: Beg the Court's indulgence.

4 (Brief pause.)

5 Q All right. The second issue that I want to go over
6 with you -- well, before I move on, did you have any
7 interactions with Charlene Gerrick prior to Sammie's trial?

8 A I did.

9 Q All right. And did you ever ask her about the root
10 and what she might know about it?

11 A No, I didn't. Sammie told me he put the -- had the
12 root, so I didn't ask her about that.

13 Q All right.

14 MS. SCRANTON: I'm sorry, Your Honor. I'm having a
15 difficult time hearing the witness. And I'm not sure if
16 it's trailing off, or if it's because maybe Mr. Grose,
17 maybe, could move a little to the right just so that I can
18 hear the words better?

19 THE COURT: Okay. One -- one attorney needs to -- to
20 make a -- make objections. Ms. Coleman has already made
21 the objection suggestion. So, Ms. Coleman, you'll need to
22 be the one to speak for the State of this witness.

23 MR. GROSE: Is this -- would this help? I'm ---

24 MS. COLEMAN: Yes. Thank you.

25 THE COURT: And Mr. Williams, just make sure you speak

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1 into ---

2 THE WITNESS: I ---

3 THE COURT: --- to the microphone.

4 THE WITNESS: I will.

5 BY MR. GROSE:

6 Q Do you recall during trial an issue coming up that a
7 grand juror was also a witness in the case?

8 A I remember it from looking at the transcript.

9 Q Okay. And the -- I want to show you -- I apologize
10 for not printing it out -- but is this the part of the
11 transcript that you looked at, at page 136?

12 A I think so. Yes.

13 Q Okay. And in there, it -- it indicates there was a
14 re-indictment before trial; is that right?

15 A That's correct.

16 Q All right. And it indicates that (as read:)
17 "Fortunately, the grand jury was in session, so we put the
18 indictment through and she recused herself." Is -- is it
19 clear from that whether or not they put the indictment
20 through once or twice or do you know?

21 A There's an indictment dated 11/14/2013, so that was
22 actually the third indictment.

23 Q Okay. You did not make a motion to quash the
24 indictment based on that, did you?

25 A I did not.

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1 Q Okay. And of course, what happens in the -- the grand
2 jury is private, secret.

3 A That's correct.

4 Q All right. And so we don't know -- do we even know
5 which witness that was?

6 A I may have at the time; but as I sit here, I don't
7 remember.

8 Q And it's not reflected in the transcript.

9 A It's not.

10 Q Okay. And is there any way of knowing what that
11 witness might have told the other grand jurors about this
12 case?

13 A There would not be.

14 Q Okay. Now, during the trial, there were two jurors
15 that were removed. Well, two -- let me rephrase that. One
16 juror that was removed, and another juror that there was
17 questions about whether to remove.

18 A I think that's correct.

19 Q Okay. And do you recall Juror No. 9, Ms. Beasley,
20 being removed?

21 A I remember it after reading the transcript. Yes.

22 Q Okay. And -- and what were the -- do you recall what
23 the reasons were for removing that juror?

24 A There were some questions about whether or not she had
25 some mental health issues, and I think they even had

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1 commitment orders from the Probate Court and signed by my
2 wife.

3 Q Okay.

4 A And so out of an abundance of caution, the judge
5 decided to remove her.

6 Q Okay. And where did -- well, was this an issue that
7 the judge addressed in chambers?

8 A Probably. Again, I -- I don't remember.

9 Q Okay.

10 A It was at a break that he brought it -- brought it up.

11 Q Okay.

12 A And then I think we put it on the record afterwards.

13 Q Right. So that would've been something that came up
14 in chambers in all likelihood?

15 A Well, I think. But I'm not -- I'm not certain.

16 Q All right. Do you know whether or not Sammie Gerrick
17 was present when that came up?

18 A If it was in chambers, he probably was not present.

19 Q Okay. And the -- the record doesn't seem to reflect
20 that the judge questioned the juror about whether or not
21 her mental health history would impact her ability to sit
22 on the jury, did he?

23 A I don't remember him doing that.

24 Q Okay. And of course, you know, all the time we have
25 potential jurors that have some kind of health issues,

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1 don't we?

2 A That's certainly possible.

3 Q And would you agree that the ordinary procedure is, is
4 for the judge to question them to determine whether or not
5 that would have any impact on their ability to serve?

6 A Well, when it comes to mental health issues, if
7 there's substantial evidence they have those issues and
8 that they're ongoing, I'm not certain that he would need to
9 go into it.

10 Q Well, I mean, there -- there's a lot of people who
11 have been committed for short periods of time to the mental
12 hospital and treated; isn't that correct?

13 A I -- I would agree with that.

14 Q Okay. And that, you know, doesn't mean that because
15 somebody was committed to a mental hospital or had a period
16 where they were actively suffering from a mental illness,
17 that doesn't disqualify them for jury service at a later
18 time, does it?

19 A It -- it -- it would not.

20 Q Okay. Did you make an objection either to the
21 procedure for removing the juror or for the juror being
22 removed?

23 A I did not.

24 Q Okay. Now, later in the trial, there became another
25 issue with a juror, Juror No. 23; is that right?

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1 A That's correct.

2 Q And that was a lady by the name of "Amanda Brown"; is
3 that right?

4 A That's correct, I believe.

5 Q And do you recall what the issue was with her?

6 A I think one of the witnesses may have been on her
7 Facebook account as a friend or acquaintance.

8 Q I'm gonna show you -- I've got three pages. I don't
9 know that you have to go through all three of these, but
10 pages 481, 482, and 483 of the transcript. Can you take a
11 look at that?

12 (The witness complies.)

13 A Okay.

14 Q All right. And do you recall -- does that help you
15 remember what the issue was?

16 A Well, it says there was a lady named "Taylor White"
17 that was in nursing school, and she didn't really know the
18 witness. They just happened to be on Facebook, and she had
19 not corresponded with her by Facebook.

20 Q All right. And again, was -- was that -- where --
21 where were the discussions about this juror? Where did
22 they take place?

23 A I don't remember.

24 Q Okay. Is it possible that that came up in chambers,
25 too?

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1 A It could have.

2 Q All right. And was there any objection by you to the
3 procedure or for removing the juror?

4 A There ---

5 Q Or for -- objection to the juror continuing rather?

6 A There was not.

7 Q Okay. And if it came up in chambers, would Sammie
8 Gerrick have been present?

9 A Not for the initial discussion. He would've been
10 present when we put it on the record.

11 Q Okay. And was the -- it indicates that there was some
12 communication by the juror to the judge; is that right?

13 A It did. It does.

14 Q All right. And is -- is that -- if -- if the judge
15 questioned the juror, was that done on the record anywhere?

16 A It's not on this record. No.

17 Q Okay. All right. Now, who was the witness, again ---

18 A Amanda ---

19 Q --- that she knew?

20 A Amanda Brown.

21 Q No, Amanda Brown was the juror ---

22 A Oh, I'm sorry. Taylor White.

23 Q Taylor White. And do you recall what Taylor White's
24 role in the trial was?

25 A Without going back and looking at the transcript, I

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1 don't. There ---

2 Q Okay.

3 A --- there was several witnesses.

4 Q Let me hand you pages -- well, there was a lot of
5 witnesses.

6 A Yeah.

7 Q -- 219 to 227 of the transcript. And I'll trade with
8 you.

9 (Mr. Grose hands documents to the witness.)

10 (Brief pause.)

11 A She was the girlfriend of a fellow named "Terrell
12 Haynes," and Sammie went to that house the night. I think
13 Sammie also lived at that house. She says he had some
14 white clothes in his hand, and he went back to the laundry
15 area. They asked if he took a shower and she says she
16 doesn't know, but he came back and he was dressed
17 differently.

18 And if I remember correctly, on cross-examination, you
19 know, there was all this theory that Sammie had -- had dug
20 this hole out in the middle of the woods somewhere and
21 stuck Tyrone in -- in it. And I asked what he looked like,
22 and she said he looked clean, and he looked alright.

23 So I didn't -- now that you remind me, I didn't think
24 her testimony was that crucial.

25 Q Okay.

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1 A In fact, it could've helped us in some ways.

2 Q Well, did -- did her testimony become part of the
3 narrative of the State's theory?

4 A I -- I think it did.

5 Q Okay.

6 A In the sense that they said he went and cleaned
7 himself up and changed clothes; but at the same time, her
8 testimony wasn't that strong on that issue.

9 Q Well, and of course, that would be for the jury to
10 decide, right?

11 A Sure.

12 Q Okay. And -- and while we're on her testimony,
13 there's -- I think you mentioned at least two things. One
14 issue with her testimony was Sammie carrying some clothing;
15 is that right?

16 A That's correct.

17 Q And the fact that he had changed clothing, right?

18 A Correct.

19 Q Okay. And then there was an issue about whether or
20 not she was aware that Sammie took a shower or not; is that
21 right?

22 A They asked her that.

23 Q Yes.

24 A And she couldn't say.

25 Q And she didn't know.

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1 Did they also ask her about a pink car?

2 A There was a comment about a pink car, yes.

3 Q Okay. Now, when we -- when we ask voir dire or the
4 Court asks voir dire, and we want to know whether a witness
5 knows a potential juror, what is -- what is your
6 understanding of the reason as to why we do that?

7 A To see if they have any bias in hearing the testimony.

8 Q Okay. And with -- with a bias -- and obviously, it
9 could go either for or against a potential witness. But if
10 there's a bias, a juror might be more likely to believe a
11 witness because of that bias; is that correct?

12 A More likely or not more likely.

13 Q Right.

14 A When -- it can go either way, like you said. This
15 lady came forward and said, you know, "Oops. I didn't tell
16 you about this."

17 Q Uh-huh.

18 A And when somebody does that, I take that as, you know,
19 a pretty good sign that they want to be a good, fair, and
20 honest juror.

21 Q Right.

22 A So ---

23 Q Well ---

24 A --- it didn't concern me.

25 Q All right. Are you familiar with the concept of

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1 "implicit bias"?

2 A Not in those terms at least.

3 Q Well, sometimes we -- we -- we have a bias that we are
4 not aware that we have.

5 A Oh. I -- I would agree with that, yeah.

6 Q Yeah. (Retrieves documents) I'll take that back from
7 you.

8 But I -- I do want to -- a little bit later when we
9 get to the closing, I'll want to come back to what this
10 witness's, you know, role became in the Solicitor's
11 narrative.

12 Now, in this case, there were some photographs that
13 were admitted into evidence; is that right?

14 A There was.

15 Q Okay. And -- and -- and there were a lot of
16 witnesses, a lot of pieces of evidence introduced, a lot of
17 photographs. But there was two groups of photographs that
18 depicted Tyrone Donaldson's body; is that right?

19 A Yes.

20 Q Okay. And one group would have come from when they
21 dug Tyrone up from the -- the grave site, the shallow
22 grave.

23 A That's correct.

24 Q Okay. And of course, the record will reflect what the
25 description of those photographs were, but do you recall

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1 what the testimony was about those?

2 A I would have to refer to the record to get the
3 specific testimony about it.

4 Q Okay. If I told you that they showed, for lack of a
5 better word, excavating the grave at various stages, would
6 you agree with that?

7 A I think that's true.

8 Q And that they showed the condition that Tyrone was in
9 in the grave?

10 A They did.

11 Q And there was some close-up photographs to show
12 ligatures that were on Tyrone's arms -- I mean, hands and
13 -- and legs?

14 A I believe so.

15 Q Okay. And do you recall whether or not Tyrone's body
16 had started decomposing?

17 A It had.

18 Q Okay. There was another set of photographs that came
19 in from the autopsy; is that right?

20 A I believe so.

21 Q And again, some of these were to show the condition of
22 Tyrone's body, right?

23 A They were. And I think the -- the medical examiner
24 used them to testify also.

25 Q Right. With regards to ligature marks or -- or -- or

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1 the ligatures; is that right?

2 A I -- I think it was ligatures and it -- it may have
3 been cuts or lacerations on the body.

4 Q There -- there was. What she referred to -- or what
5 the prosecutor referred to as "defensive wounds"?

6 A Right.

7 Q Okay. Was the fact that Tyrone's body was found in a
8 -- in a shallow grave, was that an issue that was disputed
9 at trial?

10 A No.

11 Q Okay. The fact that his -- there was ligatures around
12 his wrists and legs, was that an issue that was disputed at
13 trial?

14 A No. I mean, I -- I think there was an issue with the
15 ligaments about where they came from.

16 Q Right.

17 A And they tried to tie it to where Sammie had been, and
18 I think that was a reason they wanted those pictures in.

19 Q Okay. And -- and would there have been ways to have
20 presented that without introducing the -- the pictures?

21 A Well, they had a -- a bunch of pictures, and ---

22 Q Right.

23 A --- and it's my experience that the Court normally
24 lets some of those pictures in, if not all of the picture
25 in.

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1 So we had conversations, and they're not on the
2 record. Well, we do mention the conversations on the
3 record about what's gonna come in and what's not. And we
4 did limit the pictures as to what came in, but some of them
5 did come in.

6 Q All right. Could -- could the -- the ligatures have
7 been introduced themselves without having to show any of
8 Sammie's body -- I mean, any of Tyrone's body rather?

9 A The ligatures were in an envelope, and as I recall
10 there was an issue about odor coming from the envelope and
11 the ligatures, and we did not ---

12 Q Okay.

13 A --- want that in there.

14 Q All right. Did you ever consider stipulating to the
15 condition of -- of Tyrone's body and what the pictures
16 would've shown regarding the ligature?

17 A Again, I thought it was best to limit the number of
18 pictures, thinking that the Court would probably at least
19 allow some. And so that's the course of action I took.

20 Q Okay. Is that course of action inconsistent with
21 trying to offer to stipulate what they show?

22 A (No response.)

23 Q I mean, you could offer to stipulate, and -- and get
24 the judge to rule on that, couldn't you?

25 A I -- I think -- I think that's -- that's correct, but

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1 in -- in my experience, Courts normally let some of those
2 pictures in. So I went ahead and tried to get -- to limit
3 the number, and -- and -- and not get the worst ones. And
4 I thought if I had an agreement on that, we would be better
5 going forward than me not having an understanding about
6 what they were gonna put in.

7 Q Well, I -- I mean, you could get the judge to rule on
8 your offer of stipulation, and then you could still make a
9 motion that the photographs be limited, couldn't you?

10 A I -- I guess I could. Yes, sir.

11 Q Okay. And without making the motion, the offer of
12 stipulation, the motion to exclude, and offer to stipulate,
13 then that issues not preserved for appellate review. You
14 would agree with that?

15 A I would agree.

16 Q And this would go for both the photographs from the
17 grave and the photographs from the autopsy, correct?

18 A That's correct.

19 Q Okay. And in fact, pathologists are sometimes capable
20 of, you know, testifying about injuries using models or
21 diagrams and not necessarily the actual photographs; is
22 that correct?

23 A They could.

24 Q Okay. Now, do you recall any testimony about -- from
25 witnesses about Tyrone's character?

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1 A There -- there was limited testimony that he was a
2 good father and a family man.

3 Q Well, and -- and they talked about -- as a family man,
4 and a father, they talked about his cooking; do you recall
5 that?

6 A I remember talk of a cook shed in the back, playing
7 cards in the back.

8 Q All right. I'm gonna show you page 162 of the
9 transcript.

10 A Says (as read): "He would cook, clean. He would help
11 kids with their homework and make sure they got their
12 baths. Got 'em ready for school."

13 Q All right. And there was several instances or at
14 least a couple of instances in the record of that kind of
15 testimony, wasn't there?

16 A I -- I think so.

17 Q And that was from a witness named "Shaunta Kimberly
18 Smith," S-h-a-u-n-t-a. Is that right?

19 A If you say so.

20 Q Okay. And I'm gonna show you pages 176 and 177 of the
21 transcript. This is Maurice Williams. And was there
22 testimony about being a good father and a good husband?

23 A Said (as read): "He was friendly, family oriented,
24 loved his kids. That's basically him."

25 Then it says (as read): "Did he do a good job taking

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1 care of his kids?" "Yes."

2 "And what's the things he would do?" "Dressing them,
3 cooking for them, taking them to play, everything. And
4 that was about the extent of it."

5 Q Okay. Was this -- was this character evidence about
6 Tyrone relevant to any issue in the case?

7 A I thought it was background about Tyrone, and you
8 know, can -- can you object to it? Maybe, but you stand up
9 and you object to stuff like that in front of a jury, they
10 think you trying to hide stuff from them. So I -- I just
11 normally don't object to limited testimony like that.

12 Q Well, did -- do you recall whether the Solicitor made
13 use of this limited testimony in his closing argument?

14 A He may have.

15 Q Okay. And you know, this could also be characterized
16 as, you know, victim impact evidence, couldn't it?

17 A (No response.)

18 Q It talks about the children and his -- and his family.

19 A It -- it didn't go into the fact that this is
20 devastating on his children, that -- that his children are
21 distraught, can't sleep at night, and all that. It -- all
22 it basically said was that he was a good father.

23 Q Who -- who wouldn't cook for his children because he's
24 dead?

25 A It didn't say -- there wasn't anything like that, I

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1 don't believe.

2 Q Well, it's -- it's implied. If he -- if he cooked and
3 cleaned and helped him [sic] with his [sic] homework, that
4 would imply that they lost ---

5 A I think ---

6 Q --- that service from their father, wouldn't it?

7 A --- I think that had they gone into asking, "Well, he
8 can't cook for them anymore 'cause he's dead," I think that
9 would've been objective -- objectionable. But just ---

10 Q All right.

11 A --- just comments saying he's a good father, I -- I'd
12 -- I would tend not do object to that.

13 Q Okay. And we're gonna come back to the Solicitor's
14 closing a little ---

15 A Okay.

16 Q --- bit later on.

17 Now, there was also some evidence introduced about
18 Sammie's character, wasn't there?

19 A I don't remember that.

20 Q Well, do you recall that -- the Solicitor asking
21 Maurice Williams -- let me just show you this. This is
22 page 205.

23 The Solicitor asked (as read): "Have you known Sammie
24 Gerrick for a long time, correct?" And the answer's (as
25 read): "Yes. A good number of years. Yes, sir. You

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1 could say that." And it says, question, "He's been in a
2 little trouble before, hasn't he?" Answer is, "I guess.
3 I'm not sure." And then it says, "But you didn't mind
4 bailing him out of jail, correct?" "Well, I didn't mind
5 helping Tyrone bailing him out of jail." Is that right?

6 A That's what it says.

7 Q Okay. Now, of course, the -- the -- the issue with
8 the bail money from Tyrone and -- and Maurice was an issue
9 in the case, right? I mean, that was part of the motive.

10 A Correct.

11 Q All right. But this question asked (as read): "He's
12 been in a little bit of trouble before?" And that -- the
13 jurors could infer from that that, you know, Sammie has
14 some type of lengthy record, couldn't they?

15 A I think that they could infer that he had been in
16 trouble with the law before from that.

17 Q Okay. And it also came into the trial about an escape
18 charge, too, didn't it?

19 A I think it did, but I'm -- I'm hazy on that.

20 Q Okay. And -- and by the way, part of the issue with
21 the bail money had to do with unpaid child support, didn't
22 it?

23 A See, I don't remember.

24 Q Okay. If I show you page 269 as an example, if you
25 look at lines 1 through 6.

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1 (The witness complies.)

2 A Yeah. It does say that he was put in -- sentenced to
3 six months for child support. And then, while being
4 sentenced, he received some more charges to leaving out the
5 courthouse and pushing down a Sheriff's officer.

6 Q Okay.

7 A So I guess it was two things.

8 Q And -- and the -- the issue with the motive regarding
9 the bail money could've been presented to the jury without
10 bringing up the -- what's essentially escape. Leaving out
11 the courthouse and pushing down a Sheriff's office [sic]
12 and running through the door of the courthouse.

13 A It -- it could've been.

14 Q All right. Now, I'm gonna show you on page 333 at
15 lines 7 to 12. Can you take a look at that?

16 (The witness complies).

17 A This witness is Shawn Harley. It says he was
18 transported by the US Marshall's Task Force because he was
19 incarcerated at -- at the Charleston County Detention
20 Center at the time.

21 Q Okay. And there's no indication as to why he was in
22 the Charleston County jail, is there?

23 A There's not.

24 Q And there's no indication as to why -- as to why the
25 United States Marshall's Task Force was needed to transport

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1 him, is there?

2 A There's not.

3 Q And that testimony could imply other criminal charges,
4 couldn't it?

5 A It could.

6 Q Yeah. And the -- the involvement of the US Marshalls
7 could imply Federal charges?

8 A It could.

9 Q And it also could apply -- imply a need to using them
10 because of a certain type of character of Sammie, couldn't
11 it?

12 MS. COLEMAN: Your Honor, I'll object at this point to
13 leading and testifying.

14 THE COURT: Yeah. Rephrase your question, Mr. Grose.

15 Q Could the jurors draw any kind of adverse image or
16 inference from the testimony about the United States
17 Marshalls being used to transport Sammie?

18 A You know, I -- I think they could perhaps.

19 Q Okay. I want to show you page 236 of the transcript,
20 lines 20 to 23. What is that testimony about?

21 A I think this lady saw Sammie and Tyrone in the parking
22 lot of a local convenience store, and she saw him moving
23 his hands.

24 Q Okay. And what does it say about how Sammie looked?

25 A They say (as read): "He could have been looking

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1 mean."

2 Q Okay. Do you see anything objectionable and
3 prejudicial about that statement?

4 A This was right before the supposed going out to the
5 woods, and my -- my recollection is I cross-examined her on
6 it, and -- and I didn't -- wasn't that concerned. You
7 know, I did not object to the testimony though.

8 Is it prejudicial? Yes, it certainly could be
9 prejudicial. Is it objectionable? I don't know that it
10 is.

11 Q Okay. I -- I want to go back to Charlene Gerrick for
12 a minute. Did you interview her about the law enforcement
13 interview that they conducted with her?

14 A We did speak about that.

15 Q And did it come to your attention whether or not they
16 had asked her about communications with her husband?

17 A Well, it was in the statements that she gave me, so I
18 knew that they did.

19 Q Okay. And it was in the statements that came to you
20 in discovery, too ---

21 A That -- that's what I mean. Yes, sir.

22 Q Yeah. Okay. Okay. She ended up being a pretty
23 important witness for the government in this case, didn't
24 she?

25 A Yes.

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1 Q And the -- the testimony at trial had to do with her
2 involvement with Sammie and going and getting a vehicle and
3 moving it to another location; is that right?

4 A That's correct.

5 Q Okay. Did it ever occur to you that law enforcement
6 never would have obtained that information absent a
7 violation of the spousal privilege?

8 A For Sammie, I didn't have the right to assert the
9 spouse -- spousal privilege, all right?

10 Q But -- but she did.

11 A But she did. That's correct.

12 Q Right.

13 A So then -- then the question becomes: Is -- do I have
14 standing to assert the other stuff that she told them that
15 she was involved with, the fact that that came out
16 improperly.

17 Q All right. Well ---

18 A So ...

19 Q Did you advise her that she could get a lawyer?

20 A I did.

21 Q Did you do anything to assist her in getting a lawyer?

22 A No.

23 Q Okay. Did you make a motion for the judge to inquire
24 whether or not that information came from a violation of
25 the spousal privilege?

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1 A I don't think so.

2 Q Okay. And to be clear, I mean, she asserted that at
3 trial.

4 A She asserted spousal privilege at trial.

5 Q And -- and -- and didn't want to testify at all at
6 trial.

7 A That's correct.

8 Q Okay. And did it occur to you to make an argument
9 that the testimony that they -- that the government
10 presented at trial from Charlene was, for lack of a better
11 way of saying it, fruit of the poisonous tree?

12 A Well, once again, do I -- I don't think I've got
13 standing to make that argument.

14 Q All right. But she -- but she asserted the privilege
15 at trial, right?

16 A She -- she did.

17 Q All right. And you would agree that Sammie has a due
18 process right at trial.

19 A Correct.

20 Q Okay. Now, I want to talk about closing arguments a
21 little bit. Do you recall what the order of closing
22 arguments were in this case?

23 A Prosecution opened on the law and then I gave my
24 closing and then the prosecution closed.

25 Q Okay. Now, I -- I never thought I would be in court

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1 asking this question, but after the recent opinion in the
2 Michael Beaty case, how was it that that order of closing
3 arguments was selected?

4 A I had put in some photographs as evidence because I
5 thought that I was gonna have a witness that I did not use.

6 Q Okay. And because you had presented evidence, that
7 had an impact on the -- the order of closing arguments?

8 A It did.

9 Q Okay. Now, when I look at the -- the index -- at the
10 -- of the transcript, on page 7 -- and again, I'm sorry for
11 not printing this out -- but it reflects that Mr. Water's
12 closing argument on the law began on page 681, your closing
13 argument on 687, and Mr. Water's closing argument on 696?

14 A That's correct.

15 Q Okay. And did -- in fact, was Mr. Water's closing
16 argument limited -- first argument limited to the law?

17 A I believe so.

18 Q Okay. In the *Beaty* case, they tell us that there's no
19 State rule and hasn't been for years on the order of
20 closing argument. Was this -- do you know what Judge
21 Early's rule was, since he was the trial judge, for the
22 orders of closing argument?

23 A I -- I know in -- in most criminal cases, if the
24 Defendant puts evidence in, then he goes -- he does not get
25 to go last.

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1 Q Okay.

2 A And that's -- that's the rule that Judge Early
3 followed I believe.

4 Q All right. And -- and what about the rule limiting
5 the prosecution's closing -- first closing, under these
6 circumstances, to being on the law? Was that also a rule
7 that Judge Early followed?

8 A I think so.

9 Q Okay. Now, Mr. Waters -- his closing argument starts
10 on page 696 and ends on 744. Not quite, but almost 50
11 pages, between 45 and 50 pages. Were you given any
12 opportunity to respond to his closing argument?

13 A I was not.

14 Q All right. Did you ask for any opportunity to
15 respond?

16 A I did not.

17 Q Did it occur to you to do that?

18 A It did not.

19 Q Okay. Now, in this closing argument, Mr. Waters built
20 the argument around three themes or three points. One was
21 the -- the -- Sammie's motive to commit the murder. Do you
22 recall that?

23 A Uh-huh. Yes.

24 Q All right. And two was Sammie's opportunity to commit
25 the murder. Do you recall that?

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1 A I believe so, yes.

2 Q And three was the evidence of consciousness of guilt,
3 or guilty conscious by Sammie; is that right?

4 A There was -- there was talk of that, yes, sir.

5 Q All right. And would you agree or disagree whether or
6 not Mr. Waters attacked Sammie's character during closing?

7 A I -- I don't remember.

8 Q Okay. If I showed you page 696 of the transcript,
9 there where it's highlighted, he starts off talking about
10 the many twists and turns of Sammie Gerrick, doesn't he?

11 A It says that.

12 Q Okay. And at the end of 699, going on to 700 (as
13 read): "It might be different than what was before, but a
14 classic person who tells falsehood, a classic liar."

15 A It says that.

16 Q Okay. On page 704, he talks about another lie by
17 Sammie Gerrick over there?

18 A It says that at the top of the page.

19 Q Okay. And part of his theory was (as read): "The
20 acts to conceal, to lie, to cover up, divert attention, to
21 lie."

22 A It says that.

23 Q Okay. All right. Now, we're switching gears for a
24 second, but I said we would come back to Tyrone and whether
25 or not the Solicitor used Tyrone's character in closing

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1 argument.

2 On page 708, at line 3, you would agree that he talked
3 about Tyrone as a family man: cooking, taking care of the
4 children, cleaning, doing homework; is that right?

5 A He did.

6 Q Yeah. And down at the bottom of that page 708, (as
7 read): "You haven't heard one person say a bad word about
8 Tyrone except for Sammie Gerrick." Is that right?

9 A That's correct.

10 Q Okay. Page 711 they talk about Sammie (as read): "...
11 constantly trying to manufacture evidence to conceal,
12 divert, and cover up." Is that right?

13 A Correct.

14 Q On page 712, talking about Sammie Gerrick (as read):
15 "He has to move, he has to bob, he has to weave." Going up
16 713.

17 A It does.

18 Q All right. Going back to Taylor White, the Solicitor,
19 on page 722, beginning at line 3 -- well, actually
20 beginning at line 1, is talking about Taylor White's
21 testimony. He talks about a barrel of clothes, he goes to
22 where the washing machine, comes back out without the
23 clothes, goes into the bathroom where the shower is, and
24 then he changes clothes.

25 And then the Solicitor, at line 8 and 14, talks about

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1 Sammie needing a shower, right?

2 A It -- it does.

3 Q All right. In fact, there was no testimony that
4 Sammie ever took a shower.

5 A That's -- that's correct.

6 Q And you never got an opportunity to respond to that,
7 did you?

8 A I did not.

9 Q Okay. And switching gears, but still on 722, another
10 statement about Sammie telling a lie.

11 A Yes.

12 Q Okay. And on 723, at line 20, Solicitor calls Sammie
13 (as read): "A classic liar"?

14 A He does.

15 Q 724, line 12 (as read): "You saw evidence of a liar"?

16 A Correct.

17 Q Again on evidence -- on 725 (as read): "Faking texts
18 and telling this lie, telling that lie." Is that right?

19 A That's correct.

20 Q On 726, it says (as read): "He gets tired of telling
21 lies." You see that?

22 A Says (as read): "He's tried telling lies."

23 Q Oh, I'm sorry. He's tried telling lies. Thank you.

24 726, he also comes back to Taylor White whose the
25 witness that was Facebook friends with one of the jurors,

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1 and he talks about the pink car?

2 A I ---

3 Q Lines 6 through 12.

4 A That's correct.

5 Q All right. And -- and both of the times he brings up
6 Taylor White, you never got a chance to respond and explain
7 why, in your opinion, Taylor White was not a strong
8 witness, did you?

9 A No.

10 Q On page 727, he refers to -- talking about Sammie, he
11 doesn't just call it a lie, he calls something a "silly
12 lie"?

13 A That's correct.

14 Q Okay. On page 736, he talks about Sammie playing mind
15 games and lies.

16 A He -- he does.

17 Q And then, on page 737, at line 3 and line 22, the
18 prosecutor uses the word "cockamamie." Is that right?

19 A Correct.

20 Q And also, at line 20, calls Sammie a "classic liar"
21 again? I'm sorry.

22 A I -- I think that's referring to Sammie, yeah.

23 Q Okay. Talking about Sammie, 738, line 10 (as read):
24 "Concocts this story"?

25 A Right.

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1 Q 739, line 13, again we've got "cockamamie story"?

2 A Correct.

3 Q 740, line 10, "classic liar" ---

4 A Right.

5 Q --- again?

6 Would you agree or disagree that that's, you know, an
7 assault on Sammie's character?

8 A I think it's commenting on the testimony, and -- and
9 yes, it's speaking bad about his character; but it's also
10 commenting on the testimony, and I think he's allowed to do
11 that.

12 Q Well, are you aware of any case law that suggests or
13 holds that a prosecutor should not refer to a Defendant as
14 a liar in a -- in an inflammatory kind of way?

15 A Off the top of my head, no.

16 Q Still talking about the closing argument, did the --
17 the Solicitor sort of advanced his theory about what
18 happened to Tyrone and how Sammie killed Tyrone; is that
19 correct?

20 A That's correct.

21 Q And the testimony of Taylor White was a part of that,
22 wasn't it?

23 A Yeah, it would've been.

24 Q Okay. And the -- the testimony of the pathologist was
25 also an important part of that, wasn't it?

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1 A He talked about the pathologist I believe.

2 Q I'm sorry?

3 A I think he did, yes, sir --

4 Q Okay.

5 A -- talk about the pathologist.

6 Q On 742 and 743, he talks about -- the Solicitor talks
7 about Tyrone and his body being able to have the final
8 word. Can you take a look at those pages? Actually, look
9 at 744, too, please.

10 (The witness complies.)

11 (Brief pause.)

12 A Okay. What's your question.

13 Q Would you agree that he gives a theory of Tyrone being
14 killed at the location of the grave?

15 A He does.

16 Q Are there things in that argument that you had cross-
17 examined the pathologist about as far as how long Tyrone
18 was in the grave or the -- the -- the so-called "defensive
19 wounds"?

20 A I remember asking her about how long he was in the
21 grave, and I probably asked about the defensive wounds; but
22 I just don't -- without looking at the testimony, I
23 couldn't tell you.

24 Q Well, the -- the prosecutor attributes the defensive
25 wounds -- the scratches to Sammie's fingernails, doesn't

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1 he?

2 A No. No. What -- what they're talking about here is
3 that Sammie had all these scratches on him the day after
4 this, and I think what they're saying is that Tyrone was
5 scratching Sammie.

6 Q Okay. Well, were they also trying to say that Sammie
7 -- I mean that Tyrone had defensive wounds?

8 A The -- the marks -- lacerations, I believe, that was
9 on his arms, the cuts.

10 Q Okay. All right. And do you recall whether those
11 defensive wounds were -- could be consistent with something
12 other than being in a struggle?

13 A Are we talking about the -- the scratches or we
14 talking about ---

15 Q About Tyrone's wounds.

16 A I think I -- I think I did ask that.

17 Q Okay. And the -- the prosecutor implies in closing
18 that those came from struggling with Sammie, though,
19 doesn't he?

20 A He does.

21 Q All right. And you never got a chance to respond to
22 his argument about that, did you?

23 A No.

24 Q Okay. And the -- the time of death was also pretty
25 important to the State's case, right?

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1 A It -- it was.

2 Q Because they had to place Sammie and Tyrone together,
3 preferably at the location where Tyrone's body was found,
4 right?

5 A That's correct.

6 Q All right. And the -- was there any way that the
7 pathologist could say exactly what the day of death was or
8 time of death?

9 A I think she said that the body was consistent with
10 having been dead for 13 to 14 days, but she couldn't say
11 for certain if that was the case.

12 Q All right. And you never got a chance to respond to
13 the prosecutor's argument about trying to pinpoint the time
14 of death to a particular day, did you?

15 A No, I didn't --

16 Q Okay.

17 A -- in closing.

18 Q Huh?

19 A Not in closing, no.

20 Q Right. 'Cause you didn't get a chance to go again,
21 right?

22 A Correct.

23 Q Okay. So the -- what I've handed you there is the
24 last three pages of closing, is that fair to say, of the
25 Solicitor's closing?

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1 A That's correct.

2 Q Okay. And so what we've been talking about, as far as
3 the testimony that comes from Sammie's body, that was close
4 to the last thing that the Solicitor did, wasn't it?

5 A Yes.

6 Q All right. And then, on that last page, he comes back
7 and makes a plea to the jury at the very end, doesn't he?

8 A He says (as read): "On behalf of the State of South
9 Carolina, on behalf of all of Tyrone's family and friends
10 out here, I ask you to do your duty. Do the right thing
11 and find this man guilty of murdering Tyrone."

12 Q And so "on behalf of Tyrone," could that imply the
13 good character of Tyrone that came in during the testimony
14 and the closing argument?

15 A I -- I -- I guess so.

16 Q And could that imply the loss -- and getting justice
17 for the loss to Sammie's, I mean, to Tyrone's family and
18 children -- including his children?

19 A It -- it could imply that.

20 Q Could that imply to do justice for Tyrone or to return
21 a verdict for Tyrone based on something other than the
22 evidence?

23 MS. COLEMAN: Objection. Calls for speculation.

24 THE COURT: Overruled.

25 A I -- I don't think this is -- this is that bad. He's

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1 just asking them to find a verdict and to find Sammie
2 guilty. And he does say "pn behalf of his family and
3 friends out here."

4 Q Okay.

5 A But he leaves it at that.

6 Q All right. Well, it -- it's not in isolation, though,
7 is it?

8 A Meaning ...?

9 Q Meaning it comes after almost 50 pages of calling
10 Sammie a liar, a classic liar --

11 A He --

12 Q -- and a -- calling his stories cockamamie.

13 A He called Sammie a liar several times.

14 Q And it comes after testimony and argument about
15 Tyrone's character, doesn't it?

16 A After testimony that he was a good family man,
17 correct.

18 Q On -- I want to switch to the trial judge's
19 instructions to the jury, okay?

20 A Okay.

21 Q And do you recall the trial judge telling the jurors
22 to find true facts?

23 A I saw that in your petition, and I believe the record
24 does say that.

25 Q Okay. And it -- it's at least once in the opening

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1 instructions or comments; is that right?

2 A I think so.

3 Q And it's multiple times in the final instruction on
4 the law. You would agree with that?

5 A He said -- I think he did say "true facts." I -- I
6 don't know how many times, but he did say that.

7 Q Okay. And are -- are you aware of any case law at the
8 time of this trial that you could've used to argue that
9 that was lowering the burden of proof?

10 A I -- I'm not and -- and I don't see a big distinction
11 between saying "finding the facts" and "finding the true
12 facts." So ...

13 Q Well, would you agree that sometimes we don't know
14 what the true facts are?

15 A I would agree with that, and so if the true facts --
16 if you'd have to find the true facts, that might raise the
17 burden, not lower the burden. So -- but I didn't notice
18 that statement until you brought it up, and it didn't sound
19 to me as being anything objectionable.

20 Q But you would agree that the function of the jury is
21 to determine whether the State has met their burden of
22 proof or not?

23 A Beyond a reasonable doubt. Yes, sir.

24 Q And you would agree that the jury is -- is not --
25 their function is -- is not to search the record to try to

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1 determine what happened.

2 A Well, they have to rely on the record to determine
3 whether there's guilt to make a finding of guilt. So I --
4 I'm not certain I understand your question.

5 Q Okay. Are you familiar with some of the case law
6 regarding circumstantial evidence, the reason why we don't
7 use the -- the -- we don't tell jurors the old "Edwards
8 Charge" is because it might require them to search for
9 explanations on the record, other explanations of the
10 evidence?

11 A As you've just stated it, I'm not certain what you're
12 talking about.

13 Q All right.

14 MR. GROSE: Your Honor, I've been at it awhile. I
15 think I'm done, but I'd like to look at my notes and confer
16 with my client, if I could.

17 THE COURT: Just take a second. We'll -- we'll take a
18 break after you are finished ---

19 MR. GROSE: Okay.

20 THE COURT: --- before we start cross-examination.

21 (Brief pause.)

22 MR. GROSE: That -- that does conclude the
23 examination, Your Honor.

24 THE COURT: Okay. All right. We'll take a break at
25 this point. And Mr. Williams, as you know, you're under

1 oath. Don't -- don't discuss your testimony with anyone
2 while we're taking our break.

3 We'll be at recess for a few minutes.

4 (Off the record at 11:14 a.m.)

5 (On the record at 11:30 a.m.)

6 THE COURT: All right. Ms. Coleman.

7 MS. COLEMAN: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. COLEMAN

10 Q Mr. Williams, I'd like to start with just kind of a
11 general overview of your representation in this case,
12 starting with this: How long have you been practicing law?

13 A Little over 30 years.

14 Q Thirty years? And about how long did you represent
15 Mr. Gerrick before his trial?

16 A A year to a year and a half, and I -- and I think
17 closer to a year and a half.

18 Q What kind of investigation did you do into the
19 evidence?

20 A Well, I talked to Sammie. I reviewed all of the
21 documents provided to me by the -- the State. I hired a --
22 an M.E. to look over the M.E. report to help me prepare. I
23 also hired a private investigator to talk to witnesses
24 named Rob -- "Roger Sharpe." And I spoke to Sammie. I
25 looked at all leads that -- that he gave me as to what

1 could've happened in the case.

2 Q Did you ever hire an expert to analyze the green
3 leaves that were found at the gravesite?

4 A I did.

5 Q Okay. What was the result of that consultation?

6 A Well, let me tell you how that came about first.
7 About three weeks, roughly, before trial, a note -- or a
8 letter was found in Sammie's cell. It was supposed to be
9 from a fella named "Dustin Williamson." Dustin, in the
10 letter, admits to having killed Tyrone Donaldson. All
11 right. He says that he did it in Santee, okay, which is 60
12 miles from Barnwell, and then they came back sometime later
13 sometime and buried the body where -- where it was found.

14 Dustin was also in trial -- on trial for murder. The
15 question is: Is he gonna be a witness in this case, and is
16 there anyway I can corroborate what's in that note, that
17 this actually happened somewhere else?

18 The first -- I -- I had a buddy that practices law
19 down in Allendale who was a forestry major. So he and I
20 went to the scene and we looked at the photos and -- and he
21 tells me he thinks that it's a Sweetgum leaf. Okay? Now,
22 mind you, he's got photos, not the actual leaf.

23 We go to the scene, there's no Sweetgum trees in the
24 area. We hired a fellow out of Clemson named "Vic
25 Shelburne." Vic Shelburne saw the original photos and

1 said, "Yeah. That's more consistent with a Sweetgum leaf,
2 but I need to see the scene."

3 He came down to the scene -- and this was during the
4 trial or near -- near -- yeah, it was during the trial --
5 and looked around and -- and saw another type of tree. I
6 think it was a Laurel Oak. And he said, "Well, it's more
7 -- since this Laurel Oak tree is here, these leaves could
8 be Laurel Oak also, and it's probably Laurel Oak as opposed
9 to Sweetgum." So I couldn't use him. All right? But I --
10 but I did investigate that.

11 Q Okay.

12 A We also, you know, looked at -- you know, the -- the
13 leaves were nice and bright and green. They looked like
14 they were fresh off the tree. You know, I -- I asked, I
15 think, him and maybe another biologist from USC Aiken why
16 that would be, and he basically said they just have a
17 slower rate of -- of decay than -- than -- than flesh does.

18 Q Because the body had been in the grave for
19 approximately two weeks ---

20 A That was -- that was the thought, that it had been
21 there for two weeks.

22 Q Okay.

23 A And the question is: What would the leaves look like
24 if they had been buried with the body for two weeks?

25 Q Okay. You mentioned a moment ago Dustin Williamson.

1 What ever happened with Mr. Williamson?

2 A I'm not -- I'm not -- he didn't testify, if that's
3 what you mean.

4 Q Uh-huh.

5 A Now, what happened to his charges, I -- I don't know.

6 Q Okay. But he did not testify at trial?

7 A He did not testify and -- and ---

8 Q And do you recall why that is?

9 A Well, when we got to court, he asserted his Fifth
10 Amendment privileges. All right?

11 Q Uh-huh.

12 A There was some talk with the judge about getting the
13 letter in that he had -- had -- had written. But at that
14 time, and I'm not certain whether I knew this at the time,
15 at the court -- that we argued this in front of the Court,
16 but shortly thereafter, we found out that Shelburne
17 couldn't corroborate that the leaves came from somewhere
18 else. So I had nothing to corroborate what was in the
19 letter.

20 After Sammie had gotten arrested and charged with
21 this, he had -- there was a witness that came forward named
22 "Early Glover" that said that Sammie had offered him \$1,000
23 to write an alibi about where Sammie was and that he wasn't
24 there or whatever, and that he didn't kill Tyrone. The
25 State called him and he re -- recanted and said, "Sammie

1 paid me this money. This -- and this didn't happen."

2 I was concerned that if I tried to put that letter in
3 and I didn't have anything to corroborate it, the State was
4 gonna come back in -- in reply and -- and -- and put up
5 evidence that would -- that would go to show that Dustin
6 really couldn't have written this letter.

7 For example, I think in -- Shawn [phonetic] Harley,
8 the -- the -- the main investigator had talked to him, and
9 while he -- he admitted to -- to Investigator Harley that
10 he had signed the letter, he could not give him any details
11 and would not give him any details about what was in the
12 letter.

13 So I -- I -- it was a close call, but I thought I
14 could do more harm than good by trying to put the letter
15 in.

16 Q So was it a strategical decision on your part not to
17 introduce that letter?

18 A It -- it was.

19 Q Okay. And Early Glover testified at trial, right?

20 A He did.

21 Q Okay. So there was evidence introduced of Mr. Gerrick
22 paying people to write letters confessing to this crime?

23 A That's correct.

24 Q Okay. What kind of pre-trial motions did you make?
25 Did you move to exclude the -- the root capsule and the

1 "Law Stay Away" ---

2 A The root -- if I miss some, please help me here. The
3 -- I also had some questions about whether one of the
4 statements Sammie gave, whether he had been properly --
5 whether he had invoked his right to counsel and been
6 ignored; and -- and others.

7 We had, you know, conversations again about the
8 photos, although I didn't make any motions about those.

9 Q Was there a discussion on the record before the trial
10 about Charlene Gerrick's testimony?

11 A Yes. And there -- there was mention in pre-trial
12 about that, about excluding her.

13 Now -- now, I -- I don't have the right to assert
14 that. So she had to come to court and testify that she
15 didn't want to -- that she didn't want to testify at the
16 hearing; and she did, and -- and we did keep out those
17 communications.

18 Q Okay. And I'll ask you more in detail about that in a
19 few minutes. I'm gonna go down the list of each one of
20 them.

21 A All right.

22 Q What was your trial strategy in general?

23 A My concern in the case was -- was all the -- the story
24 -- the different stories or facts that Sammie had told and
25 their inconsistency.

1 So -- so I'd like to tell you I had one singular
2 strategy, that there was actually two, though. One was --
3 was to -- to cross-examine and -- and to make the testimony
4 -- at least some of the testimony unbelievable.

5 We -- I didn't see how I could put Sammie on the
6 stand, not necessarily because of his criminal record, but
7 because the different things that he had said and the
8 inconsistency of his testimony.

9 But -- but then, you know, if -- if we could prove
10 that -- that -- that he -- if we could have proved that --
11 that there was foreign material in the grave that didn't
12 come from that area and had Dustin's letter in or his
13 testimony, then, at that point in time, we may have had a
14 stronger defense.

15 Q Uh-huh.

16 A But we didn't know.

17 Q Okay. And that was something that you -- you stated
18 you developed as the trial was ---

19 A As -- well, within a week before the trial and as the
20 trial was going on. That's correct.

21 Q Okay. You mentioned Mr. Gerrick's statements. How
22 many statements did he make in this case?

23 A Lord. There were -- there were three recorded
24 interviews, and there were two or three, I think, written
25 statements. There was also what he had told Early Glover.

1 Q Uh-huh.

2 A And they were all inconsistent.

3 The -- the worst statement, I guess, as far as putting
4 him at the scene, was the third statement that he gave to
5 Jeff Croft where he -- he basically said he was there, and
6 two other individuals who did testify at trial were there,
7 along with a fellow named "Big Joe," which he couldn't
8 identify this person other than by the name "Big Joe."

9 Q Okay. So he -- Mr. Gerrick admitted that he was at
10 the crime scene in one of his statements?

11 A He did.

12 Q Even if you had presented and succeeded on some kind
13 of argument that Big Joe and -- and these other people who
14 participated in the alleged drug deal were actually the
15 ones who killed the victim in this case, do you believe
16 that he could've been convicted through accomplice
17 liability by admitting he was there? Was that a concern
18 you had?

19 A I was worried about that. And -- and I was worried
20 about just the different stories that he had given.

21 Q Uh-huh. And how had the stories changed over time?

22 A Well ---

23 Q What -- what was his first version of the story?

24 A I -- I think his first story was he -- he wasn't
25 there. Okay? And then his -- his third story -- and the

1 second varied from that some, and then the third story is
2 he -- is he was there, but these other people did it.

3 Q Uh-huh.

4 A All right? And it was a drug deal gone bad. And then
5 you had Early Glover in the mix after that.

6 Q All right. Did Maurice -- I believe Williams was his
7 last name? Maurice Williams testified at trial. Did he
8 testify that Mr. Gerrick told him originally that he was --
9 he had gone out to the woods with the victim and they had
10 dug up a safe and put the money in the victims car and ---

11 A That -- that was the story, yeah.

12 Q Okay. And the victim kissed him on the forehead and
13 drove away; is that right?

14 A That's right.

15 Q Okay. That was one of his first versions.

16 A He said -- he said, "Tyrone has got your -- has got
17 your money --

18 Q Okay.

19 A -- to -- to repay you for whatever you contributed to
20 the -- to the bond."

21 Q Okay. Did Mr. Gerrick also call one of the
22 investigators in this case?

23 A He called Holston, I believe.

24 Q Uh-huh.

25 A John Holston. There may be others, but he did call

1 John Holston.

2 Q And he told Detective Holston that the victim was
3 being held for ransom by someone else; is that right?

4 A Somebody -- yeah -- right.

5 Q Okay. But he ---

6 A And he gave a nickname, you know, no way to identify
7 the person.

8 Q Yeah. And he didn't give him any information about
9 what the ransom was or where ---

10 A Well, he said -- he said he needed \$25,000 and they
11 would -- they would be able to get Tyrone back.

12 Q Okay. So he had given several different statements to
13 ---

14 A Correct.

15 Q --- to various people in this case.

16 A Correct.

17 Q Okay. How did you address that to the jury at trial
18 and in your closing argument?

19 A It was hard to address. I -- I -- I think what I
20 basically is, "Look, there are a lot of stories out here,
21 and -- and what you've got to do is look at the evidence
22 and determine what's true. And you've got to understand
23 this is a man who may have said things that weren't -- that
24 were inconsistent with each other, but -- but to look at
25 the other evidence and see if what the State says adds up."

1 And my -- my closing was -- was short, but I think I said
2 all I needed to say.

3 Q Just in general, can you briefly describe the State's
4 evidence that they presented at trial? Was there any
5 direct evidence in this case?

6 A No. It's all circumstantial.

7 Q Okay. What about ---

8 A We kept out direct evidence.

9 Q Okay.

10 A We kept out the communications of Mrs. Gerrick with
11 her husband, and we kept out -- there was -- there was a
12 jailhouse informant, I believe, named "Xavier McCoy" that
13 they decided not to call after the "Massiah" hearing.

14 Q What kind of circumstantial evidence did the State
15 present, just in general?

16 A Of course, they -- they had the gravesite and they had
17 Charlene taking them to the gravesite. They had Charlene
18 telling them about how she took the car to -- to Orangeburg
19 and -- and had -- and had followed Sammie over there and
20 had brought him back.

21 They -- they had Sammie using, right after this --
22 this supposedly took place, the victim's debit card at the
23 ATM and at the -- I think somewhere else also.

24 They were able, with Sammie's testimony, to put Sammie
25 at the site, okay, where it happened. They had a fellow

1 named "Joe Thomas" who -- who saw Sammie around this time
2 and actually called him, around 3 o'clock or 3:05 or
3 something like that, and said, "Where ya goin'," heading
4 toward the site. They had Sammie and Tyrone there earlier,
5 there together in town.

6 They had Sammie -- I'm sorry -- Tyrone dropping off
7 Sammie, I think at home, and then going to his home. They
8 had Tyrone going home, changing his shoes, grabbing a
9 shotgun, throwing it in the back of the car, and then
10 heading out. They had Tyrone stopping somewhere getting a
11 couple of shovels, putting them back in -- into the back of
12 his pick up truck and then Tyrone following him from the
13 residence.

14 So they -- they put them together, they had shovels
15 from which a hole could be dug to put the body. They had
16 this story about the safe, which, although it sounds sort
17 of ludicrous, is consistent with the shovels. And they --
18 they had them all at the site. And of course, they had --
19 they had the -- the -- the -- the coroner's testimony and
20 -- and the -- and photos.

21 Q How would you characterize the State's evidence
22 against him? Did you think this was a strong or weak case?

23 MR. GROSE: Objection. Relevance. Speculation.

24 THE COURT: Overruled.

25 A I think but for Sammie's inconsistent statements and

1 his inability to be quiet, it -- it would not have been a
2 strong case. But I think -- I think his statements hung
3 himself.

4 Q I'm going to go now through the amended application.
5 And Mr. Grose has already gone through these allegations
6 with you, so I'll try not to harp on them too long.

7 A Okay.

8 Q But I'd just like to touch back on each one of them.
9 Do you have a copy of the amended?

10 A I don't.

11 Q Do you mind?

12 MS. COLEMAN: May I approach, Your Honor?

13 THE COURT: Yes, ma'am.

14 MS. COLEMAN: Thank you.

15 Q (Hands document to the witness) Just for your
16 reference as we go through.

17 A Okay.

18 Q Okay. And looking at the second page of that, under
19 No. 11 there, these are the specific allegations against
20 your performance.

21 Starting with A -- letter A (as read): "Not moving
22 for Judge Early to recuse himself about the root evidence."
23 And you testified about this a bit already, but in your
24 opinion, was there any -- any conflict of interest with the
25 judge there?

1 A I -- I didn't think there were grounds to ask him to
2 remove himself.

3 Q Okay. And is -- Judge Early is the only judge in the
4 circuit ---

5 A That's correct.

6 Q Okay. And do you believe -- do you believe that this
7 -- that Judge Early presiding over this trial with this
8 evidence presented impacted the jury in any way?

9 A Well, I -- I -- I don't, and -- and you know, if
10 another judge had presided, you would still have this note
11 that said "Save me Jack Early" that would come into
12 evidence, and everybody would know who Jack Early is in
13 Barnwell. So I -- I didn't see it as being an issue.

14 Q Did you do any investigation about the root evidence
15 on your own?

16 A Well, I mean, I -- I looked at what they -- they had,
17 and when you say "investigated," I mean, I know what a root
18 is, and I looked online to see what they're for an all
19 that. But -- but other than that, no, I -- I didn't.

20 Q Okay. And you made a motion to suppress this
21 evidence, didn't you?

22 A I did.

23 Q Okay. And that motion was not successful?

24 A It was not. And you know, my -- my concern was and
25 that -- you know, is that it -- it deals in -- in

1 superstition, it deals in witchcraft, and it might unfairly
2 and unduly cause some people to think that this guy's got
3 some kind of issues dealing with that.

4 Q The State -- I'm sorry.

5 A Go ahead.

6 Q The State did not present this as evidence of
7 superstitious witchcraft or anything, did they?

8 A That's not -- that's -- no.

9 Q Okay. How was it presented?

10 A It was presented as evidence of a guilty conscious.
11 "Tell-Tale Heart" basically.

12 Q Okay.

13 A And there was one time, I think, when an -- when an
14 investigator popped up and said "witch doctor root" and the
15 judge immediately shut her down. So that was the only time
16 it came up.

17 Q And he issued a curative instruction I think.

18 A I think so.

19 Q Okay. After the judge denied your motion to suppress
20 this evidence and you knew it was coming in, did you want
21 to -- what -- what was your strategy at that point?

22 A Well, I -- I did not see how talking about the root
23 could help us in any way, and -- and I thought we just
24 needed to stay away from it as best we could.

25 Q Okay.

1 A So I didn't ask anything. I didn't try to explain it
2 or do anything else with it except just ignore it.

3 Q Did you ever discuss the root with Charlene Gerrick?

4 A I don't ---

5 Q You testified ---

6 A I don't remember ever having a conversation with
7 Charlene about the root.

8 Q Okay. Did she ever come up to you and explain that
9 she wrote the note and she put it in his car?

10 A No.

11 Q Okay. If she had told you this ---

12 A If she'd have told me this, I would've asked her about
13 it on -- on cross-examination ---

14 Q Okay.

15 A --- when she was called as a witness.

16 Q And in order for her to testify at trial about whether
17 her husband knew about -- knew if this evidence was in the
18 car or not, she would've had to waive her privilege; is
19 that right?

20 A Ask me that one more time.

21 Q Sure. Sorry. If Mrs. Gerrick could testify at trial
22 that her husband did not know that the root was in the car
23 -- in his car, wouldn't she have had to communicate it --
24 to testify about her communications with her husband?

25 A It could have, but now, I don't -- I don't want to say

1 that for certain.

2 Q Okay.

3 A All right. I don't know that I followed all that
4 through. You know, and again, to me that wasn't an issue
5 'cause Sammie had told me it -- he had had the root. So...

6 Q Okay. Did he tell you he wrote the note?

7 A No. He didn't say he had wrote the note.

8 Q But he knew that it was -- the root ---

9 A He had -- he had ---

10 Q --- was in his ---

11 A --- he had obtained it.

12 Q He obtained it.

13 A Right.

14 Q Okay. And again, in order for -- for you to explain
15 the root more or explain Sammie's -- the reason why Sammie
16 had the root, would he have had to have testified at trial?

17 A He may have.

18 Q Okay. And that was something you wanted to avoid,
19 right?

20 A I -- I didn't see how he was gonna be able to testify
21 at trial.

22 Q Okay.

23 A And -- and I didn't see where bringing -- drawing
24 attention -- I didn't see where drawing attention to the
25 root helped us in any way.

1 Q Okay. The -- let's see. I'll move down the list.

2 We've done "B," the root. The true facts statement,
3 letter "C," I think we've already gone over that. You
4 testified earlier you didn't really see anything
5 objectionable about the judge's comment on true facts?

6 A That -- that didn't set off any bells on me. I mean,
7 if there's something wrong with that, then it's wrong, but
8 it -- it did not concern me.

9 Q Okay. In you opinion, just based on his jury charges
10 and his instructions to the jury throughout the trial in
11 general, was it your impression that he clearly explained
12 that the State's burden of proof?

13 A He -- he did.

14 Q Okay. Was there anything, in your opinion, that was
15 misleading or confusing about the State's burden of proof?

16 A I -- I didn't -- I didn't think so.

17 Q Okay. As far as the jurors that were excluded or that
18 -- there was some discussion of issues with the jurors in
19 this case, the one who had mental health issues, is that
20 something you thought was a big issue in this case? Did
21 you want that juror to serve?

22 A No, I did not want her to serve.

23 Q Why not?

24 A Well, because I didn't know how that would affect how
25 she would think and ration -- rationalize and deal with the

1 case. And -- and quite frankly, there was an alternate
2 juror that I would've rather had on the regular jury that I
3 thought would be better for Sammie, and guess what? He got
4 on the jury. So ...

5 Now, we still lost, but I thought I stood a better
6 chance with him than what we had.

7 Q Okay. And you testified earlier as well about the
8 other juror who was Facebook friends with one of the
9 witness; is that right?

10 A I did.

11 Q But she -- her -- her representation to the Court was
12 that she didn't really know this person very well; is that
13 right?

14 A That's right. And she was straightforward and -- and
15 up front about it also.

16 Q Okay. And did you -- you did not raise an objection
17 to her remaining on the jury?

18 A I did not.

19 Q Okay. And why not?

20 A I did not see her as being an issue ---

21 Q Okay.

22 A --- on the jury -- being on the jury. I thought she
23 could be fair.

24 Q Okay. Do you believe that her presence on the jury
25 altered the results of the trial in any way?

1 A I mean, I -- I can't -- I can't say that now.

2 Q Okay.

3 A So ...

4 Q Okay. The photographs of the victim's body -- I'm on
5 issue "E" here. He says you -- you should have stipulated
6 to the graphic photographs or offered to make a stipulation
7 to the admission of the photographs. Were the photographs
8 coming into evidence anyway?

9 A Well, a ruling had not been made on them. He's right
10 about that.

11 Q Okay.

12 A But it's -- it's -- it's been my experience that the
13 Court normally lets some of the photos in, and what you try
14 to do is minimize the graphic ones as best you can.

15 Q Okay.

16 A So that's what I did.

17 Q Okay. And that was a strategy on your part?

18 A Correct.

19 Q Okay. And if you had offered to stipulate to some of
20 these coming in without -- or -- or excuse me. Strike
21 that. I believe the applicant is alleging that you -- you
22 should have stipulated to the description of how the body
23 was found rather than entering photographs; is that -- is
24 that your understanding?

25 A I -- I think so. And -- and -- and the location of

1 the -- of the grave.

2 Q All right. If you had offered to stipulate to this
3 rather than admitting those photographs, do you believe the
4 prosecutor would have agreed to the stipulation?

5 A Usually they want to put the photographs in.

6 Q Okay. And you were able to keep out many of these
7 photographs, right?

8 A Correct.

9 Q Okay. Was the decomposition of the body a relevant
10 fact in this case?

11 A It -- it -- it -- it had to go to timing and how long
12 he had been there.

13 Q Okay. And is that one reason why the photographs were
14 introduced?

15 A I believe so, yes.

16 Q Okay. And they -- they were also introduced in order
17 to show evidence of the shallow grave in which he was
18 found; is that right?

19 A That -- that's correct. And -- and the fact that he
20 was bound and tied.

21 Q Okay. Okay. Issue "F," regarding Charlene Gerrick --
22 and we touched on this a little bit earlier -- she did not
23 testify at trial about her communications with her husband;
24 is that correct?

25 A She did not.

1 Q Okay. Did she ever report to you any reports of
2 intimidation or threats by the investigators?

3 A I think she did at -- at some point say that, but the
4 -- the question is -- and that's when I referred her to
5 another attorney.

6 Q Okay.

7 A And I think she wanted to back out of her statement.
8 And so -- at the same time. So -- but I can't remember
9 exactly what she told me as I sit here.

10 They -- they had a video of her, alright? And on the
11 video, she doesn't look to be intimidated. She doesn't
12 look scared. She's just saying what happened. So ...

13 Q And during that video, do you recall if they
14 specifically asked her about her conversations with her
15 husband, or was she just explaining what happened?

16 A I -- I think so.

17 Q They did ask her?

18 A Right.

19 Q Okay. Was Mrs. Gerrick ever a potential suspect at
20 any point during the investigation that you know of?

21 A No.

22 Q Okay. And you testified earlier that it's your
23 opinion that you would have no standing to make a motion to
24 suppress based on fruit of the poisonous tree?

25 A See, I don't -- I don't think I do, and I -- I think

1 you know, when I -- I -- I attempted to assert her
2 privilege at the pre-trial hearing, you know^u, we all agreed
3 that we'd have to bring her to court and she would have --
4 actually have to get on the stand and say that she didn't
5 want to testify about communications and that's what --
6 that's what happened.

7 Q Okay. And what did Mrs. -- what did Charlene end up
8 testifying at trial? What was the substance of her
9 testimony?

10 A That -- that her and Sammie had driven to the place
11 where they found the grave, that they had taken a white
12 Honda belonging to Tyrone to somewhere in Orangeburg and
13 left it there; that -- that she followed Sammie; that --
14 that she picked him up; they went, I think, to -- to
15 Dodgers and got some chicken and drove back home. Then --
16 she then took them to the site to where the car was.

17 Q Okay. And that testimony was not protected by spousal
18 privilege, right?

19 A I did -- no. That's -- that was her actual
20 involvement ---

21 Q Okay.

22 A So no.

23 Q Was there anything improper about that testimony
24 coming in at trial?

25 A I do not believe so.

1 Q Okay. The next issue is the failure to object to
2 improper victim impact evidence. And Mr. Grose has gone
3 through this with you, specific sites in the transcript.
4 In your opinion, at the time of trial, was that improper
5 victim impact testimony?

6 A I -- I think a little evidence could be offered to
7 say, "Hey, you know, this is a guy from the community. He
8 has a family. He was a daddy. He worked," and stuff like
9 that and it's okay. Now, if they get beyond that and they
10 talk about the -- the devastation of his loss to the -- to
11 the victims, I think that's wrong, that's improper.

12 Q Okay.

13 A That didn't happen. It was -- it was just your basic,
14 general, "How -- how did you know Tyrone? Was he a father?
15 Did he take care of his kids" kind of stuff.

16 Q Okay. And that was being used by the State to show
17 that it was unusual that he would just fall off the grid
18 and disappear and never come back, right?

19 A That was their theory, yes, ma'am.

20 Q And also to show it was -- it was -- they had no
21 knowledge of him being a drug user, Tyrone using drugs?

22 A Right. And -- and some of the -- some of the stuff
23 that Sammie was saying, I think, was that -- that he was
24 involved in -- in a drug deal.

25 Q Okay. So that contradicted Sammie's testimony ---

1 A That's right.

2 Q --- his statement? Okay.

3 It was also used to show that he could usually be
4 reached by his friends and family, right?

5 A That's correct.

6 Q Okay. And of course, that was -- that was to
7 contradict the storyline that shows that he disappeared,
8 and Mr. Gerrick is saying that he drove away and wasn't
9 coming back, right?

10 A That's right.

11 Q Okay.

12 MR. GROSE: If she's going in order, Your Honor, I
13 will withdraw our letter "H." We haven't produced any
14 evidence about that.

15 THE COURT REPORTER: Excuse me. About what? You any
16 evidence?

17 MR. GROSE: Letter "H."

18 THE COURT REPORTER: Okay. And then you said?

19 MR. GROSE: That -- that we'll withdraw that one.

20 THE COURT: Are there any others after "H" that you
21 chose not to proceed on?

22 MS. COLEMAN: I don't see a letter "J."

23 THE COURT: Okay.

24 MS. COLEMAN: I don't know if that was an -- an error.

25 MR. GROSE: Yeah. But then -- yeah, that's an error.

1 That's just a typo. No, that -- I think that's the only
2 one, Your Honor.

3 THE COURT: Okay. It's so noted.

4 MS. COLEMAN: Thank you.

5 BY MS. COLEMAN:

6 Q Okay. Impermissible character testimony, number --
7 letter "I" there. And Mr. Grose pointed out specific
8 citations there. There was evidence presented that Sammie
9 Gerrick was in jail at the beginning of this storyline; is
10 that right?

11 A That's correct.

12 Q Okay. And that fit into the State's theory of his
13 motive, right?

14 A Getting bailed out of -- or bonded out of jail.
15 Correct.

16 Q All right. Because Tyrone, the victim, and Maurice,
17 his friend, both --

18 A They -- they --

19 Q -- paid money to bail him out of jail.

20 A That's correct.

21 Q Okay. I meant to ask this earlier as well: Was the
22 evidence of Tyrone's deceased wife -- that was used to show
23 -- or it might've been used to show that he had some money
24 from the settlement ---

25 A Well ---

1 Q --- from the car accident. Sorry.

2 A Yeah. He had a Corvette, he had a Tahoe, and -- and
3 this white car. And so the question is -- and he's
4 unemployed --

5 Q Uh-huh.

6 A -- so how do you buy that? So they -- they brought up
7 the deceased wife and -- and the settlement --

8 Q Okay.

9 A -- from when she died.

10 Q So there's some evidence that Sammie potentially knew
11 about the settlement and knew that the victim had money,
12 right?

13 A I think so, yes.

14 Q Or that's at least implied by the State ---

15 A Well---

16 Q -- based on that evidence.

17 A Yeah. Well, I think more importantly, they were --
18 they were trying to say that -- that -- that Tyrone was a
19 -- was a drug dealer, and if -- if you're unemployed, you
20 got all these cars, well, how'd you get 'em? And -- and --
21 and -- and he had this wrongful death settlement from his
22 wife. I think that was more the -- where it was going.

23 Q Okay. Sorry. Back to the improper character
24 evidence. Lost my train of thought there. Okay. So
25 there's evidence that Sammie was in jail at the beginning

1 of this, right, on other charges that were unrelated to
2 this, correct?

3 A It was -- that's correct.

4 Q Okay. Was that admissible or was there a reason to
5 object to that?

6 A I -- I thought that the fact that they were getting
7 him out of jail was -- was relevant to the State's theory
8 of what was going on. They needed to be able to say that.

9 Q Okay. And Mr. Grose pointed to a specific citation
10 where they referred to Mr. Gerrick being incarcerated in
11 Charleston County and the U.S. Marshall's transporting him.

12 A And -- and I'm sorry. That is in the record, and I
13 don't remember the circumstances of that.

14 Q Okay.

15 A So ...

16 Q In your opinion, based on the other evidence against
17 him, do you believe that that made a difference on the
18 jury's verdict?

19 A I don't think it would have. And I -- I -- I think
20 hopping up every time they say something that's just a
21 little bit objectionable hurts your credibility because it
22 looks like you're trying to hide something.

23 Q Okay. Is that your strategy in general on issues?

24 A In general, in -- in most trials.

25 Q Okay. Okay. Closing argument, the prosecutor's

1 statements in closing argument, did you notice anything
2 objectionable at the time during the prosecutor's closing
3 argument?

4 A Well, he -- he mentioned the -- the commenting and
5 saying he was [sic] liar. I mean, I -- I guess I could've
6 jumped up and said, "We object to him being called a liar."
7 And the judge could've said, "Don't call him a liar or say
8 the testimony's inconsistent."

9 And I -- I just don't see that being that -- that
10 critical. And then I'm drawing attention to it.

11 Q Okay.

12 A So I didn't object to it.

13 Q Okay. So that's not something you thought ---

14 A I -- I didn't ---

15 Q --- was worth making an objection to at the time.

16 A Correct.

17 Q Okay. Was there evidence in -- presented at trial
18 that Mr. Gerrick had told and untruth or ---

19 A There ---

20 Q --- changed his story?

21 A Well, there were consistent -- very inconsistent
22 stories.

23 Q Okay. So his -- the prosecutor's statement that he
24 had told lies was based on the evidence in the case, right?

25 A Well, that's correct. And -- and if I had gotten up

1 to try to argue that his stories weren't inconsistent, I'd
2 -- I just don't think I would've gotten anywhere.

3 Q Okay. And in your closing argument to the jury, you
4 -- you essentially conceded that he had changed his story,
5 right?

6 A I -- I had to.

7 Q Okay. Why did you take that strategy or that approach
8 in your closing?

9 A Well, I think -- I think the jury wants to know, that
10 -- that -- that we're trying to tell them the truth in --
11 in -- in our arguments, otherwise they just shut you down.
12 They don't listen to you.

13 So if I'd have -- if I'd have got up there and said,
14 "You heard all these statements and they're perfectly
15 reasonable," and tried to explain them all, I wouldn't have
16 gotten anywhere because I couldn't explain them all.

17 Now, I went -- I -- I tried, but I - I just couldn't
18 do it.

19 Q So you're trying to gain -- gain some credibility
20 with the jurors.

21 A I'm trying to keep my credibility.

22 Q Okay. Was there anything in the prosecutor's closing
23 argument that you believe misstated the evidence presented
24 at trial?

25 A Not significantly; not significantly.

1 Q Have you ever requested the opportunity to respond to
2 a prosecutor's closing argument before when you did not
3 have the last closing?

4 A I never did.

5 Q Okay. Why is that?

6 A The rule, as I -- understanding, is if I put evidence
7 in, he gets to go last.

8 Q Okay.

9 A And now, quite -- quite frankly, the leaves, that was
10 a gamble. I did it because I -- I hoped that I would have
11 a witness that I could bring to court to corroborate Dustin
12 and the statement. That fell apart and didn't happen. So
13 you know, as part of strategy, I -- I did it, and I -- and
14 being a Monday morning quarterback, knowing what I know
15 now, I wish I had it back. But unfortunately, I can't --
16 you can't do it that way.

17 Q So it was the -- the rule, and it -- it's your
18 understanding that it was the rule at the time, that if you
19 put in evidence, the prosecutor gets the last closing
20 argument?

21 A That's correct.

22 Q Okay. I just -- and there's some speculation that
23 this rule might be changing in the future or might have
24 been altered by *Beatty*. But at that time of the trial,
25 that's how it was done, right?

1 A That's -- that's my understanding.

2 Q Okay. So you didn't request a response to the closing

3 ---

4 A I did not.

5 Q Okay. If you had requested one, do you think the
6 judge would've allowed you to respond?

7 A I don't think so. I mean, Judge Early's pretty
8 consistent in the way he does things, and he normally
9 follows that rule.

10 Q Did Judge Early direct the prosecutor to open on the
11 law in this case? Do you recall?

12 A What -- whatever he did, he said on the record, and I
13 think that's what happened.

14 Q So you would defer to the transcript?

15 A I would -- I would defer to the transcript.

16 Q Okay. We discussed earlier some potential issues with
17 the indictment in this case about a witness who was on the
18 Grand Jury. Did these issues come up before the Applicant
19 was indicted for the third time by the Attorney General's
20 Office?

21 A The -- the issue regarding the -- the witness came up,
22 I think, the week -- the week before trial. Now, I
23 remember this -- I did -- you asked me about this, I think,
24 last week when we briefly talked, and I didn't remember it
25 until I went back and looked at the transcript.

1 But I -- but I did that, and I -- I went back and
2 checked and there is a third indictment, I -- I think maybe
3 the Thursday or Friday before trial, where he's re-indicted
4 with that -- with that person being recused.

5 Q Okay. So you think that new indictment resolved that
6 issue of the potential grand jury problem?

7 A I think it did.

8 Q Okay. And were you on notice of the charges?

9 A I was.

10 Q Okay. Did you believe at the time there was any
11 reason to move to dismiss the indictments based on -- or
12 quash the indictments based on this issue?

13 A I did not.

14 Q Okay. You have testified already that -- about Dustin
15 Williamson and the letter he wrote, and -- and also about
16 Early Glover and the letter that he testified about at
17 trial. Did you do any other investigation into a possible
18 defense of third-party guilt?

19 A We -- we -- we did, but I -- I didn't have much. I
20 had Big Joe, and I didn't have anything other than Big Joe.
21 And I -- I think my -- the investigator tried to talk to
22 Mr. Dickson and this other -- Andre, maybe -- this other
23 witness, but didn't have a whole lot of success. So -- and
24 you know, one of them had an alibi about where he was. In
25 fact, I think both of them did.

1 And you know, I -- I guess Sammie could've testified
2 regarding them being there, but that did not appear to be a
3 good idea; and then you get the question about whether
4 Sammie's actually participating in the -- what's happening,
5 or -- or -- of participating in the crime.

6 MS. COLEMAN: Beg the Court's indulgence one moment.

7 (Brief pause.)

8 Q Mr. Williams, did you cross-examine Janice Ross at
9 trial?

10 A I did.

11 Q Okay. And did you -- did you question her on whether
12 there was any dust or particles found in the victim's
13 throat?

14 A Remember nose. I -- and I probably said "throat." I
15 just don't remember that.

16 Q Okay. Why did you do that?

17 A There was some indication about whether he'd been
18 buried alive.

19 Q Uh-huh.

20 Q And of course, if he's killed somewhere else like
21 Dustin says and -- and then brought there, you would not
22 expect to find him to have inhaled particles into his nose.

23 Q What was her response ---

24 A There ---

25 Q Sorry.

1 A There was also an issue about whether or not he had
2 been -- whether had been suffocated and had died
3 underground.

4 Q Uh-huh.

5 A So for that reason. Her response is there wasn't any.

6 Q Okay. There was no dirt in his ---

7 A Right.

8 Q Was there ever a determination or -- presented at
9 trial of the method of death?

10 A I think at the end she may have said "suffocation" in
11 redirect. I think, but I -- I's rely on the transcript to
12 -- to say. I think -- and I think on cross, I got her to
13 say she didn't know, but then she backed up and said
14 "suffocation."

15 Q Nothing further. Thank you.

16 A Thank you.

17 THE COURT: Any redirect?

18 MR. GROSE: Yes, sir. Thank you.

19 REDIRECT EXAMINATION

20 BY MR. GROSE

21 Q Mr. Water's closing argument was pretty devastating,
22 wasn't it?

23 A He made a good argument. He did.

24 Q I mean, how far does a prosecutor have to go with a
25 devastating closing argument that includes objectionable

1 comments before you object?

2 A I thought the vast majority of what he said was
3 supported by the evidence. So -- so when -- when you say
4 "devastating," yes, it's devastating. All right?

5 Q But how many times does he get to call -- you know,
6 call the client names before you object?

7 A (No response.)

8 Q I mean, it's one thing to say that these statements
9 are inconsistent. It's another thing to drill and drill
10 and drill that he's -- he's a common liar. Would you agree
11 with that?

12 A I -- I -- I think they are different characters --
13 character -- characterizations of the same thing. All
14 right? Now -- now, yeah, "inconsistent" is a lot softer.

15 Q Right.

16 A All right? And he -- he did -- he did use the word
17 "liar" and I did not object to it.

18 Q And if you had objected the first time and the judge
19 had sustained it, you might've called attention to it; but
20 then the jurors wouldn't have heard it over and over and
21 over and over again, right?

22 A Well, that's true.

23 Q Okay. The -- there was a question about Judge Early
24 being the only judge in the circuit. Do you recall that
25 question?

1 A He -- he's the only registered -- resident judge in
2 the circuit.

3 Q Right. And you're familiar that, you know, the -- the
4 judges travel outside of the circuit, right?

5 A That's correct.

6 Q And a request could've been made to assign a different
7 judge, couldn't it?

8 A It -- it could've been made.

9 Q Yeah.

10 A I didn't see the need for it.

11 Q Okay. With regards to Charlene and the root, the --
12 the jurors were aware that this was a root what -- weren't
13 they?

14 A Well, that's what it was called was a "root."

15 Q Right. What made the term "root" not objectionable,
16 but the term "witchcraft" objectionable?

17 A I think I objected to it being introduced. You had to
18 describe it as something.

19 Q Uh-huh.

20 A So I don't know what you describe it as if you don't
21 call it a "root."

22 Q Call it a "note"?

23 A You could.

24 Q Okay.

25 A It says the same thing.

1 Q Well, right. It was ---

2 A Yeah.

3 Q --- it was a substance that was issued, and the --
4 anyway, I'll leave it at that.

5 Now -- and we -- we get back to -- I mean, they've
6 asked you a question about the standing, as far as Charlene
7 asserting the -- the privilege is concerned. But there --
8 there's no question that she asserted that privilege at
9 trial, is there?

10 A As to the communication, that's correct.

11 Q Right. And so once she asserted it, you were free to
12 argue what that meant, weren't you?

13 A Well, I -- I think -- I think clearly the privilege
14 goes to communications between her and her husband, not
15 what she actually did.

16 Q Right.

17 A So I'm not certain ---

18 Q Well -- well, let me -- let me come at this another
19 way. Once she asserted the privilege, you could have asked
20 for a hearing to determine whether or not the -- the
21 information that she was there to testify about -- what she
22 did and observed Sammie doing -- you could've asked for a
23 hearing to determine whether that was so intertwined with
24 the communications between her and Sammie as to render
25 everything inadmissible.

1 A My understanding of the rule is if she has
2 involvement, she's got to testify about what she actually
3 did, not -- if it's beyond just the communications.

4 Q Uh-huh.

5 A Had he come into the house and just -- and just said
6 something to her --

7 Q Right.

8 A -- and that -- that's it, you're right, I think
9 nothing comes in. But -- but I think what -- if she says,
10 "I took them to the site. I helped him take the car to
11 Orangeburg," I think that comes in.

12 Q Wait, but you heard her testifying this morning that
13 they wouldn't have known the things that she had done and
14 observed if they hadn't asked her about the priv -- or
15 about privileged communications.

16 A I heard her say that.

17 Q Right. And you don't dispute that that's the case, so
18 you?

19 A Yeah. I -- I -- I don't know what she would've said.

20 Q All right. Well, you don't have any evidence to
21 dispute that.

22 A I -- I don't.

23 Q Okay. And there was a question about, you know, the
24 State having -- or wanting to respond to, you know, whether
25 Tyrone was a drug dealer. There's a difference between

1 dealing and using, isn't there?

2 A There is.

3 Q And not all people who deal use.

4 A That's correct.

5 Q All right.

6 MR. GROSE: Beg The Court's indulgence, for a second.

7 (Brief pause.)

8 Q Nothing futher.

9 THE COURT: All right. Anything further from this
10 witness?

11 MS. COLEMAN: Just briefly, Your Honor.

12 RE-CROSS EXAMINATION

13 BY MS. COLEMAN

14 Q The root that Mr. Grose is referring to, was this
15 referred at trial -- did the prosecutor at trial refer to
16 this as a "root" or as a "capsule"?

17 A I know in my motion I referred to it as a "root." Now,
18 what he called it in trial, I -- I just don't remember.
19 I'd -- I'd have to rely on what the record said.

20 Q And the -- the capsule that they're referring to
21 actually did contain a tree root; is that right?

22 A It contained scraps of this and scraps of that all
23 wrapped up and taped up.

24 Q Okay. So that is different than referring to it by
25 what it actually is, than ---

1 A Well ---

2 Q --- witchcraft, right?

3 A It -- it's -- it's more than just a note. All right?
4 There's stuff with it, if that's what you mean. I'm not --
5 I'm not certain.

6 Q Okay. And not only did you move to suppress it before
7 the trial, but you also filed a post-trial motion for a new
8 trial based on that root, right?

9 A I did.

10 Q Okay. And that was the issue raised on appeal, too,
11 right?

12 A It was.

13 Q Okay. But of course, you didn't argue that issue, his
14 ---

15 A Right.

16 Q --- appellate attorney did. But it's in the record
17 before the Court.

18 Did you move to exclude this -- the root under Rule
19 403; do you recall? Was that the basis of ---

20 A That -- that's right.

21 Q Okay. And rule ---

22 A No, that's -- unfairly prejudicial.

23 Q Okay. And so this analysis includes an -- a -- an
24 analysis of prejudice against the Defendant, right?

25 A Right. In other words, that the -- that the probative

1 value was outweighed by the unduly fair prejudicial effect.

2 Q Okay. And Judge Early found that is was not
3 outweighed by that.

4 A Correct.

5 Q Okay. Nothing further. Thank you.

6 THE COURT: Anything further?

7 MR. GROSE: Not from this witness.

8 THE COURT: Thank you, Mr. Williams.

9 THE WITNESS: Thank you, Judge.

10 THE COURT: You may step down.

11 (The witness complies.)

12 THE COURT: Mr. Grose, call your next witness.

13 MR. GROSE: Call Sammie Gerrick.

14 MS. COLEMAN: Your Honor, is there any objection to
15 this witness being released today?

16 THE COURT: Any objection to Mr. Williams being
17 excused?

18 MR. GROSE: No, sir.

19 THE COURT: All right. Thank you, Mr. Williams. You
20 are excused.

21 SAMMIE LEE GERRICK, having been
22 first duly sworn, testifies as follows:

23 CLERK OF COURT: Have a seat in the witness chair, and
24 state your full name.

25 THE WITNESS: Sammie Lee Gerrick, Sr.

1 DIRECT EXAMINATION

2 BY MR. GROSE:

3 Q Mr. Gerrick, you are the applicant in this case; is
4 that correct?

5 A Yes, I am.

6 Q Okay. I want to start off by asking some questions
7 about the -- the root.

8 A Yes, sir.

9 Q Did -- did you make that root?

10 A No, sir. I don't believe in it.

11 Q Did -- and you don't believe in it?

12 A No, sir.

13 Q Okay. And did you write the note?

14 A No, sir.

15 Q Did you make the can of "law stay away"?

16 A No, sir.

17 Q Did you put it in your car?

18 A No, sir.

19 Q Did you ever tell your lawyer that you knew that it
20 was in the car?21 A No, sir. When me and Mr. Williams talked, he
22 conferred [sic] that he had the handwriting -- the
23 handwriting from that note compared, and he say it wasn't
24 me. It wasn't nothing on the note that -- with no DNA
25 symptoms [sic], things of that nature.

1 Q And during your -- well, prior to trial, were -- were
2 you incarcerated, or were you out on bond?

3 A I was out on bond, and then 10 to 11 days after that,
4 they revoke -- revoked by bond.

5 Q Okay.

6 A And I suffers [sic] with high blood pressure and
7 angioedema and things of that nature. So I went to Aiken
8 County Hospital. And the Sheriff Department from Aiken
9 County, I believe, came in there and got me.

10 It was a little bit -- a little after August, I
11 believe, and I went to Blackville; and I got in the
12 Blackville patrol car, and they transported me to
13 Charleston.

14 Q Okay. And so was your pre-trial incarceration in
15 Charleston?

16 A No, sir.

17 Q Okay. You went to Charleston for the hospital?

18 A No, sir. I went to Charleston because when I left
19 Aiken Hospital, Charleston has a hospital down there ---

20 Q Okay.

21 A --- so they took me down there to where they could
22 keep a eye on me.

23 Q Okay. All right. And what I'm -- what I'm getting at
24 is -- though, is were you in a position where you could
25 talk with Charlene about the facts of your case prior to

1 trial without being listened to by the authorities?

2 A No, sir. When they transported me to Charleston, they
3 wouldn't let me -- for some apparent reason, I don't know
4 who did it, but Charleston said I couldn't make any phone
5 calls, I couldn't write no letters, I couldn't do anything.

6 Q Okay. Of course, phone calls are monitored.

7 A Yes, sir.

8 Q Okay. So when did you find out that she had -- that
9 she was the one who made the root?

10 A I find out after I had got convicted and -- first of
11 all, Mr. Williams told me that when him and I -- he came to
12 Lieber. He said, "Did you know Charlene made a video and a
13 statement?" So I said, "No, sir. I don't have no
14 knowledge of that."

15 So he told me to stay stairry [phonetic] of my wife.
16 And I said, "Hold up, man." I said, "This my wife. What
17 are you talking about?" He said, "Well, your wife did a
18 video with the Sheriff Department, and I think you need to
19 see it."

20 So from my understanding, he was supposed to send the
21 video down to Lieber, but I never got it to see it. So I
22 couldn't verify what he was saying.

23 Q But it was only -- it was after your conviction that
24 you found out she was the one who'd done the ---

25 A Yes, sir.

1 Q Okay. I want to talk about the -- the jurors, and the
2 first juror is No. 9, Ms. Beasley, the one that purportedly
3 has a mental health history. Were you present when that
4 issue was discussed with Judge Early?

5 A No, sir.

6 Q And do you know where that discussion took place?

7 A It took place in the chambers.

8 Q Okay. And were you ever in chambers for any meetings
9 with the judge and the lawyers during your trial?

10 A No, sir. None whatsoever.

11 Q Okay. Would you have wanted to keep Ms. Beasley as a
12 juror, if -- if ---

13 A Yes, sir. Because you know, my trial counsel was
14 ineffective for failing to object to the Court conducted in
15 chamber hearing and making determinations --

16 Q Uh-huh.

17 A -- whether to remove a juror or not in my absence,
18 which is in violation of my constitutional rights to be
19 present during all critical stages of my trial proceedings.

20 Q Right.

21 A And it is a -- violated my constitutional rights to
22 due process, which is a right to notice and an opportunity
23 to be heard.

24 Q Okay. And so one of your complaints is -- is that you
25 weren't present when this was discussed.

1 A No, sir, I wasn't. If I was present, I had some
2 questions I would've demanded that my lawyer ask her.

3 Q Okay. And have you seen anything -- have you been
4 shown anything that in your estimation makes her not
5 qualified to be a juror?

6 A No, sir. Because, if I may, Judge, I look at TV. And
7 if you look at Dwayne Johnson, The Rock, he's a high -- one
8 of the highest paid actors, and he's on TV. He's talking
9 about a depression he's suffering with. That doesn't
10 hinder him from making and learning lines and ---

11 MS. COLEMAN: Objection.

12 THE WITNESS: You see what I'm saying?

13 MS. COLEMAN: This is irrelevant testimony.

14 THE COURT: Overruled. He can explain his position.

15 A I mean, I would have had demanded my lawyer ask her
16 these questions: Do [sic] she have a job? Has she ever
17 have [sic] a traffic ticket? Or things of that nature, you
18 know, because a lot of times, no matter who you are, you
19 suffer from something.

20 Q And -- and just whether or not her, in her -- in her
21 opinion, her illness would interfere with her ability ----

22 A Absolutely.

23 Q --- to serve. And of course, she was asked questions
24 like that earlier ---

25 A Right.

1 Q --- in qualifications.

2 A Right.

3 Q Okay. The other juror that I want to ask you about is
4 Juror No. 23, who is Amanda Brown. And she is the one that
5 knew the witness, Taylor White.

6 A Right.

7 Q Again, were you present when this information was
8 brought to the judge's attention?

9 A No, sir. I wasn't.

10 Q Were you present when it was discussed or -- or do you
11 know if it was discussed in chambers?

12 A It was discussed in chambers.

13 Q All right. Were you present then?

14 A No, sir.

15 Q Okay. And do you have -- would you have wanted Ms.
16 Brown to continue to serve on your jury if you had been
17 given the opportunity to be present during the hearing?

18 A I would have demanded that my lawyer have her removed.

19 Q Why was that?

20 A Because people just don't accept people on Facebooks
21 [sic], and I don't know the correspondence, what they may
22 have been going on here and there. You see what I'm
23 saying?

24 Q Right.

25 A I would have demanded that she been removed.

1 Q Right. To become friends on Facebook ---

2 A Face ---

3 Q --- you have to affirmatively agree to be friends.

4 A You have to be accepted. Yes, sir.

5 Q All right. And as it turned out, Ms. White was a
6 fairly significant witness in the case, wasn't she?

7 A Yes, sir.

8 Q All right. And I think you just said that, but you
9 would have wanted her removed.

10 A Absolutely.

11 Q Okay. That's all the questions I have. Please answer
12 anything the State ---

13 A Sure.

14 Q --- might have for you.

15 A Sure.

16 THE COURT: All right. Ms. Coleman?

17 MS. COLEMAN: I have no questions for this witness.
18 Thank you.

19 THE COURT: Thank you, Mr. Gerrick.

20 THE WITNESS: For the record, is -- is it possible --
21 I had a case citing that I needed to ---

22 MR. GROSE: We'll ---

23 THE WITNESS: --- I wanted to put on the record?

24 MR. GROSE: --- we'll handle that later.

25 THE WITNESS: You'll handle that later?

1 MR. GROSE: Yeah.

2 THE WITNESS: Okay. Thank you.

3 THE COURT: Thank you, sir.

4 THE WITNESS: All right, Sir.

5 (The witness exits the stand.)

6 MR. GROSE: Judge, I have Dr. Ross, the pathologist,
7 under subpoena for 9:30, and hen she wasn't here this
8 morning, I texted my office to check; and for no
9 communications from us, she wasn't planning on coming until
10 after she finished her other responsibilities.

11 Then I got word she would be here at 1. Then I got
12 word she was in a car accident. Then I got word again that
13 she would be here by 1. So can we take a break to give her
14 time to be here?

15 THE COURT: Yes, sir. We -- we can take a break. And
16 -- and is this the last witness?

17 MR. GROSE: Yes. I -- I -- yes.

18 THE COURT: Okay.

19 MR. GROSE: For me.

20 THE COURT: Well ---

21 MR. GROSE: I don't want to speak for them.

22 MS. COLEMAN: I don't have any for today.

23 THE COURT: That was gonna be my next question. Okay.
24 Well, we'll -- we'll take a break, and then we'll finish it
25 up --

1 MR. GROSE: All right. Thank you, Judge.

2 THE COURT: -- with the doctor.

3 MS. COLEMAN: Are we breaking until 1, Your Honor?

4 THE COURT: Let's take a break until 1 o'clock, or --
5 or if she gets here before 1, I just -- let us know and
6 we'll ---

7 MR. GROSE: Okay.

8 THE COURT: --- get started.

9 MS. COLEMAN: Thank you.

10 (Off the record at 12:36 p.m.)

11 (On the record at 1:16 p.m.)

12 MR. GROSE: Your Honor, she has already been qualified
13 as an expert here in the trial of the case. So unless you
14 want me to go through that again, I don't think ...

15 THE COURT: State stipulate that?

16 MS. COLEMAN: I'll stipulate to that.

17 THE COURT: Okay. So she's already been -- what was
18 the field?

19 MR. GROSE: You know, I -- I can't tell ---

20 THE WITNESS: Forensic pathology.

21 THE COURT: In forensic pathology.

22 THE WITNESS: Janice Edwards Ross, R-o-s-s. Uh-huh.

23 MR. GROSE: And I -- sometimes they say different
24 things --

25 THE WITNESS: Certainly.

1 MR. GROSE: But thank you, Dr. Ross.

2 DIRECT EXAMINATION

3 BY MR. GROSE:

4 Q Dr. Ross, did you perform an autopsy of Tyrone
5 Donaldson?

6 A Yes, I did.

7 Q Okay. And when was that?

8 A That was on August 5, 2011.

9 Q Okay. And when -- what was the condition of Tyrone's
10 body when it came to you?

11 A He was in decomp -- decomp -- decomposition state. He
12 had some discoloration and some skin slippage and --

13 Q And can you explain what's meant by "decomposition
14 state"?

15 A Sure.

16 Q Yes.

17 A There's different degrees. You start off with the
18 skin being discolored, and then you have skin slippage
19 where the front -- the -- the surface of the skin comes
20 off. And then, as it continues, you get bloating and then
21 you have more discoloration of the skin and tissue loss
22 sometimes.

23 Q And is it -- (coughs) excuse me -- are -- are there
24 different factors that go into the -- the rate at which a
25 body decomposes?

1 A Absolutely. It depends on whether they're in the air,
2 under the ground, or in water. And depends on the
3 temperature involved, the temperature of the body when the
4 person died. There -- there are all kind of conditions,
5 sure.

6 Q Okay. And when you looked at -- did the autopsy on
7 Mr. Donaldson, is there any way to say with any certainty
8 how long he had been dead?

9 A No, sir.

10 Q Is there any way to provide a range for the length of
11 time that he had been dead?

12 A Not by autopsy. It's mostly by scene and who last --
13 last saw him when he was -- he last texted or last had a
14 phone call. It -- it -- that -- those are the most
15 important areas to identify a time range.

16 Q But -- but that -- that's outside of the -- your
17 expertise as a pathologist, though, right?

18 A Correct. Yes.

19 Q So it -- it's fair to say then that there's no way to
20 determine the time of death for Mr. Donaldson based on any
21 medical evidence.

22 A Correct.

23 Q Okay. And so when you're asked a question as far as
24 consistent with -- in this case, I don't remember the exact
25 number of days, but I believe it was something like 13 or

1 14 days, was that consistent with what you saw? It -- it
2 -- "consistent with" is not necessarily to a reasonable
3 degree of medical certainty, is it?

4 A Correct.

5 Q And how is it -- when -- when a prosecutor is asking
6 you if something is consistent, how is that time frame
7 selected?

8 A We get our information from the coroner who is at the
9 scene, and -- and again, identifies whether -- when the
10 last person -- person was last seen, when the -- if there's
11 mail in the mailbox, etcetera.

12 Q And again, that's not a medical opinion.

13 A That's correct.

14 Q Okay. Now, is there anything -- of course, you were
15 provided information that Tyrone's body was in a shallow
16 grave.

17 A That's correct.

18 Q Okay. And a shallow grave is consistent with foul
19 play?

20 A Yes.

21 Q And is -- is there any way, from a medical standpoint,
22 though, that you can, say, determine the location of where
23 Tyrone died?

24 A No.

25 Q Okay. Do -- does the fact that Tyrone had ligatures

1 on him -- on his wrists and his ankles give any information
2 as to where the location of death could've been?

3 A No.

4 Q Okay. And again, it would be non-medical, but if
5 somebody were to say him being killed at that spot and then
6 tied up, that would seem inconsistent; but that's not a
7 medical issue, is it?

8 A Correct.

9 Q Okay. Now, there was some questions about the manner
10 of death. And can you just explain briefly what is meant
11 by "cause of death" and "manner of death"?

12 A Sure. Cause of death is what actually caused the
13 death. Manner of death is how that cause came about,
14 whether it was a suicide, an accident, a homicide, or a
15 natural death.

16 Q Okay. And you concluded that Tyrone's death was a
17 homicide.

18 A Correct.

19 Q And what factors related to that?

20 A The situation of his hands and feet being tied and
21 bound, and his being buried in a shallow grave.

22 Q Okay. Now, as far as the cause of death, what
23 actually happened to him, that was -- that's a different
24 issue isn't it?

25 A Yes.

1 Q Okay. And can you say with any certainty what the
2 cause of death actually was?

3 A No. All I can say is what was not there. There was
4 no ---

5 Q Okay.

6 A --- there was no internal bleeding, there was no
7 fractures. There looked like possibly could've been some
8 injury to the forearms may have been a defense wound
9 because of the discoloration of the skin. I can't say that
10 there was a lot of bruising around the head, for instance,
11 that would cause him to go unconscious. So the cause of
12 death is kind of rule out everything else so far.

13 Q Is kind of what?

14 A Rule out everything else.

15 Q Right. And you suggested at trial that it was
16 possibly asphyxiation.

17 A Correct.

18 Q Can you say for certain that it was asphyxiation?

19 A No.

20 Q So if you can't say that, you can't say that to a
21 reasonable degree of certainty.

22 A Correct.

23 Q And if you can't say that, you can't say that somebody
24 was strangled to death, can you?

25 A No, I cannot.

1 Q And was there any marking on the necks that you could
2 identify? I understand he was decomposing, but anything on
3 the neck that you could identify from strangulation or
4 being choked out?

5 A No, there was not. There was no fracture of the
6 larynx or the hyoid bone.

7 Q Okay. And any bruising on the neck?

8 A Not that I could identify.

9 Q Okay. And as far as being rendered unconscious and
10 buried, he had not inhaled a lot of dirt or anything, had
11 he?

12 A Not that I -- let me double check. No.

13 Q Okay. And so -- and is there -- can there be a
14 difference between asphyxiation and strangulation?

15 A Well, you can -- asphyxiation means that the brain
16 lacks blood supply and it can -- can occur with
17 strangulation, whether it's man -- manual strangulation or
18 from suicidal rope, choke hold. It can be from carbon
19 monoxide, it can be from lack of blood.

20 Q Okay. And so is it fair to say that you're able to
21 rule out certain causes of death, but you're not able to
22 say what actually was the cause of death?

23 A Correct.

24 Q Okay. And a minute ago you mentioned on one of the
25 arms possible defensive wounds?

1 A Yes. Excuse me for looking at my report.

2 Q No, no. Please do.

3 A There were some lacerations to the skin of the left
4 posterior arm which could mean he saw something coming at
5 him and tried to defend himself.

6 Q Okay. Is there any way to say that to a reasonable
7 degree of medical certainty?

8 A There was a defect there. Again, because of
9 decomposition, you couldn't see the color ---

10 Q Okay.

11 A --- whether it looked like he'd been bleeding or what.

12 Q And so you can say, to a reasonable degree of medical
13 certainty, that there was a defect.

14 A Correct.

15 Q Can you say to a reasonable degree of medical
16 certainty that that defect was caused by a defensive wound?

17 A No, sir.

18 MR. GROSE: Beg The Court's indulgence for a moment.

19 (Brief pause.)

20 Q That's all I have. Thank you Dr. Ross.

21 THE COURT: All right. Ms. Coleman.

22 MS. COLEMAN: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. COLEMAN:

25 Q Hi, Dr. Ross.

1 A Hi.

2 Q Your findings today that you just testified about,
3 would it have been -- well, it would've been easier for you
4 to -- to spot some potential issues on the body if you had
5 received it sooner; is that correct?

6 A Correct.

7 Q Okay. And that's because the body would've been less
8 decomposed?

9 A That's correct.

10 Q Okay. So because of some of the decomposition and
11 skin slippage, you're unable to tell if these were
12 defensive wounds, right?

13 A Correct.

14 Q Okay. If you had seen the body sooner, could you have
15 been able to make a finding about the manner of death?

16 A Well ---

17 MR. GROSE: Objection. Speculation.

18 MS. COLEMAN: I apologize, Your Honor, that's ...

19 Q If you had had more information and gotten this body
20 sooner, do you believe it would have been -- strike that.

21 You testified at trial about the victim's fingernails
22 falling off his hand; is that correct?

23 A Yes.

24 Q Okay. Due to the decomposition of the body?

25 A Correct.

1 Q Okay. If the fingernails had been intact, might have
2 you -- might have you been able to extract possible DNA
3 evidence from underneath his fingernails?

4 A We could have. I don't know if we collected them or
5 not. But it -- it's possible that we could have gotten
6 something from them if they -- he was fresher, but ...

7 Q So the body was pretty far decomposed at the time you
8 received it if his fingernails were falling off, correct?

9 A Yes.

10 Q Okay. And all of your testimony today is consistent
11 with what you testified at the trial, right?

12 A Correct.

13 Q Okay. Nothing further. Thank you.

14 THE COURT: Anything further of this witness?

15 MR. GROSE: No, sir. I would ask that Dr. Ross be
16 excused.

17 MS. COLEMAN: No objections.

18 THE COURT: Thank you, Dr. Ross.

19 THE WITNESS: Thank you.

20 THE COURT: You are excused.

21 (The witness exits the stand.)

22 MR. GROSE: As we alluded to earlier, Dr. Ross is our
23 last witness. I know we've had some hearings in the past,
24 and there's, I guess, lots of areas of law that goes with
25 some of our -- our claims. And so I would ask for either

1 an opportunity to submit post-trial briefs or proposed
2 orders from each side, whatever your preference might be.

3 THE COURT: I would -- since there are a lot of issues
4 here, I would prefer each party to submit a brief outlining
5 fully any cases and -- and applicable law that you would
6 wish the Court to consider, and I would direct you to do
7 that.

8 Mr. Grose, I don't know what you and Ms. Coleman's
9 schedules are. Could you get that to me within 15 days?

10 MR. GROSE: No, sir. My -- I -- I have a first degree
11 CSC minor trial in Beaufort the week of May 21. And so
12 while I can work on it, I don't think, with preparing for
13 that ---

14 THE COURT: Okay.

15 MR. GROSE: What's -- today's the 9th. I mean, 30
16 days I think would be reasonable. I find when you extend
17 them out too long, it just -- it -- other things get in the
18 way, and I don't want to do that. I'd rather do it while
19 it's fresh.

20 THE COURT: Well, let's say -- let's say 30 days. Ms.
21 Coleman, anything that would --

22 MS. COLEMAN: 30 days is fine.

23 THE COURT: -- make it -- okay.

24 So each side submit a brief within 30 days, send the
25 other side a copy of your brief. And again, any --

1 anything you would like me to consider as far as case law,
2 statutory law, or anything else as it applies to this case,
3 put -- submit that to me.

4 MS. COLEMAN: Okay. And Your Honor, if I -- if I may,
5 if we could have the opportunity to file a responsive brief
6 once we receive the Applicant's brief, just in order to
7 respond to their assertions?

8 THE COURT: I'll grant you to do that within five days
9 of receipt of the other side's brief.

10 MR. GROSE: So you want each side to submit a brief
11 and then we get to respond.

12 THE COURT: Yes, sir.

13 MR. GROSE: Okay. That's fair.

14 THE COURT: Yes, sir.

15 MR. GROSE: Just wanted to make sure I understood.

16 THE COURT: And I have a lot -- a lot of things to
17 read, and I appreciate the hard work of counsel on both
18 sides; and this will be under advisement with the briefs to
19 be submitted.

20 MR. GROSE: Thank you, Judge.

21 THE COURT: We'll close the record.

22 MS. COLEMAN: Thank you, Your Honor.

23
24 -- END OF TRANSCRIPT OF RECORD --
25

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Second Circuit Court for Aiken County, South Carolina, on the 9th day of May, 2018.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

E/ Bonnie H. Kelly

Bonnie H. Kelly, CVR

Official Court Reporter

Columbia, South Carolina

November 1, 2018

7

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL	)	
	)	Case No. 2016-CP-06-00111
Sammie Lee Gerrick,	)	
	)	
Applicant,	)	
	)	Post-Hearing Brief in Support of Application
vs.	)	for Post-Conviction Relief
	)	
	)	
State of South Carolina,	)	
	)	
Respondent	)	
_____	)	

Sammie Gerrick submits this post-hearing brief in support of his application for post-conviction relief (“PCR”).

I. PROCEDURAL HISTORY.

The State of South Carolina arrested Mr. Gerrick for the murder of Tyrone Donaldson. The Barnwell County Grand Jury indictment Mr. Gerrick for Murder. The State tried Mr. Gerrick before the Honorable Doyet A. Early, III and a jury. Creighton Waters and Jason S. Anders represented the State. Daniel W. Williams represented Mr. Gerrick. The Jurors convicted Mr. Gerrick of murder. Judge Early sentenced Mr. Gerrick to life imprisonment without the possibility of parole. Tr. 768.

Mr. Gerrick appealed. Lara M. Caudy of the South Carolina Commission on Indigent Defense represented Mr. Gerrick. The Court of Appeals affirmed Mr. Gerrick’s conviction and sentences. *State v. Gerrick*, Op. No. 2016-UP-092 (filed February 24, 2014). The Remittitur issued on March 25, 2015.

On March 15, 2016, Mr. Gerrick filed a PCR application. On September 30, 2016, the State served its return. On May 3, 2018, Mr. Gerrick amended his PCR application alleging he “was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth

Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution” in the following particulars:

a) Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a “root.” Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court’s opinion about the “root” evidence and constituted a conflict of interest.

b) Failing to investigate and present available evidence explaining the “root.”

c) Failing to object to the trial judge’s opening comments and final instruction on the law, instructing the jurors to find the “true facts,” including but not limited to the opening instruction, “[A]t the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict;” and the final instructions to the jurors, “It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;” “That is your sole responsibility, your sole duty to determine what the true facts are in this case;” and “You’re here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I’ve given it to you.”

d) Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick’s constitutional right to be present during all critical stages of his jury trial.

e) Failing to make an offer to stipulate to graphic photographs of the victim’s body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors’ minds as to deny Mr. Gerrick due process.

f) Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.

g) Failing to object to improper victim impact evidence that was not relevant and which were intended to arouse sympathy, passion, and prejudice in the jurors’ minds.

h) Failing to object to testimony that violated the confrontation clauses of the state and federal constitutions.

i) Failing to object to impermissible character testimony that violated Rule 404, SCRE.

j) Failing to object to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

k) Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

l) Failing to object to statements by the prosecutor during closing argument which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof.

m) Failing to object to inflammatory statements by the prosecutor which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and were so defamatory to Mr. Gerrick that it denied him due process.

n) Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in the case, which denied Mr. Gerrick's right to a fair and impartial grand jury presentment.

o) Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

p) Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal.

q) The cumulative effect of trial counsel's errors requires a new trial.

PCR Application at ¶¶ 10 and 11.

On May 9, 2018, this Court convened an evidentiary hearing on the amended application. Charles Grose represented Mr. Gerrick. Julie A. Coleman and Caroline Scrantom represented the State. At the conclusion of the hearing, this Court requested post-hearing briefs.¹ This brief follows.

¹ This Court requested both parties submit briefs within thirty days. On June 8, 2018, this Court extended the deadline to Friday, June 15, 2018.

II. FACTUAL BACKGROUND.

A. Evidence Presented at Trial.

1. Truth seeking.

During opening remarks to the jurors, the trial judge instructed the jurors:

So use your ordinary common sense, determine what the *true facts* are, and at the conclusion when you 12 acting collectively as one determine what those *true facts* are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict.

Tr. 145, lines 7-11 (emphasis added).

During the final instruction on the law, the trial judge informed the jurors, “It is your sole responsibility to determine what the *true facts* are in the case and apply those *true facts* to the law as I give it to you and render a verdict,” “That is your sole responsibility, your sole duty to determine what the *true facts* are in this case,” and “You’re here to give careful consideration and deliberation of the evidence presented to you, to decide what the *true facts* are, and apply those facts to the law as I’ve given it to you.” Tr. 748-49, 756-57 (emphasis added).

2. Exclusion from hearings about jurors.

During the trial, the trial judge removed two jurors. Prior to swearing the jurors, the trial judge met with the lawyers, off the record, in chambers. Back on the record, the trial judge announced he “had a discussion with the representative from the Attorney General’s Office and Mr. Williams concerning” Juror Number Nine. According to the trial judge, this juror “had a number of incidents in [Barnwell County] dealing with mental health issues.” The trial judge removed Juror Number Nine from the jury. Tr. 139-41.

Juror number 23 was selected as an alternate. Tr. 115. After the trial judge removed a sleeping juror from the case, Juror Number 23 was elevated to a regular juror. Tr. 281-82. Later on, Juror Number 23 “informed one of the deputies that on her Facebook account” she is friends

with Taylor White, who is a witness that testified in the case. The trial judge convened an off-the-record hearing in chambers where the judge questioned the juror, provided the prosecution and defense an opportunity to question the jurors, and decided not to remove the juror. Tr. 481-83.

When Taylor White testified about living at the same house as Mr. Gerrick at the time Tyrone Donaldson disappeared, the following exchange occurred:

Q: Okay. And tell me what – tell me what the Defendant did when you saw him that evening.

A: He came in through the slide door into the back of the house. He went to the room. He came back out the room. He went outside. He came back in carrying some clothes and whatnot. He went into the -- well, he passed through the living room which is where we were sitting on the chair. He went into the laundry room, came back out, went into the bedroom, changed into a wife beater and some basketball shorts and he went back outside.

Q: So he came inside. He went back out. He came back in and he had something in his hand?

A: Yes.

Q: What did he have in his hand?

A: It looked like white clothes.

Q: Had some clothes in his hand?

A: Yeah.

Q: And he took them towards where?

A: The laundry room.

Q: And when he came back from the laundry room area, did he have the clothes in his hand?

A: No.

Q: Okay. Then you say – where did he go after that?

A: He went back to the bedroom.

Q: Okay. *Did he take a shower?*

A: *I can't say.*

Q: Okay. What happened when he came out?

A: When he came out he was changed into some black basketball shorts and a white wife beater.

Q: And what was he wearing when he first came in?

A: Some jeans, some light jeans and a striped collared shirt.

Q: And how long did you stay at Terrell's that evening?

A: I left about, I want to say maybe around 9:30, 10 o'clock.

Tr. 222-23 (emphasis added).

3. The "root."

The prosecution sought to admit evidence of the "root" as evidence of Mr. Gerrick's consciousness of guilty. *See, e.g.*, Tr. 78.

State's witness Melissa Skipper Wallace testified about evidence collected from processing Mr. Gerrick's Dodge Ram truck. She identified a photograph of the center console of Mr. Gerrick's truck (State. Ex. 45) and discussed two items collected. One item "was a taped-up package that we opened and it was later determined to be – it was told to me it was a witchcraft root." The trial judge interjected, "Whoa, whoa. Disregard that, ladies and gentlemen of the jury." The other item was a "container titled Law Stay Away" (State's Ex. 46). Trial counsel moved for a mistrial noting a curative instruction "just draws more attention to it." The trial judge denied this motion. Tr. 423-28.

Investigator Shaun E. Harley read the note contained in the "root" to the jurors:

Set me Sammie Gerrick free from murder and revoke bond. Jack Early set me free now. Jack Early set me free now. Jack Early set me free now. Sammie Gerrick, Sr.

Sammie Gerrick, Sr. Sammie Gerrick, Sr. So shall it be. So shall it be. So shall it be. Amen. Amen. Amen.

Tr. 346. On cross-examination, Investigator Harley acknowledged SLED handwriting experts determined Mr. Gerrick did not write the note, and law enforcement did not know how the note got into Mr. Gerrick's vehicle. Tr. 387-89.

4. Testimony of Charlene Gerrick.

Mr. Gerrick's wife, Charlene Gerrick, asserted the spousal privilege. Tr. 47-51, 293-98. The State called Ms. Gerrick to testify in the presence of the jurors. On the night Tyrone Donaldson disappeared, Ms. Gerrick and her husband drove down a paved road into the woods and located a white Honda Civic. According to Ms. Gerrick, her husband had a key to that car. Ms. Gerrick followed her husband who drove the white Honda Civic to the China Express in Orangeburg, where Mr. Gerrick parked the car. They bought food and gasoline and went home. Trial counsel did not cross-examine Ms. Gerrick. Tr. 302- 10.

5. Graphic Photographs.

The prosecution introduced the following "graphic," Tr. 416, line 12, photographs through the testimony of SLED Agent Melissa Skipper Wallace:

- State's Exhibit 35 was taken as law enforcement "progressively uncovered" the decedent. "The end that is closest to the bottom of the photograph is where he head was. And one of his feet's actually sticking up on the upper portion." Tr. 416, lines 11-22.
- State's Exhibit 36 was taken after law enforcement "had uncovered a good bit of the body," documenting he was buried "approximately two feet." Tr. 416, line 23 – 417, line 16.
- State's Exhibit 37 "shows the root that was going though [the decedent's] arm, through the bend of the arm." It also shows he was buried approximately two feet. Tr. 417, line 17 – 418, line 3.
- State's Exhibit 38 "is a close-up photograph of one of the arms with a binding around the wrist." Tr. 318, lines 4-17.

- State's Exhibit 40 "is another photograph of one of the wrists denoting the binding is still around the wrist. You can also see part of the body in the photograph." Tr. 418, line 20 – 419, line 1.
- State's Exhibit 41 "is another photograph of the hand and the forearm. It also shows the binding still around the wrists." Tr. 419, lines 2-13.
- State's Exhibit 42 "is a close-up of the calves of the victim and part of the feet. Also shows the binding around the ankles." Tr. 419, line 22 – 420, line 5.

Trial counsel did not object to any of these photographs. Tr. 411, line 22 – 413, line 6.²

According to the testimony, the prosecution's stated purpose for introducing these photographs was to demonstrate the decedent's body was buried in a shallow grave, the ligatures were still around his wrists and ankles, and the body was in a moderate to severe state of decay. The prosecutor offered this same evidence through witness testimony. Agent Wallace described these same facts without needing the assistance of the photographs. Tr. 415, line 10 – 416, line 10. Officer Harley testified about his observations of the decedent's body being found in a shallow grave. Tr. 389-90.

Dr. Janice Ross, a forensic pathologist testified, without referring to any photographs, "[B]esides the clothing that he had on, [Mr. Donaldson] had some ligature marks that were essentially like shoe strings around his wrists and his ankles, but they were not connected." Tr. 440, line 21 – 441, line 4. The prosecutor then introduced the following autopsy photographs through the testimony of Dr. Ross:

- State's Exhibit 55 "shows the ligature around one of the ankles." Tr. 442, lines 2-13.
- State's Exhibit 56 shows "the ligature in place on the left wrist." Tr. 442, lines 14-23.

² State's Exhibit 39 was also introduced into evidence without objection, but the prosecutor withdrew that photograph from evidence prior to publishing it to the jurors. Tr. 419, lines 14-18.

- State's Exhibit 57 shows the ligature around the right wrist". Tr. 442, line 24 00 443, line 3.
- State's Exhibit 58 shows "the ligature mark area with the ligature removed." Tr. 443, lines 4-9.
- State's Exhibit 59 shows a tattoo on the right forearm that was used to identify Mr. Donaldson. Tr. 443, lines 10-24.
- State's Exhibit 60 shows a ligature mark, but you cannot tell on which part of the body. Tr. 443, line 25—444, line 11.
- State's Exhibit 61 shows a ligature on one of the arms, wrist." Tr. 444, lines 12-19.
- State's Exhibit 62 is a "photograph of the left anterior forearm . . . showing two defects in the skin that appear to be lacerations." Tr. 448, lines 2-22.

Trial counsel did not object to any of these photographs. Tr. 441, lines 8-25.

6. Victim impact Evidence.

The prosecution presented victim impact evidence. The prosecutor asked Shaunta Kimberly Smith about spending time with Mr. Donaldson:

Q: Did you ever have cause to stay over with Tyrone?

A: Yes, I did.

Q: Explain to me how that would work if you would.

A: Me and Tyrone would actually, you know, get together and meet. When we meet up, you know, I would go to his house, stay for a couple of hours, but you know, I would have to go to work the next day. So we used to spend time together during that time.

Q: Okay. Did you ever spend the night with him?

A: Yes, I have.

Q: Okay. And tell me a little bit about Tyrone. Did he have any kids he was caring for?

A: Yes, he did.

Q: Can you tell us who they were and how old they were back then to the best of your recollection?

A: He had a daughter, [redacted]. I believe she was around four or five at that time. He also had a daughter, [redacted]. She was around seven or eight, somewhere up in there. He also had a stepdaughter that was there which was [redacted].

Q: Okay. And what about Tyrone, did he help take care of those kids?

A: Yes, he did.

Q: Describe that to me if you would, please.

A: He would cook. He would clean. He would, you know, help the kids with their homework and make sure they got their baths, you know, and got ready for school the next day. He would do all of that for them.

Q: He was kind of like Mr. Mom?

A: Yes, very much.

Q: Do you know if Tyrone was married prior to all of this happening in July of 2011?

A: I know he had been married but, you know, he had told me, you know, his wife and mother-in-law was in a car accident years ago.

Q: Uh-huh.

A: And he was still, you know, he was still kind of affected by it, but was trying to, you know, move on with his life.

Tr. 161-62.

The prosecutor questioned Maurice Williams about Mr. Donaldson:

Q: Did you know Tyrone Donaldson.

A: Yes, sir.

Q: Well, tell us how long you've know Ty, Tyrone. Tell us about that.

A: Well, I've known him basically all my life growing up, but I really got to know him for, like, the last five years. We've been hanging buddies.

Q: And describe Tyrone a little bit to the jury.

A: Nice guy. Very friendly. Very family oriented. Love his kids. That's basically him.

Q: Did he have some young kids he was taking care of?

A: Yes, sir.

Q: Did he do a lot to take care of those kids?

A: Yes, sir.

Q: What are some of the things he would do?

A: Everything from dressing them, cooking for them, taking them to play. Everything.

Tr. 176-77.

7. Bad character evidence.

Both the prosecutor and trial counsel introduced evidence of Mr. Gerrick's bad character.

Trial counsel questioned Maurice Williams:

Q: [Y]ou've known Sammie Gerrick for a long time; correct?

A: Yeah, for a good amount of years. Yes, sir. You could say that.

Q: And he's been in a little trouble before; hasn't he?

A: I guess. I'm not sure.

Q: But you didn't mind bailing him out of jail; correct?

A: Well, I didn't mind helping Tyrone bailing him out of jail.

Tr. 205, lines 8-16. And:

Q: He asked you why, the first time you were interviewed by police why you didn't tell them everything until the second statement. Why was that?

A: Well, at that point Mr. Gerrick was still on the streets and I was thinking, like, I know a lot. And I was just really afraid.

Q: You were scared?

A: I was scared.

Q: Of who?

A: Mr. Gerrick.

Q: So you were scared if you ran your mouth too much it might come back on you?

A: Right.

Q: From who?

A: Mr. Gerrick.

Tr. 210, lines 2-16.

The prosecutor asked John Rice, a jailor, about whether Mr. Gerrick had any scratch marks on him. Mr. Rice replied, “[H]e had probably had scratches on him but that came prior to when they brought him back to jail after that escape.” Tr. 216, lines 1-9.

The prosecutor asked Shaneka Lakeisha DeLoach to describe Mr. Gerrick’s face. She responded, “He could have been looking mean.” Tr. 236, lines 20-23.

The prosecutor asked Investigator Shaun E. Harley about law enforcements interview of Mr. Gerrick on August 17, 2011:

THE WITNESS: Mr. Sammie Lee Gerrick, he was transported by the US Marshall’s Task Force because I think he was incarcerated at the Charleston County Detention Center at that time. And was transported back her to Barnwell County to the sheriff’s office where we interviewed him at that time.

MR. WATERS: Court’s indulgence. (pause).

Q: All right. So, tell us where Sammie Gerrick was.

A: He was at the Charleston County Detention Center.

Q: And y’all had him brought back to Barnwell; is that correct?

A: He was transported by the US Marshall’s Task Force.

Tr. 333, lines 1-18.

The prosecutor asked Chief of Police John Holston to publish Mr. Gerrick's August 17, 2011 written statement. Chief Holston began:

When I was in the Banberg County Jail I had no way of contacting so, to the fact of being sentenced to six months in jail for child support. While being sentenced I received som more charges by leaving out of the courthouse and pushing down a sheriff's officer and running through the door at the courthouse.

Tr. 269, lines 1-6.

8. Closing Argument

The prosecutor made a powerful closing argument centered around Mr. Gerrick's alleged motive, opportunity, and guilty acts or guilty consciousness. *See, e.g.* tr. 697.

During the closing argument the prosecutor misrepresented Taylor White's testimony:

But, you remember, Taylor White states that later on that evening when she sees Sammie, he comes in, he goes back out, he comes back in with a barrel of clothes. He goes in the area where the washing machine is. He comes back without the clothes. He goes into the bedroom where the shower is and then he doesn't – and he changes clothes. He comes out in different clothes. Okay. Now, sure, a man can take a shower. By itself that means nothing. But when you put it together with everything else, what does it tell you.

Okay. It's just a, one more circumstance, one more fact that starts to draw that circle around Sammie Gerrick.

All right. Why did he need another shower? He already had one that morning or that afternoon, you know, right when he got out of jail. Why did he need to change for?

Tr. 722, lines 1-17.

The prosecutor argued the victim impact evidence introduced through witnesses earlier in the trial:

[B]efore we go through all Sammie's guilty acts, let's talk about Tyrone and what you heard about Tyrone. Tyrone was a family man. He took care of those kids, two young kids and his teenage sister. He cooked for them. He cleaned for them.

He did their homework. The family and the friends said Tyrone wasn't doing any drugs. Tyrone wasn't into any drugs. The officer said we looked into it Tyrone wasn't into any drugs.

Tr. 708, lines 1-8. And, "You haven't heard one person say a bad word about Tyrone except Sammie Gerrick." Tr. 708, lines 24-25.

The prosecutor argued for the jurors to seek justice for Tyrone Donaldson. Examples include:

- "Let's let Tyrone have the last word. And I told you before, Tyrone can testify here today. He was found, as I stated before with – his hands tied. His ankles had been tied. His body face down, suffocated, choked out." Tr. 742, lines 4-8.
- Is that Tyrone speaking to you right there? Is that Tyrone Speaking to you right there? The man who had the motive. The Man who had to opportunity. The man who engaged in all these guilty acts and he's got these scratches on him right after this crime happened." Tr. 743, lines 3-7.

The prosecutor repeatedly called Mr. Gerrick a liar. *See, e.g.*, Tr. 696, lines 17-18 ("we deal with the many twists and turns of Sammie Gerrick over there."); Tr. 699, line 25 – 700, line 2 ("It might be different than what was before but a classic person who tells falsehoods, a classic liar."); Tr. 704, line 1 ("Another lie by Sammie Gerrick over there."); Tr. 707, lines 21-22 ("The acts to conceal, to lie, to cover up, to divert attention, to lie."); Tr. 712, line 25 – 713, line 1 ("He has to move. He has to bob. He has to weave."); Tr. 721, line 9 ("Lies five, six, and seven."); Tr. 722, line 23 ("That's a lie."); Tr. 723, line 20 ("classic liar."); Tr. 724, line 12 ("You saw the evidence of a liar."); Tr. 725, lines 8-9 ("from faking texts to telling this lie to telling that lie."); Tr. 726, lines 1-2 ("He's tried telling lies."); Tr. 727, line 22 ("He comes back and tells that silly lie to Maurice."); Tr. 734, lines 21-22 ("Liar. Classic liar who admits to what you can prove and then creates a story based on that."); Tr. 735, lines 7-8 ("So he's got to come up with a new lie."); Tr. 736, line 18, ("that this is just all mind games and lies"), Tr. 737, line 3 ("cockamany last

version”); Tr. 737, lines 20-22 (“Classic liar. Prove this, move the story. Prove that, move the story. Prove that, move the story. And it’s just a cockamany thing.”); Tr. 738, line 10 (“concocts this story”); Tr. 739, line 13 (“cockamany story”); Tr. 740, line 10 (“Classic liar.”); Tr. 742, lines 15-16 (“And we also know that Sammie Gerrick told lies about that, too.”); Tr. 744, lines 12-14 (“Tyrone was fooled by Sammie Gerrick’s lies and he died for it. Don’t y’all be fooled by his lies, too.”).

The prosecutor argued the “root” as evidence of guilt:

But anyway, they searched the truck. And what do they find? In this console they find what I’ll call the little capsule. Right here. And they find a bottle of Law Keep Away. Law Keep Away found in the console of his truck where people tend to keep their personal items in their car where a lot of us spend our time.

And, you know, normally, again, by itself, it’s not really that significant. And there’s the capsule itself. But when you open it up and you know what else is going on in Sammie Gerrick’s life and you get this. This is what’s in there: Set me Sammie Gerrick free.

Let me back it [sic] out.

Set me Sammie Gerrick free from murder and revoke bonds. Jack Early set me free now. Jack Early set me free now. Jack Early set me free now. Sammie Gerrick, Sr. Sammie Gerrick, Sr. So shall it be. So shall it be. So shall it be.

Set me free from murder and revoke bonds. What was going on in Sammie Gerrick’s life at that time? He had been questioned by the police multiple times. He knew he was the target of this investigation. He was engaging in all sorts of things to try to throw people off the track, whether it was the story about the ATM, or whether it was the track phone, or the lies, or the claim about the \$25,000 to Chief Holston. He knows he’s in the fire. He’s in the frying pan right now.

Now I don’t know what he hoped to accomplish by this but I can say this. It was in his car next to a bottle of Law Keep Away, kept close and personal. And we also know that, as I told you before, a few days prior to that he had had his bond revoked. So I mean, it ties right to this case. He was hoping somehow this plea would keep him out of trouble. Set me Sammie Gerrick free from murder and revoke bonds. Well, guess what. He is facing a bond revocation and he was a target in a murder investigation. Who does that but a guilty man? Who does that?

And again by itself, the same thing with the Law Keep Away, Law Stay Away. Excuse me. By itself it's just a novelty item. By itself, it's just a novelty item. It's an incense powder. It says Law Stay Away. And it's got this picture, as you can see, a guy pushing away a police officer who's dropping the billyclub. It's law Stay Away incense powder, and it's found right next to this plea and wrapped up in that capsule. Right there together in his console.

Tr. 732, line 2 – 733, line 22.

The prosecutor argued his theory about how Sammie Gerrick killed Tyrone Donaldson:

I submit to you that Sammie told Maurice we're going out – or, excuse me. Sammie told Tyrone we're going out to the woods to get that money. And they got the two shovels because they were going to dig it up. And Sammie went out there and made Tyrone unknowingly help dig his own grave.

And then he struck defensive wounds on the arm. I showed you before. And he overpowered him. He tied him up. He made him give up his PIN number so he could later claim he was entitled to use it. And then he choked him out and Tyrone with his hands tied was doing the best he could. And that's where he got the scratches right there on the inside of the elbow and right there on the chest area, because that's all Tyrone could do. But he couldn't win and he died.

There's only one man that all these circumstances fit. Only one man. And it's Sammie Gerrick.

He's got the motive. He's got the opportunity. He's got the guilty acts. He's got 16 lies, a classic liar who moves his story all the way down. He's got the track phone, the texts, the capsule, the Law Keep Away, the green netting, Bradley Smith saw him staring off into space when the crime happened. He had never did that before.

You've got, you got Early Glover faking evidence. You got Charlene taking the car and moving it in the middle of the night. You got using the ATM card, and you got Tyrone speaking to you with these scratches. All of this points to one man; Sammie Gerrick.

I got one last thing to say. Tyrone was fooled by Sammie Gerrick's lies and he died for it. Don't y'all be fooled by his lies, too.

On behalf of the State of South Carolina, on behalf of all of Tyrone's family and friends out here, I ask you to do your duty, do the right thing and find this man guilty of murdering Tyrone.

Tr. 743, line 8 – 744, line 18.

B. Evidence Presented at PCR Evidentiary Hearing.

Mr. Gerrick's wife, Charlene Gerrick, testified at the evidentiary hearing.³ During the investigation, law enforcement did not advise Ms. Gerrick about her right to invoke the spousal privilege. Had she been aware of the spousal privilege, then she would have invoked it when being interviewed by investigators. Had she invoked the privilege, then investigators would not have learned about her helping her husband move a car from a secluded location in Barnwell County to the China Express restaurant in Orangeburg. Investigators told Ms. Gerrick she would lose custody of her special needs daughter if she did not cooperate with their investigation. Ms. Gerrick prepared the "root" and placed it inside her husband's automobile. She did not tell Mr. Gerrick about her responsibility for preparing the "root" until after his trial. Mr. Gerrick testified and confirmed he did not know about his wife's role in preparing the "root" until after his jury trial. Mr. Williams did not interview Ms. Gerrick about the "root."

Mr. Williams testified the court appointed him to represent Mr. Gerrick because Circuit Defender Grant Gibbons had a conflict of interest with Mr. Gerrick from his prior employment in the Second Circuit Solicitor's Office.⁴

Mr. Williams testified about the two jurors that the trial judge removed from the case. He acknowledged the trial judge made this decision in chambers outside Mr. Gerrick's presence.

Mr. Williams testified about the trial judge's opening comments and final instruction on the law informing the jurors their "sole responsibility" was to determine the "true facts" and render

³ Attorney C. Rauch Wise represented Ms. Gerrick at the evidentiary hearing to ensure her spousal privilege was honored.

⁴ The Solicitor's Office conflicted Mr. Gerrick's prosecution to the Attorney General's Office.

a verdict. Mr. Williams was not aware of any case law prohibiting these comments and instructions.

Dr. Janice Ross testified at the PCR hearing. She classified the manner of death as a homicide because the decedent was buried in a shallow, clandestine grave. Although she could rule out certain causes of death, Dr. Ross could not offer an opinion about a particular cause of death to a reasonable degree of medical certainty. Nor could Dr. Ross offer an opinion to a reasonable degree of medical certainty about the location of death, *i.e.* whether death occurred at the location of the grave or some other place. She also could not opine to a reasonable degree of medical certainty that the cuts or scratches on Mr. Donaldson's body were defensive wounds.

III. STANDARD OF REVIEW.

Under the first prong of *Strickland v. Washington*, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “Decisions made in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* “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.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government’s case ...,” and “we must consider the totality of the evidence before 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.* “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Id.* 422 S.C. at 189, 810 S.E.2d at 844. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

IV. ARGUMENT.

- A. Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a “root.” Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court’s opinion about the “root” evidence and constituted a conflict of interest.**

Regardless of favorable or unfavorable beliefs about the “root,” reasonable jurors would have concluded that Judge Early declined to “help” Mr. Gerrick keep the law away or obtain his freedom. Presiding over the trial conveyed to the jurors Judge Early’s belief that Mr. Gerrick’s trial should proceed. Trial judges are prohibited from communicating their personal beliefs about the facts of the case to the jurors. S.C. Const. Art. V, § 21. *And see, e.g., State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (instructing the jury on statute, providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, was an impermissible charge on the facts); *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (Ct. App. 1992) (requested charge on motive constituted impermissible charge on fact); *State v. Dawkins*, 268 S.C. 110, 232 S.E.2d 228 (1977) (where the jury returned to the courtroom after deliberating for a short time and inquired about the distance between the cars, the trial judge’s response that he did not think there was any testimony of the distance ‘in inches and feet’ constituted an impermissible comment on the testimony given in the case requiring reversal).

Additionally, the jurors could have viewed the “root” as an attempt to cast a spell on Judge Early or otherwise improperly influence him. Regardless of whether the jurors believed Judge Early discounted the root or was somehow influenced of the root, the influence of witchcraft or the “root” on anyone other than the accused is inadmissible. *State v. Mattison*, 276 S.C. 235, 239, 277 S.E.2d 598, 600 (1981) (“The trial judge excluded testimony as to the general effect of the fear of witchcraft or ‘roots’ on people, but permitted such testimony directed solely to its effect

upon appellant. The testimony in question was properly excluded as irrelevant.”) *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

The State’s case against Mr. Gerrick was not overwhelming. *See Smalls, supra*. Because credibility was the central issue for the jurors to determine, Judge Early presiding over Mr. Gerrick’s trial, thereby conveying his beliefs about the “root,” prejudiced Mr. Gerrick. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was “no physical evidence of sexual abuse”); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when “credibility was the most critical determination of this case”); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) (“These credibility questions and inconsistencies in the witnesses’ testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry’s guilt is overwhelming or that Berry’s guilt is the only rational conclusion that could be reached from the evidence presented.”). This Court should order a new trial.

B. Failing to investigate and present available evidence explaining the “root.”

The prosecution relied on the “root” to show Mr. Gerrick’s consciousness of guilt. Trial counsel did not interview Ms. Gerrick who was responsible for placing the “root” in her husband’s automobile. Mr. Gerrick’s testimony additionally explained that there was talk in the community about Mr. Gerrick being investigated for murder—something that would be upsetting to anyone regardless of guilt or innocence—which further undermined the prosecution’s claim the evidence demonstrated Mr. Gerrick’s consciousness of guilt.

A new trial is warranted when trial counsel’s failure to investigate prejudices and accused. *See, e.g., Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014) (trial counsel’s failure to interview accused’s former girlfriend as a potential alibi witness warranted a new trial); *McKnight v. State*,

378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (trial “counsel was ineffective in failing to investigate medical evidence contradicting the State's experts’ testimony); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (Trial counsel's failure to adequately investigate and present mitigating evidence during penalty phase was deficient performance); *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (defendant convicted of forgery and burglary was denied effective assistance of counsel due to defense counsel's failure to investigate possible defenses); *Bagwell v. State*, 410 S.C. 259, 266, 763 S.E.2d 630, 634 (Ct. App. 2014) (“trial counsel's failure to conduct DNA testing on the glass prior to trial constituted ineffective assistance of counsel”).

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

C. Failing to object to the trial judge’s opening comments and final instruction on the law, instructing the jurors to find the “true facts,” including but not limited to the opening instruction, “[A]t the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict;” and the final instructions to the jurors, “It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;” “That is your sole responsibility, your sole duty to determine what the true facts are in this case:” and “You’re here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I’ve given it to you.”

As seen, the trial judge repeatedly instructed the jurors to determine the “true facts.” Our Supreme Court long ago disfavored instructions like the one involved in this case. In *State v. Manning*, the trial court instructed:

Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and *that is a doubt for which you can give a real reason*. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted

to. *A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason.* So it's to that degree of proof that the State is required to establish the elements of a charge.

305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991) (emphasis supplied by the court). The Court, accordingly, prohibited trial judges from telling jurors “to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant.” *Id.*, 305 S.C. at 416, 409 S.E.2d at 374. “Rather than conveying to the jury the principle that the State must affirmatively establish appellant’s guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant’s explanation of the evidence to determine the existence of reasonable doubt.” *Id.* 305 S.C. at 417, 409 S.E.2d at 374-75. Our Supreme Court reaffirmed this analysis in *State v. Raffaldt*, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995)⁵ and *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004) (In *Manning* “we held that a circumstantial evidence charge which requires the jury to seek some reasonable explanation other than the defendant’s guilt ‘turns the State’s burden of proof on its head by requiring the jury to find a ‘reasonable explanation’ of the evidence inconsistent with appellant’s guilt before it can find him not guilty.’”).

In *State v. Needs*, the trial judge charged the jurors, “[Y]ou, the jury, must seek some other rational or logical explanation other than the guilt of the accused.” And, a “reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act.” 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998). Our Supreme Court “strongly urge[d] the trial courts to avoid using” this language when instructing jurors about circumstantial evidence and reasonable doubt. 333 S.C. at 155, 508 S.E.2d at 867. In *Aleksey*, this Court again reminded,

⁵ In *Raffaldt*, the trial judge instructed, “So in the consideration of circumstantial evidence, you must seek some reasonable explanation other than the guilt of the accused and if such reasonable explanation can be found, then you cannot convict upon circumstantial evidence alone.” 318 S.C. at 115, 456 S.E.2d at 393.

“Jury 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 a defendant.’” 343 S.C. at 26-27, 538 S.E.2d at 251 (citing *Needs*). More recently, in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), this Court instructed trial judges to remove similar instructions from charge books. “Such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State’s burden to prove the defendant’s guilt beyond a reasonable doubt.” *Id.* See also *State v. Beaty*, No. 2015-000718, 2018 WL 1938544 (S.C. Apr. 25, 2018) (trial judge’s preliminary remarks to the jury, that jury’s role was to “search for the truth,” determine “true facts,” and render a “just verdict,” were improper).

Although decided after Mr. Gerrick’s trial, *Beaty* did not articulate a new rule of law. *Daniels*, *Cherry*, *Manning*, *Needs*, *Raffaldt*, and *Aleksey* placed trial counsel on notice to object to this jury instruction, but trial counsel was not aware of this line of cases. See *Weik*, *supra*. Additionally, in *Cage v. Louisiana*, 498 U.S. 39 (1990), a unanimous United States Supreme Court held that the jury instruction in that case was contrary to the “beyond a reasonable doubt” requirement articulated in *In Re Winship*, 397 U.S. 358 (1970) (holding that the accused is protected against conviction under the Fourteenth Amendment except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The words “substantial” and “grave” suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements were taken in conjunction with the court’s reference to a “moral” rather than evidentiary certainty, a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

“It is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean.” *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (citations omitted). “In order to make this determination, the challenged instruction must be examined in the context of the trial court’s entire charge to the jury and not in isolation.” *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). “Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.” *Id.*, 376 S.C. at 506, 657 S.E.2d at 64 (quoting *Francis v. Franklin*, 471 U.S. 307, 322 (1965)). “Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge.” *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). “A jury charge is no place for purposeful ambiguity.” *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

Trial counsel, therefore, was ineffective for not objecting the trial judge’s opening remarks and final instruction on the law. *See Gibson and Lowry, supra*. The trial judge’s final instruction, “That is your sole responsibility, your sole duty to determine what the true facts are in this case,” rendered the entire instruction invalid. *See Beaty, Daniles, and Aleksey, supra*.

These instructions prejudiced Mr. Gerrick. Reasonable jurors could have concluded they had to determine the “truth,” rather than applying the burden of proof. Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

D. Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.

“[T]he Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial.” *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). See also *In Interest of Dwayne M.*, 287 S.C. 413, 414, 339 S.E.2d 130, 130 (1986) (An accused “has a constitutional right to be present at every stage of the criminal proceeding against him.”); *State v. Taylor*, 261 S.C. 437, 442, 200 S.E.2d 387, 389 (1973) (“By virtue of their constitutional rights, persons accused of crimes are entitled to be present at every stage of the trial.”). And see *United States v. Runyon*, 707 F.3d 475, 517 (4th Cir. 2013) (“district court erred in deciding to dismiss [Jury] Foreman with neither Runyon nor his lawyer present); *United States v. Rolle*, 204 F.3d 133 (4th Cir. 2000) (defendant’s absence from individual voir dire of certain prospective jurors satisfied error and plain error prongs of plain error analysis); *United States v. Camacho*, 955 F.2d 950 (4th Cir. 1992) (accused had constitutional and statutory right to be present at his trial, including empaneling of jury). “The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.” *Faretta v. California*, 422 U.S. 806, 819 (1975). In *United States v. Hanno*, the Fourth Circuit Court of Appeals held “dismember[ing a jury] without giving notice to and in the absence of the defendant” violates “the defendant's due process right to be present under the constitution.” 21 F.3d 42, 46 (4th Cir. 1994). See also *United States v. Camacho*, 955 F.2d 950 (4th Cir. 1992) (trial judge erred in removing juror during in camera proceeding in absence of defendant and his counsel). The Fourth Circuit further held the trial “court erred in not recording the proceedings in which Hanno's jurors were removed.” *Hanno at* 48. South Carolina courts have recognized the right of an accused to be present when the trial

judge makes decisions involving jurors. *See, e.g., State v. Elmore*, 279 S.C. 417, 422, 308 S.E.2d 781, 785 (1983), *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (trial judge entering jury room with prosecutor and defense counsel “runs counter to the requirement that in a death case the defendant be present at all stages of trial”); *State v. James*, 116 S.C. 243, 107 S.E. 907, 908 (1921) (accused had right to be present when trial judge provided additional instructions to jurors).

The retention of Juror Number 23 was particularly prejudicial because she knew State’s witness Taylor White. As evidenced by the closing argument, the prosecution considered Ms. White a major witness. The prosecutor argued, falsely, that Ms. White witnessed Mr. Gerrick take a shower, which was circumstantial evidence of concealing his guilt. Juror Number 23, no doubt, was influenced by her knowledge of Ms. White.

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

E. Failing to object to or make an offer to stipulate to graphic photographs of the victim’s body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors’ minds as to deny Mr. Gerrick due process.

“Photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a capital case if they are irrelevant or not substantially necessary to show material facts or conditions.” *State v. Kornahrens*, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (citing *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986)). *See also State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010) (Use of horrendous photographs

during the sentencing phase of a capital trial is “an area of growing concern” for our Supreme Court that has strongly encourage[d] all solicitors to refrain from pushing the envelope.”).

Here, the prosecution’s stated purpose for introducing these photographs was to demonstrate the decedent’s bond was buried in a shallow grave, the ligatures were still around his wrists and ankles, and the body was in a moderate to severe state of decay. As our Supreme Court held:

There was no dispute as to these facts. All of them were fully established both by uncontradicted medical and lay testimony. These pictures were calculated to inflame and arouse the passions of the jury and their introduction was wholly unnecessary to establish the facts claimed. They should have been excluded.

State v. Waitus, 224 S.C. 12, 27, 77 S.E.2d 256, 263 (1953) (citing *State v. Edwards*, 194 S.C. 410, 10 S.E.2d 587, 588 (1940) (“[P]hotographs which are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are entirely irrelevant or not substantially necessary to show material facts or conditions.”). Trial counsel was deficient for not objecting to these photographs or offering to stipulate to their contents.

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

F. Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.

Charlene Cerrick’s testimony that she helped her husband move Tyrone Donaldson’s white Honda Civic from a secluded area on a dirt road in the woods to the China Express in Orangeburg was an important piece of circumstantial evidence for the prosecution. Ms. Gerrick testified at the PCR hearing that her statement was obtained in violation of her spousal privilege and as the result

of law enforcement threatening to place the Gerricks' special needs child in foster care. Trial counsel was not aware of this information because he did not interview Ms. Gerrick, meaning he could not make a strategic decision about a motion to suppress this statement. *See Weik, supra*. Threatening to place the Gerricks' special needs child into foster care rendered Ms. Gerrick's statement involuntary. *State v. Corns*, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) (threat to arrest wife and place children in foster care rendered accused's statement involuntary).

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

G. Failing to object to improper victim impact evidence that was not relevant and which were intended to arouse sympathy, passion, and prejudice in the jurors' minds.

The prosecutor introduced evidence about Mr. Donaldson being a family man, being "Mr. Mom" to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson's good character with Sammie Gerrick's bad character as a "classic liar." This testimony was prohibited by the South Carolina Victims' Bill of Right, which provides:

The circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing. Within a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement and the court must allow the defense an opportunity to respond to the statement. However, the victim impact statement must not be provided to the defense until the defendant has been found guilty by a judge or jury. *The victim impact statement and its contents are not admissible as evidence in any trial.*

S.C. Code Ann. § 16-3-1550(F) (emphasis added). *See also State v. Hill*, 331 S.C. 94, 105, 501 S.E.2d 122, 128 (1998) ("This section merely limits the victim impact evidence in non-capital

cases.”). *And see State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (Murder victim's sister's testimony about victim's family, how victim acquired his nickname, “Bunny,” and that victim had played drums in high school band, was not relevant to issue of defendant's guilt in murder prosecution).

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

H. Failing to object to testimony that violated the confrontation clauses of the state and federal constitutions.

Mr. Gerrick withdrew this claim at the evidentiary hearing.

I. Failing to object to impermissible character testimony that violated Rule 404, SCRE.

As seen, both the prosecutor and defense counsel elicited testimony about Mr. Gerrick’s bad character. This testimony implied Mr. Gerrick’s guilt and was improper character evidence pursuant to Rule 404(a), SCRE. Some of this evidence implied Mr. Gerrick had a prior criminal record or was incarcerated for other offenses. “[E]vidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper.” *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986)). *See also Deck v. Missouri*, 544 U.S. 622 (2005); *Estelle v. Williams*, 425 U.S. 501 (1976); *State v. Lawson*, No. 2015-002467, 2018 WL 2708761 (S.C. Ct. App. June 6, 2018) (admitting evidence of an accused’s prior criminal record required reversal).

Trial counsel was ineffective for not objecting to this improper character evidence. *See, e.g., Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989) (failure to object to improper character evidence was prejudicial ineffective assistance of counsel warranting a new trial). Trial counsel

did not have a strategic reason for not objecting. *See Ingle and Freiburger, supra.* Reasonable jurors would view Mr. Gerrick as less credible because of his prior criminal record and unspecified long-term incarceration.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

J. Failing to object to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

During his closing argument, the prosecutor argued facts that were not supported by the evidence. First, the prosecutor claimed Taylor White testified she witnessed Mr. Gerrick take a shower, arguing this testimony to be circumstantial evidence Mr. Gerrick was covering up the crime. The prosecutor's claim misstated Ms. White's testimony, as she expressly denied witnessing Mr. Gerrick taking a shower. *See Section II(A)(3), supra.* Second, the prosecutor advanced a theory of the forensic evidence that was not supported by the state's own forensic pathologist, Dr. Janice Ross. *See Section II(B), supra.*

Trial counsel was ineffective for not objecting to the prosecutor's misstating Ms. White's testimony. *See, e.g. Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) ("some of the solicitor's statements regarding Victim's credibility were not only damaging to Tappeiner, but misrepresented the evidence adduced at trial").

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and*

Berry, supra, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

K. Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

Our Supreme Court recently reminded, "[W]ith the repeal of Circuit Court Rule 58 by Rule 85(c), SCRCP, [on July 1, 1985] and with the adoption of Rule 39, SCRCP, there is no codified or otherwise duly adopted court rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence." *State v. Beaty*, __ S.C. ___, 813 S.E.2d 502, 509 (S.C. 2018). Our Supreme Court then observed:

This Court cannot simply assume that from July 1, 1985 through the trial of the instant case, the criminal trial courts of this State have uniformly continued to follow repealed Circuit Court Rule 58 to the extent that it remains the "practice as it has heretofore existed" in criminal cases in which the defendant introduces evidence. We have no effective way to ascertain the prevailing practices of current and past trial judges. We can only conclude that absent a published court rule or a defined common law rule, individual trial judges have developed their own practices governing closing argument in cases in which a defendant introduces evidence.

Id. 813 S.E.2d at 509. And:

[T]rial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, our authority—and the authority of the trial court—is but to address due process considerations as they arise. In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial.

Id. 813 S.E.2d at 513.

Beaty, although decided after Mr. Gerrick's trial, did not announce a new rule of law. Our Supreme Court merely observed that the lack of a formal rule required trial judges to exercise

discretion to protect the due process rights of an accused. At the PCR hearing, trial counsel testified Mr. Gerrick's trial judge exercised a strict rule of not allowing a defendant who presented evidence to respond to the prosecutor's closing arguments on the facts. "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015). The prosecutor made a powerful closing argument that misstated important facts, advanced a theory of the forensic evidence not endorsed by Dr. Ross, emphasized the good character of Mr. Donaldson, and attacked Mr. Gerrick's character as a "classic liar." Trial counsel not only failed to object to any of these argument, but also did not ask for an opportunity to respond to the false statements and character assignation. Trial counsel did not offer a valid strategic reason for not requesting an opportunity to respond.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

L. Failing to object to statements by the prosecutor during closing argument which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof.

The prosecutor introduced evidence about Mr. Donaldson being a family man, being "Mr. Mom" to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson's good character with Sammie Gerrick's bad character as a "classis liar." These arguments were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof. Trial counsel was ineffective for not objecting. *See, e.g., Tappeiner v. State*, 416 S.C. 239, 252, 785 S.E.2d 471, 478

(2016) (“[T]he solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors' emotions, rather than the evidence in the record.”); *Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (“trial counsel was deficient in failing to object to the challenged portion of the solicitor's closing argument because it constituted a “Golden Rule” argument which impermissibly appealed to the passion of the jurors by asking them to “speak up” for the child victim”); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial counsel formed deficiently by failing to object to solicitor's “golden rule argument” at penalty phase); *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (prosecutor's use of “you” some 45 times in closing argument, asking jury to put themselves in place of victim, constituted reversible error).

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

M. Failing to object to inflammatory statements by the prosecutor which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and were so defamatory to Mr. Gerrick that it denied him due process.

The prosecutor introduced evidence about Mr. Donaldson being a family man, being “Mr. Mom” to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson's good character with Sammie Gerrick's bad character as a “classic liar.” The prosecutor repeatedly called Mr. Gerrick a liar. “Our supreme court has previously held it is improper to call a party a liar in closing argument.” *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002). *See also Major v.*

Alverson, 183 S.C. 123, 190 S.E. 449 (1937). Trial counsel was not aware of this line of precedent, and his “ignorance” of the law “cannot be characterized as strategic.” See *Weik*, *supra*. Additionally, trial counsel’s decision not to object in order not to call attention to the insult must be rejected because the prosecutor’s comments were not isolated, but rather an “in-your-face” attack of Mr. Gerrick’s character that was emphasized over-and-over again.

Because the State’s case against Mr. Gerrick was not overwhelming, see *Smalls*, *supra*, and credibility was the central issues for the jurors to determine, see *Anderson*, *Jennings*, and *Berry*, *supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

N. Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in the case, which denied Mr. Gerrick’s right to a fair and impartial grand jury presentment.

The following exchange occurred during a pre-trial hearing:

MR. WATERS: And lastly, Your Honor, we did push through or have the grand jury rule on a new indictment last week. As we were here for trial prep we -- Lieutenant Harley realized that one of the individuals on the grand jury had -- was a witness in the case. Not -- just kind of an auxiliary fact witness. And so fortunately the grand jury was in session. So we put the indictment through and she had recused herself obviously for that, but I've served that indictment on Mr. Williams. He's aware of that, but I just wanted to make --

THE COURT: There's no motion to quash the indictment, there's been no attack on the indictment; is that correct, Mr. Williams?

MR. WILLIAMS: Your Honor, just for the record. He has raised to me the fact that there is a time frame given for the murder. I've looked at that and I've talked to SLED. They've given me all of their evidence. So I'm able to properly defend him in the indictment. And I know what the charges are.

THE COURT: Thank you.

Tr. 136-37.

Trial counsel appears to base his lack of objection on his understanding that an indictment

is a notice document. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). An indictment is not merely a notice document as the State is required to present testimony to the grand jury establishing probable cause. The right of an accused to have a grand jury review the charges against him is a Constitutional right enumerated in the Fifth Amendment to the United States Constitution as well as in Article I, §11 of the South Carolina Constitution. “It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment.” *State v. Rector*, 158 S.C. 212, 236, 155 S.E. 385, 394 (1930) (quoting *Crowley v. United States*, 194 U.S. 461, 473 (1904)).

It has long been recognized that when an indictment is presented, the accused “may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined.” *State v. Faile*, 43 S.C. 52, 20 S.E. 798 (1895). *See also*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Our Supreme Court has recognized that questions about the fairness and impartiality of the grand jury are “so closely analogous” to questions regarding the qualification of jurors, that questions of the latter have bearing on considering questions related to the former. *Rector*, 158, S.C. at 240, 155 S.E. at 395 (citing *State v. Richardson*, 149 S.C. 121, 146 S.E. 676 (1928)).

A defendant must challenge the legality and sufficiency of the process of the grand jury *before* the jury renders a verdict in order to preserve the error for direct appellate review. *See Evans v. State*, 363 S.C. 495, 509 (2005) (citing *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)).

“Grand jury proceedings are presumed to be regular unless clear evidence indicates

otherwise.” *State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (citing *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (1991)). Our Supreme Court has recognized the incredible burden this standard places on defendants. “It is usually difficult for a defendant to make such a claim...[because] speculation about ‘potential’ abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. Fortunately, given the nature of State Grand Jury proceedings, there is a complete record available for analysis.” *State v. Thrift*, 312 S.C. 282, 302-303, 440 S.E.2d 341, 352 (1993) (quoting *State v. Thompson*, 305 S.C. at 502, 409 S.E.2d at 424 (emphasis in the original)). Mr. Gerrick’s case, however, was not a State Grand Jury case, meaning there is not record of the proceedings.

In this case, a grand juror that was also a witness in Mr. Gerrick’s case participated in the presentment and probable cause determination. Once the grand juror discussed the case with the other grand jurors, empaneling a new grand jury was the only way to cure the error.

O. Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

At the PCR hearing, trial counsel testified he was aware of evidence establishing that someone other than Sammie Gerrick killed Tyrone Donaldson. Trial counsel as ineffective for not presenting this evidence to the jurors. *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

P. Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal.

On appeal, appellate counsel briefed the following three issues:

1) Whether the court erred by admitting into evidence a “root” associated with witchcraft and a can of “Law Stay Away” that were seized from the center console of Appellant’s truck pursuant to a search warrant because this evidence was not relevant and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant?

2) Whether the court erred by denying Appellant’s motion for a mistrial after law enforcement characterized the “brown piece of paper bag” that was “taped up” to form some sort of “capsule” with weeds, twigs, and a penny inside and the words “Set me Sammie Gerrick free from murder and revoked bonds” written on the outside as a “witchcraft root” in front of the jury since this testimony was highly prejudicial and the court’s curative instruction failed to cure the prejudice suffered by Appellant?

3) Whether the court erred by refusing to grant a mistrial when the state showed a videotape of Appellant’s interview with law enforcement before his arrest with a polygraph machine clearly visible on the table since this was unduly prejudicial and denied Appellant a fair trial.

Trial counsel did not federalize these issues by arguing the error deprived Mr. Gerrick of his due process right to a fair trial. The failure to federalize these issues denies Mr. Gerrick the right to present these in a federal habeas corpus petition, should that need ever arise. *See* 28 U.S.C. § 2254.

Q. The cumulative effect of trial counsel’s errors requires a new trial.

This Court must also apply a cumulative prejudice analysis. *Kyles*, 514 U.S. at 436 (the prejudice must be “considered collectively, not item-by-item”). The United States Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally” in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. “[A]s a whole” implies a cumulative analysis.

Likewise, in *Strickland*, the Court stated, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional *errors*, the result of the proceeding would have been different.” 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of “individual error” or error-by-error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”⁶

The South Carolina Supreme Court has never before explicitly applied a cumulative prejudice analysis. *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). The court declined to do so in *Green* because Green failed to meet the threshold requirement of showing error. Specifically, the Court held that “[m]ultiple errors do not exist in this case to form any cumulative prejudicial effect.” 351 S.C. at 197, 569 S.E.2d at 325. While the application of the cumulative error doctrine is an unsettled issue in this state, South Carolina recognizes the doctrine in other contexts. The “cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citing *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995)). The Court of Appeals applied the

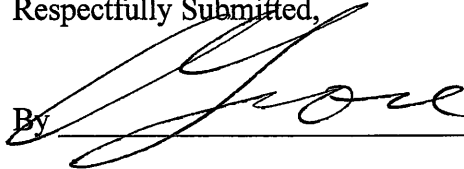
⁶ Numerous courts, relying on *Strickland*, have held that a cumulative prejudice analysis is appropriate. See, e.g., *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008); *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008); *In re Gay*, 968 P.2d 476 (Cal. 1998); *McIntosh v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997); *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).

cumulative error doctrine in *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (“[T]he cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal.”).⁷

V. CONCLUSION.

For the foregoing reasons, the Court should grant Sammie Garrick’s application for post-conviction relief, vacate his conviction and sentence, and remand this matter to the Court of General Sessions for a new trial.

Respectfully Submitted,

By 

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June 15, 2018
Greenwood, South Carolina

⁷ The South Carolina Supreme Court denied the state’s petition for writ of *certiorari* on October 7, 2000. After granting Blurton’s cross petition for writ of *certiorari* on April 26, 2001, the Supreme Court ordered a new trial for Blurton on an additional ground. *State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002).

THE STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Sammie Lee Gerrick,

Applicant,

vs.

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2016-CP-06-00111

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Julie A. Coleman, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

By



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June 15, 2018
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL	)	SECOND JUDICIAL CIRCUIT
	)	
	)	C/A No. 2016-CP-06-0111
Sammie Lee Gerrick, #165940,	)	
	)	
Applicant,	)	
	)	RESPONDENT'S POST-HEARING BRIEF
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This matter is before this Court by way of a Barnwell County application for post-conviction relief (PCR) filed by Sammie Lee Gerrick (Applicant) on March 15, 2016. The Court convened for an evidentiary hearing into the matter on Wednesday, May 9, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and represented by E. Charles Grose, Jr., Esquire. Assistant Attorneys General Julie A. Coleman and Caroline Scrantom appeared on behalf of Respondent. This post-hearing brief follows at the direction of the presiding judge, the Honorable R. Scott Sprouse.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment by the Barnwell County Clerk of Court. He is serving a life sentence without the possibility of parole.

A. The Underlying Prosecution

During its November 2013 term, the Barnwell County Grand Jury indicted Applicant for the murder of Tyrone Donaldson. Daniel W. Williams, Esquire, represented at a jury trial which began November 18, 2013, before the Honorable Doyet A. Early, III in Barnwell County. Assistant Deputy Attorney General S. Creighton Waters and Assistant Attorney General Jason

- defendant?"
- c. "Whether the court erred by denying Defendant's motion for a mistrial after a law enforcement officer characterized the "brown piece of paper bag" that was "taped up" to form some sort of "capsule" with weeds, twigs, and a penny inside and the words "Set me Sammie Garrick free from murder and revoked bonds" written on the outside as a "witchcraft root" in front of the jury since this testimony was highly prejudicial and the court's curative instruction failed to cure the prejudice suffered by Appellant?"
 - d. "Whether the court erred by refusing to grant a mistrial after the state showed a videotape of Appellant's interview with law enforcement before his arrest with a polygraph machine clearly visible on the table since this was unduly prejudicial and denied Appellant a fair trial?"

By and through the Attorney General's Office, the State made a Return to the *pro se* application.

On July 7, 2017, Mr. Grose filed his notice of appearance as Applicant's PCR counsel. He served upon Respondent an amended PCR application on May 3, 2018.² The amended application defined the claims (lettered (a) through (r)) to be pursued before this Court at the evidentiary hearing in accord with Rule 71.1, SCRCP. Each allegation is individually addressed in Respondent's merits discussion below.

II. RESPONDENT'S STATEMENT OF FACTS AS PRESENTED AT TRIAL

Applicant's trial necessitated the presentation of a large amount of circumstantial evidence. Respondent includes below a pared-down version of its statement of facts presented to the appellate court to assist this Court in its review of the broad record in this case as well as to assist in its determination of Applicant's claims in light of the standard established in *Strickland v. Washington*, *infra*:

Tyrone Donaldson was last seen by family and friends on July 21, 2011. At that time, Donaldson lived with his sister-in-law, Kelsea Hallingquest, who last saw him when he left their

² Respondent notes the amendment was filed less than a week before the hearing and requested at the outset of the hearing the opportunity to hold the record open if necessary in order to fully respond to the new allegations.

vehicles. (Tr. p. 230, l. 24 – p. 231, l. 9). Donaldson followed behind Applicant's truck. (Tr. p. 231, ll. 9-11).

Donaldson and Gerrick were next seen at 2:54 PM, which was determined from the timestamp on security camera footage at the Enterprise Bank on Main Street in Blackville. (Tr. p. 537, ll. 17-34). Security footage shows a Honda Accord following a Burgundy pickup truck out of the bank parking lot. (Tr. p. 542, l. 1 – p. 543, l. 16). At 3:15 PM at a local gas station/Subway, Shaneka DeLoach, a relative of Donaldson's and someone who knows Applicant from the community, witnessed Applicant standing outside of Donaldson's driver's side window speaking to Donaldson and "moving his hands." (Tr. p. 234, l. 11 – p. 236, l. 17). "He could have been looking mean." (Tr. p. 236, l. 23). DeLoach, who was across the street in another parking lot, could identify Donaldson's white Honda and Applicant in a burgundy Dodge truck. (Tr. p. 236, ll. 1-7).

Sometime between 3:00 and 4:00 that same afternoon, Applicant's friend Joe Thomas saw Applicant speed past his house in a gray and burgundy truck; there was another car behind him. (Tr. p. 574, l. 4 – p. 575, l. 11). Thomas called Applicant's cell phone, and Applicant replied he was busy. (Tr. p. 574, l. 5 – p. 575, l. 18). Applicant was headed north; a rural area demarcated by Sunshine Road sits about a mile north of Thomas' house. (Tr. p. 576, ll. 4-16).

No one saw Donaldson later that evening and into the night. His girlfriend, Kim Smith, received a final text message from him around 1:30 that afternoon, but when she called his cell later that evening she received no answer. (Tr. p. 165, ll. 2-21; p. 167, l. 2 – p. 168, l. 3). Williams, who was looking to be reimbursed for his bail contribution when he finished with work for the day, could not get Donaldson to answer his phone. (Tr. p. 186, ll. 15-22). Some text messages sent to Donaldson expressing worry were not received; phone records would later

take some heat off me.” (Tr. p. 248, l. 22 – p. 249, l. 14). When Applicant provided law enforcement with a handwritten statement, he spelled “I’m” as “am.”³ (Tr. p. 318, ll. 2-9). The texts came from a trac phone. (Tr. p. 611, ll. 3-18). Applicant later asked others if they had heard from Donaldson, or what they might have heard about Donaldson’s disappearance. (Tr. p. 194, ll. 3-15; Tr. p. 565, l. 18 – p. 566, l. 25).

Also occurring one day after the disappearance, Lana Joyner, a friend of Donaldson and Hallingquest, took a detour home from work, spotted Donaldson’s white Honda parked at the China Express in Orangeburg, and called Hallingquest to tell her. (Tr. p. 498, l. 23 – p. 500, l. 10). Applicant’s wife Charlene testified at trial as to how the Honda appeared at the Orangeburg China Express. Between nine and ten on the night Donaldson went missing, Applicant asked Charlene to drive him to retrieve a white Honda Civic “off a paved road, back up in the woods,” and Charlene obliged. (Tr. p. 303, l. 10 – p. 304, l. 24). Applicant had the key to the Honda Civic and drove it over to Orangeburg, parking it at the China Express. (Tr. p. 305, l. 8 – p. 306, l. 25). Charlene followed behind and then drove Applicant home. (Tr. p. 307, ll. 4-21). According to Charlene, they arrived home late that night, and recalled that Applicant did not stay with her for long. (Tr. p. 308, l. 23 – p. 309, l. 4). Gerrick was seen back at his girlfriend’s house later that night by her son. (Tr. p. 231, ll. 12-13). He said Applicant was sitting outside on the steps between ten and midnight and “looked like he was facing – like he had a lot on his mind.” (Tr. p. 231, ll. 14-24; Tr. p. 233, ll. 1-3).

Several days later on August 3, Charlene took law enforcement to the place in the woods where Applicant recovered Donaldson’s car. (Tr. p. 310, ll. 2-9). The spot was located off of Sunshine Road, where there is another “little dirt road called One Way.” (Tr. p. 327, ll. 8-16).

³ Gerrick utilized other phonetic spellings, such as spelling “right” r-a-t (“rat”) and using “no” where “know” was the appropriate form in context. (Tr. p. 318, line 10 – Tr. p. 319, line 11).

Forensic Pathologist Dr. Janice Ross conducted an autopsy on Donaldson's body the day after its discovery. (Tr. p. 438, ll. 6-25). The body, "very much covered with dirt," had decomposed in a moderate-to-severe, or "fairly advanced" fashion due to it being buried for ten to twelve days in July. (Tr. p. 439, ll. 5-21). Dr. Ross discovered neither fractures nor bullets, and could not clearly identify any bruising or other soft-tissue injury due to the extent of the body's decomposition. (Tr. p. 440, ll. 2-20). Ross found no visible particles of dirt in the throat or nostrils. (Tr. p. 451, ll. 13-17). In addition to the ligatures or bindings, Dr. Ross did identify "some defects in the back of the left forearm. They were splits in the skin consistent with a laceration." (Tr. p. 441, ll. 1-7). Dr. Ross identified these forearm lacerations as defensive wounds, such as the scratches that may be obtained by shielding oneself from harm with his or her arms. (Tr. p. 447, l. 22 – p. 448, l. 22). In conclusion, Dr. Ross determined based upon "[t]he fact that he was buried underneath dirt, and without evidence of shooting or fractured skull, for instance from a beating, it is most likely that there was some kind of asphyxiation," strangulation, and a homicide. (Tr. p. 445, ll. 1-11). Such a homicide, given the circumstances and burial scenario, could result "either from being strangled with some sort of soft item" or "result from somebody being incapacitated and then buried." (Tr. p. 445, ll. 9-18).

On August 5, law enforcement executed search warrants for Applicant's Dodge pickup truck as well as for places he was known to reside. (Tr. p. 332, ll. 10-14; p. 343, l. 23 – p. 344, l. 1). Applicant was in custody at that time. (Tr. p. 392, l. 19 – p. 393, l. 5). Law enforcement found in the center console of Gerrick's truck a "brown package, like a brown piece of paper bag It was just taped up. Once you open it, it had some dust, weed, twigs, and a penny in it." (Tr. p. 344, ll. 2-10). It was taped up like a capsule. (Tr. p. 344, ll. 18-20). Law enforcement opened the capsule to find the handwritten words:

Further DNA testing inside the Honda Civic showed no contributions from either Applicant or Charlene Gerrick. (Tr. p. 507, l. 17 – p. 510, l. 3).

Sammie's Stories

Applicant made a series of voluntary statements to law enforcement, which were introduced in segments at trial. (Court's Exhibit 2). He made his first statement on July 22, the day after commencement of the missing persons investigation. (Tr. p. 266, l. 16). Blackville Police Chief John Holston first spoke with Applicant because Donaldson was last seen in his company. (Tr. p. 266, ll. 18-21). Applicant told Chief Holston that Donaldson bailed him out of jail on July 21, they went to Enterprise Bank together sometime afterwards so that Applicant could cash a check, and then they went to the BP station in Blackville. Applicant said they remained at the BP and Junior Food Mart convenience store for a while talking and were not together any time thereafter. (Tr. p. 266, l. 25 – p. 267, l. 9).

After law enforcement got the tip about Donaldson's Honda Civic from the China Express in Orangeburg, Chief Holston again spoke with Applicant. (Tr. p. 267, ll. 10-20). Chief Holston wanted to know whether Applicant knew about Donaldson's ATM card. (Tr. p. 268, ll. 1-2). Chief Holston included SLED Lieutenant Shaun Harley in this second interview, which began late into the night on July 22 and bled into early the next morning. (Tr. p. 314, ll. 13-24). Applicant went into the details of his initial arrest,⁴ his attempts to contact Donaldson for bail money, and Donaldson ultimately bailing him out. (Tr. p. 269, l. 1 – p. 270, l. 20). Applicant's statement included more minutia about his July 21 contact with Donaldson: Donaldson drove him home from jail, Applicant went inside and cleaned up, then Donaldson and Applicant went

⁴ The chain of events arose from Applicant's Bamberg County incarceration following a wholly separate child support issue. Once Applicant received that sentence, he attempted to escape the courthouse and was apprehended in the parking lot of the Piggly Wiggly. (Tr. p. 269, ll. 1-11).

bailout at Enterprise Bank. (Tr. p. 401, l. 2 – p. 402, l. 9; Tr. p. 403, ll. 10-17). Agent Burnett also noticed scratches “visible to the eye” on Applicant’s arms and chest “consistent with having been exposed to the outdoors.” (Tr. p. 402, ll. 10-17).

Also, one week after Donaldson’s disappearance, Applicant called Chief Holston’s cell phone. (Tr. p. 274, ll. 8-12). When Holston picked up the phone, Gerrick said “Tyrone’s not dead. . . . Black’s got Tyrone and they want \$25,000 in cash for him” (Tr. p. 274, ll. 13-19). Applicant requested “backup” to get Donaldson back, explained that Donaldson must be “over around Springfield” where “Black was from.” (Tr. p. 274, ll. 20-23). Chief Holston told Applicant that if he could send him more information and proof of life, they would “go from there.” (Tr. p. 275, ll. 1-7). Applicant sent no additional information. (Tr. p. 279, ll. 12-18).

After law enforcement recovered Donaldson’s body, they had Applicant transported from the Charleston County Detention Center⁵ to Barnwell County for a fifth interview. (Tr. p. 333, ll. 1-21). Applicant started providing answers to information presented to him by law enforcement at this time. Applicant said he went to the BP station to visit with Donaldson, then visited his father’s house in Bamberg County, and then walked from there to his wife’s house. (Tr. p. 350, ll. 16-24). This time, Applicant for the first time said that he went to Orangeburg, but did not mention the Honda Civic. (Tr. p. 350, l. 25 – p. 351, l. 3). Applicant was arrested for Donaldson’s murder. (Tr. p. 358, ll. 21-25).

A few hours after arrest, Applicant requested to speak with law enforcement again. (Tr. p. 359, ll. 8-18). Applicant imparted upon the officers that he wanted to tell the whole story truthfully, opening with “I’m going to put it all out there.” (Tr. p. 361, l. 24 – p. 362, l. 3). Applicant then told the events in a different light, stating that he and Donaldson planned a drug

⁵ Applicant’s Charleston County incarceration stemmed from a bond violation. (Tr. p. 351, ll. 11-14).

statement on Applicant's behalf because Applicant told him he "was in a bind." (Tr. p. 374, ll. 3-12; Tr. p. 583, ll. 1-25). Applicant promised Glover he would pay him \$1000 to copy a statement Applicant scripted and passed through the jail cells, and Applicant practiced writing the statement to Applicant's satisfaction, signing Glover's name at the bottom. (Tr. p. 584, l. 3 – p. 587, l. 5). The statement dealt with Donaldson, who "was supposed to be the main man," meeting two other men in the woods, when an argument ensued involving Applicant, and whereupon Applicant was told to stay in the car. (Tr. p. 587, ll. 6-24). "None of it never[sic] happened" in reality. (Tr. p. 588, l. 1).

Corroboration

Upon further investigation, zero evidence corroborated other individuals in Donaldson's disappearance. (Tr. p. 376, l. 2 – p. 377, l. 2). Donaldson had no community reputation for or connection with drugs. (Tr. p. 376, ll. 11-22). In regards to the drug deal narrative, Andre Hightower testified at trial that he hardly knew Applicant and had never heard about a Big Joe. (Tr. p. 558, l. 12 – p. 559, l. 16). He also did not know O'Shane Dixon. (Tr. p. 561, l. 25 – p. 562, l. 1). Hightower was in Greenville with his girlfriend and her son on July 21. (Tr. p. 558, l. 21 – p. 559, l. 9), and he stayed in Greenville for about two days. (Tr. p. 563, ll. 2-9). O'Shane Dixon, fishing buddies with Applicant, also testified. (Tr. p. 564, ll. 13-21). Dixon was at home watching his children all day on July 21, heard about Donaldson's disappearance that evening, and began receiving phone calls from Applicant that night onward asking about what Dixon may have heard about it. (Tr. p. 565, l. 18 – p. 566, l. 25). Applicant also called off their fishing trip on July 22 without reason. (Tr. p. 567, ll. 1-21).

Also, just as Applicant and Donaldson went to the Enterprise Bank ATM on the day of Donaldson's disappearance, Applicant returned to that same ATM alone at 8:00 that same night

U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that counsel's deficient performance 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 v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate 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." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). 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. at 697, 104 S.Ct. at 2069.

Gerrick offered testimony concerning the “root” which was discovered by law enforcement in the center console of Applicant’s truck. Gerrick testified that she made the “root” and placed it there on August 1, 2011. She speculated that Applicant did not know it was there. Gerrick also briefly stated she believed in the doctrine and that she wrote Judge Early’s name on the “root” because he previously presided over a bond hearing Applicant had.

Gerrick also testified that a person named Gerard Saxon told investigator Kenny Bamberg that Applicant did not kill the victim. This was the only testimony on this point offered at the evidentiary hearing. Saxon did not testify and was not otherwise identified to the court.

Daniel Williams, Esquire

Due to the length of counsel’s testimony and the number of allegations raised in the amended PCR application, trial counsel’s testimony is included in more detail herein where relevant to the State’s position on the individual PCR claims. As a general consideration concerning trial counsel’s qualifications and preparation for trial, however, Respondent offers the following summary.

Trial counsel Williams testified that he was appointed to Applicant’s case as a member of the private bar. He represented Applicant for over a year prior to trial. This case was a conflict case from the Second Circuit Public Defender’s Office due to the hiring of one former public defender by the Second Circuit Solicitor’s Office. He has been practicing law for thirty years.

He testified that he prepared for trial by speaking with Applicant about the charge and evidence, reviewing all of the documents provided by the State in discovery, and by hiring a series of individuals to assist in the investigation of a defense. He hired a medical examiner to review the autopsy in this case. He hired Roger Sharp as an investigator to speak with witnesses that Applicant himself had pointed counsel in the direction of. This included Applicant’s wife

himself did not write the note made part of the "root." He testified he did not learn that his wife made it until after he was convicted at trial.

Applicant also testified that he disagreed with trial counsel's decisions about specific jurors excused or elevated from the panel of alternates during the course of trial. He stated that he wanted to keep seated the juror who was dismissed for having a history of mental health issues and that his trial counsel instead made that determination for him. Applicant expressed that he did not see anything about this juror that made her disqualified to serve. Applicant also testified that he did not want to retain Juror 23, who was subject to an in-chambers discussion between counsel, but that counsel told the trial court it was okay if that juror stayed on the jury. Applicant expressed he felt that it was a violation of his Constitutional rights to be excluded from decisions regarding these jurors' service.

Dr. Janice Ross

Applicant called as his final PCR witness Dr. Ross, the forensic pathologist who conducted the victim's autopsy and testified at trial. She testified about the state of decomposition of the victim's body at the time she conducted the autopsy on August 5, 2011. Referencing her file, she stated the victim was affected by discoloration and skin slippage at the autopsy. His fingernails were falling off. She testified that external factors affect the rate of decomposition such as air type and temperature, body temperature at the time of death, and the location of the body in relation to outdoor elements. Ross stated there was no way to determine precisely how long the victim had passed prior to autopsy. She noted that such a determination would not be for her to conclude, but rather could be done by examining when the victim was last seen or contacted.

- a) *Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.*

Applicant alleges Trial Counsel is ineffective for failing to move for the recusal of Judge Early from the trial based on a conflict of interest with the "root" presented at trial. The "root" was found during the execution of a search warrant in Applicant's vehicle. Law enforcement found in the center console of Gerrick's truck a "brown package, like a brown piece of paper bag It was just taped up. Once you open it, it had some dust, weed, twigs, and a penny in it." (Tr. p. 344, ll. 2-10). It was taped up like a capsule. (Tr. p. 344, ll. 18-20). Law enforcement opened the capsule to find the handwritten words:

Set me Sammie Gerrick free from murder and revoke bond.
Jack Early set me free now.
Jack Early set me free now.
Jack Early set me free now.
Sammie Gerrick, Sr.
Sammie Gerrick, Sr.
Sammie Gerrick, Sr.
So shall it be.
So shall it be.
So shall it be.
Amen.
Amen.
Amen.

(Tr. p. 346, ll. 4-18).

On the other side there was a selection resembling Psalm 130:

Out of the depths[sic], have I cried unto thee, O Lord. Lord hear my viouce[sic]:
ut[sic] think ears, be attentive to the voice of my supplications, if that Lord
shouldest mark iniquities O Lord, who shall stand? But there is forgiveness with
thee that there inaqest[sic] be feared. I wait for the Lord, my sould doth wait, and
in his word do I hope my soul waiteth for the Lord more than they that watch for
the morning I saw, more than they that watch for the morning. Let Israel hope in
the Lord. For with the Lord there is mercy. And with him is plenteous[sic]
redemptions. And he shall redeem Israel from all his inguities[sic].

affect[]” that interest; or (4) the judge or his spouse or a person within the third degree of relationship to them (or the spouse of such a person) is either a party or the officer, director, or trustee of a party, is a lawyer in the case, known to have more than a de minimus interest that could be substantially affected by the litigation, or, to the judge's knowledge, is likely to be a material witness in the proceeding. Canon 3(E)(1)(a)-(d).

“Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.” *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citation omitted); *Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct.App.2008); see also *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) (“In cases involving a violation of Canon 3, this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice.”) (citations omitted). Appellate courts “accord great weight to the trial judge's assurance of his own impartiality.” *Id.* It is the movant's responsibility to provide some evidence of the existence of the judge's impartiality. *Lyvers v. Lyvers*, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct.App.1984) (citation omitted).

The use of Judge Early's name in the “root” introduced at trial does not create any kind of conflict or the appearance of a personal bias or prejudice on the judge's behalf. Judge Early made no mention of his personal opinion on the root during trial and carefully avoided all potentially prejudicial of the root as evidence of “witchcraft.” As Trial Counsel testified, Judge Early is the only resident judge in the Second Circuit of South Carolina, so it would not be unusual or notable that the note included his name rather than another judge's name. There is simply no basis in the record from which one could conclude Judge Early reasonably questioned

knowledge about her creation of the "root." Applicant testified that he does not believe in roots, and he did not write the note around the root in this case or put it in his car. He testified that he did not tell his attorney that he wrote the note.

Trial Counsel testified that he spoke with Charlene about the case, but he did not speak with her specifically about the root because Applicant told him that the root was his and he had written the note. Trial Counsel testified he made a pre-trial and a post-trial motion to exclude the "root" under SCRE 403 as overly prejudicial by arousing passion in the jury. The motion was denied, and the court's denial of the motion was affirmed on direct appeal. He explained that when his motion was denied and the root was admitted into evidence, his trial strategy was to try to minimize the "root" as much as possible because it was damaging to his client.

Respondent submits Charlene Gerrick and Applicant's testimony were not credible on this subject, and their testimony directly contradicted Trial Counsel's credible testimony that Applicant admitted to him that he had written the note in the root. Furthermore, in order to present this testimony from these witnesses, Applicant would have had to testify at trial, which would open him up to cross-examination on a variety of subjects at issue in the case as well as impeachment with his prior criminal record, and Charlene Gerrick would likely have had to waive her spousal privilege, which she invoked at trial, in order to testify about her communications with her husband and what information he knew. Based on how the trial proceeded, it seems extremely unlikely that either witness would have chosen to testify in this manner under those circumstances.

Additionally, Trial Counsel cannot be deficient for failing to present further evidence to explain the root because he articulated a valid trial strategy in attempting to minimize the root as much as possible so as not to further harm his client's case. *Strickland* requires that trial counsel

evidence of consciousness of guilt, and any evidence presented to “explain” it likely would not have affected the outcome of the trial.

Accordingly, Applicant cannot prove either prong of the *Strickland* test, and this allegation should be denied and dismissed.

c) *Failing to object to the trial judge's opening comments and final instruction on the law, instructing the jurors to find the "true facts" in the opening and closing instructions.*

Applicant alleges trial counsel failed to object to certain instructions to the jury regarding their role in determining the “true facts.” Specifically, Applicant points this opening instruction:

... at the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict.

(Trial Tr. p. 145, lines 7-11). Applicant additionally points to two final instructions to the jurors:

It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;

That is your sole responsibility, your sole duty to determine what the true facts are in this case; and

You're here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I've given it to you.

(Trial Tr. p. 748, line 14 – p. 749, line 1; Trial Tr. p. 756, line 23 – p. 757, line 1).

Applicant premises his ineffective assistance of counsel argument on *State v Alesky*, 343 S.C. 20, 538 S.E.2d 248 (2000), and the recent decision in *State v. Beaty*, Op. No. 27693, 2018 WL 1938544 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse Adv. Sh. No. 17 at 12), *reh'g denied* (May 25, 2018). At the evidentiary hearing, this claim was primarily addressed through testimony by trial counsel Williams. Williams testified that while he was not discretely aware of

The jury instructions cited by Applicant do not form the basis for a grant of post-conviction relief. The instructions delivered in this case does not mirror either *Aleksey's* "seek the truth" or "search for the truth" language, or *Beaty's* "just verdict." The language at issue is limited to the phrase "true facts." Respondent submits that 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. Further, that the failure to object to this limited phrase did not rendered counsel's performance deficient. As trial counsel's testimony touched upon, the addition of the word "true" as a modifier of the word "facts" does not carry same connotation as instructing the jury that the trial is a search for the truth. "True facts" merely indicates there may be incongruent testimony and they may have to weigh credibility of evidence in reaching their conclusion, which is indeed the jury's role.

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. *Strickland v. Washington*, 466 U.S. at 697, 104 S. Ct. at 2069. ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."). The cited preliminary instructions were issued by the trial court in introduction and explanation of courtroom procedure, not as a means of explaining the burden of proof by which they must decide the case. (Trial Tr. p. 145). In the closing charge, the cited instruction regard only the jury's role in the greater scheme of the trial (compared with the court's role as the judge of the law) and role to deliver a unanimous verdict. (Trial Tr. p. 747, line 25 – p. 749, line 1; Trial Tr. p. 756, line 6 – p. 757, line 8). The relevant case law makes it clear that the instructions did not prejudice the Applicant because they spoke only generally to the jury's role as the factfinder. 343 S.C. at 28-

Trial Counsel testified that Applicant was probably not present during these discussions if they were discussed in chambers. Applicant now asserts it was a constitutional violation for him to be absent during this critical stage of the trial. However, because there is no resulting prejudice from his absence, Applicant cannot succeed on this claim.

A public trial violation is a structural error, which “affect[s] the framework within which the trial proceeds,” but does not always lead to fundamental unfairness. *Weaver v. Massachusetts*, 582 U.S. __ (2017). In the context of a public-trial violation during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective-assistance-of-counsel claim, the defendant must demonstrate prejudice to secure a new trial. *Id.* Here, Applicant can show no prejudice, because the release of Juror #9 and the decision to keep Juror #23 as an alternate had no effect of the outcome of the trial. Trial Counsel explained that Juror #23 could help their case if they found the testimony from the witness she knew more credible. The release of Juror #9 was reasonable where the juror had potential mental health issues and where the juror was replaced by a fair and impartial alternate. Applicant can show no prejudice from his absence during the discussions about these witnesses, and Trial Counsel likely would have made the same strategic decisions regarding these jurors even if Applicant had been present. This allegation should be denied.

- e) *Failing to make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors' minds as to deny Mr. Gerrick due process*

Respondent submits that regardless of whether trial counsel objected to the photographs (as was initially done) or stipulated to their introduction (as was also done in part), that the photographs were admissible. As a result, no prejudice can flow from this claim and post-conviction relief is not warranted. “If it is easier to dispose of an ineffectiveness claim on the

certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). Trial counsel did not act unreasonably by expecting that the trial court would find some photographs of the body admissible. He testified that, in his experience, some photographs would be coming in regardless of the extent of his objection.

Applicant further cannot demonstrate that the photographs were either inadmissible so that, had trial counsel taken some alternate course of action, there exists any reasonable probability of a different result at trial. Photographs “are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case.” *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (no abuse of discretion in admission of pre-autopsy photographs of child victim mauled by dogs); *see also State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) (in prosecution for murder and lynching, gruesome autopsy photographs held more probative than prejudicial and relevant to issue of malice). When photographs, even gruesome⁶ ones taken prior to autopsy, corroborate witness testimony and illustrate the circumstance of the crime, they will be deemed admissible. *State v. Collins*, 409 S.C. at 536, 763 S.E.2d at 28. “If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.” *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996).

The photographs in this case indeed served to corroborate other circumstantial evidence. Applicant was seen putting two shovels in the back of his truck and driving towards the area where the body was found. The victim was seen following Applicant in that direction. (Trial Tr.

⁶ Respondent is not intimating or conceding that the photographs in Applicant’s case were gruesome. Respondent additionally notes Applicant did not incorporate the photographs into the PCR record.

but she testified about moving the victim's car from the woods to a Chinese restaurant in Orangeburg. She stated law enforcement would not have known about the car without the information she gave them during her interview.

S.C. Code § 19-11-30 provides that spousal privilege applies to criminal proceedings: "no husband or wife may be required to disclose any communication made by one to the other during their marriage." The privilege belongs to the witness and cannot be invoked by the other spouse. *State v. Motes*, 264 S.C. 317 (1975). Invocation of the privilege does not preclude testimony about what transpired; and it certainly does not stop law enforcement officer testimony regarding what transpired after speaking with the witness who invoked the privilege. *State v. Copeland*, 321 S.C. 318, 468 SE2d 620 (1996).

Trial Counsel moved pre-trial to exclude Charlene Gerrick's testimony about her communications with her husband. The trial court correctly ruled that the privilege was the witness's to invoke, and she would need to invoke it at the proper time. Trial Counsel ensured Charlene Gerrick was given the opportunity to invoke her right during the trial outside the presence of the jury. However, her privilege did not prevent the State from questioning her as a fact witness about events in which she partook that were directly relevant to the investigation into the victim's disappearance and the discovery of his body. *Id.* Trial Counsel correctly testified at the evidentiary hearing that he believed he had no basis on which to move to suppress any of this testimony as "fruit of the poisonous tree" because he did not have standing to raise that issue; only Charlene herself had standing, as it was her right that was allegedly violated. Because Trial Counsel could not have successfully moved to suppress on this ground, he cannot be deficient.

60, 64 (2011) (citing *Strickland v. Washington*, *supra*). Through this lens, “when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel.” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). Trial counsel testified that he perceived this testimony to be background about the victim. He testified he did not object to the limited nature of this testimony because he did not want the jury to think he was trying to hide something. Counsel said that had the evidence at issue implied more, he would have objected. His testimony on this point evidences an exercise of valid trial strategy which cannot now, in hindsight, be deemed deficient. *Id.*

But of greater moment, the evidence Respondent can identify as being construed by Applicant as “victim impact evidence” was on each account not offered as the type of evidence deemed inadmissible by statute. Consider the following testimonies from the trial transcript in relation to the State’s case at large. The first witness to testify, the victim’s girlfriend, mentioned the victim having children and that he was their main caretaker because his wife and mother-in-law had passed away. He testified he also cared for his sister-in-law. (Trial Tr. pp. 160-163). Maurice Williams, a friend of the victim and acquaintance of Applicant, testified that on the day of the victim’s disappearance, he had confided in Williams that he was interested in remarrying and moving to Aiken or Myrtle Beach. (Trial Tr. pp. 183-184). Williams also testified that Applicant took care of his children, that his wife had died, and that he had received a settlement as a result. (Trial Tr. pp. 176-77). Lana Joyner’s testimony established that she was friends with the victim and knew that he had received a monetary settlement from his wife’s death. She said she had known him her entire life and during that time had never known him to be involved with drugs. She testified that “he was nice, he was caring. He loved his kids, [and] he ain’t never bothered nobody.” (Trial Tr. pp. 493-94).

. the corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred."); *see also Oppen v. United States*, 348 U.S. 84, 92-93, 75 S.Ct. 158, 164 (1954) (exculpatory statements are not an exception to rule that an accused person's extrajudicial, post facto admissions of essential facts or elements of a crime must be corroborated). In a case where the victim disappeared without a trace and was found days later face-first in a shallow grave, these witnesses' testimonies established particulars about the victim's daily life which assisted the jury in assessing the weight of the swath of circumstantial evidence introduced in this case, specifically, the credibility of Applicant's versions of events. Because the evidence at issue was not offered as victim impact evidence but rather was offered as corroboration, the testimony was admissible as proof of the *corpus delicti*.

Given the admissibility of the underlying evidence, trial counsel did not render deficient performance or prejudice Applicant. When evidence admitted without objection is indeed admissible, "then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001).

i) Failing to object to impermissible character testimony that violated Rule 404, SCRE

Applicant alleges Trial Counsel was ineffective for failing to object to instances that he believes are evidence of prior bad acts which were not properly admitted under Rule 404, SCRE. He points to testimony that Applicant had "been in a little trouble before." (Tr. p. 205, line 12.) Applicant's statement was read at trial, including an admission that he picked up an escape

Regarding prejudice, the underlying question before this Court on this conglomerate of allegations is “whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998). “Solicitors are bound to rules of fairness in their closing arguments.” *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). “[I]ts content should stay with the record and reasonable inferences to it.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor’s closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

However, any excerpt of the State’s closing exists as “one moment in an extended trial.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). Accordingly, a court must conduct an “examination of the entire proceedings” in context. *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* (“We must review the [closing] argument in the context of the entire record.”); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990). Even “[i]mproper comments do not require reversal if they are determined not to be prejudicial to the defendant.” *State v. Navy*, 370 S.C. 398, 412, 635 S.E.2d 549, 556 (Ct. App. 2006), *aff’d in part, rev’d in part on other grounds*, 386 S.C. 294, 688 S.E.2d 838 (2010). “Arguments of counsel are not considered so inflammatory as to require a reversal where ‘counsel responds in kind to a previous argument of opposing counsel.’” *Id.* (quoting *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 258, 509 S.E.2d 269, 271 (1998)).

object where counsel believed the jury may interpret the objection as an attempt to hide something. Trial counsel further testified that he was acutely aware that the problem inherent in defending Applicant was the number of inconsistent statements he made to law enforcement. In his final statement to law enforcement, Applicant placed himself at the scene. Trial counsel could not corroborate his statements during his investigation into Applicant's defense. In order to retain his credibility with the jury, counsel testified, he had to concede that the Applicant indeed changed his story over time and not all statements could be explained. Trial counsel also credibly testified that in his analysis of the case, Applicant's inability to refrain from giving statements to law enforcement harmed his defense. Respondent submits that counsel exercised objectively reasonable trial strategy in refusing to object to the State's characterization of Applicant during closing argument such that the failure to object was not deficient performance. *Smith v. State, supra*; *Lounds v. State, supra*; *Whitehead v. State, supra*.

Respondent further submits the State's closing argument did not warrant objection and that the failure to object cannot be determined to have prejudiced Applicant in any event. Ineffective assistance claims based on failure to object can reasonably be tied to the admissibility of the underlying evidence. *Hough v. Anderson*, 272 F.3d 878 (7th Cir. 2001); *see Thompson v. State*, Op. No. 27785, 2018 WL 1404480 at *2 (Mar. 21, 2018) (Shearouse Adv. Sh. No. 12 at 14) (deficient performance found for failure to object to inadmissible hearsay evidence), *pet. for reh'g pending* (June 6, 2018); *see also, Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"). On a similar closing argument allegation, the South Carolina Court of Appeals has held that, while the State delivered an "aggressive" closing when it referenced the defendant as a liar on multiple occasions, the closing was not so inflammatory as to require reversal. *State v. Navy, supra* at 414, 635 S.E.2d at

road saw his truck, Applicant changed his initial story about never being present at the crime scene. (Trial Tr. pp. 369-71).

Applicant next divulged a drug deal which allegedly also involved Andre Hightower and O'Shane Dixon. (Trial Tr. pp. 509-604). Both Hightower and Dixon testified that they had no knowledge or involvement with a drug deal; they had an alibi for the day the victim disappeared. (Trial Tr. pp. 558-66). Dixon added that Applicant kept calling him after the victim disappeared to see if Dixon knew anything about the investigation. (Trial Tr. pp. 565-66). Applicant instead stated that he was instructed by Hightower to move the victim's car to Orangeburg in exchange for \$400. (Trial Tr. pp. 364-68). He was arrested at this point, and on the morning after his arrest asked to speak with law enforcement again, now claiming he looked on as the others involved in the drug deal beat the victim. (Trial Tr. pp. 599-604). The victim allegedly arranged the drug deal with "Big Joe" from Georgia, and Applicant stated that he went along on the deal because he was supposed to receive some of the funds. (Trial Tr. p. 363). However, the victim had no connection to drugs, nor did he test positive for any drugs during autopsy. (Trial Tr. pp. 376, 453).

Then, Early Glover testified at trial that months after the crime, Applicant promised him \$1000 in exchange for copying a statement that said he and Glover were present when the victim was beaten, but that neither of them had anything to do with it. Applicant wrote the statement and Glover copied and signed it. Applicant never mentioned Early Glover in any prior statement, but did send a letter to SLED stating that somebody could vouch for his innocence. (Trial Tr. pp. 372-74, 583-88).

In light of this evidence and the remainder of the circumstantial evidence presented, (*infra* at pp. 3-16), the State's closing argument tracked the evidence of (1) motive, (2)

circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed . . ."). Accordingly, Applicant's allegation fails to meet *Strickland's* error-and-prejudice standard and does not warrant relief.

- (1) *Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.*

In yet another claim related to closing arguments, Applicant alleges trial counsel was ineffective for asking for an opportunity to respond to the prosecutor's closing.⁸ As to this specific claim, trial counsel testified that he was aware that there is a rule regarding the order of closing arguments. The rule, counsel correctly testified, is that where the defense put in evidence, the State gets the final closing. *State v. Gellis*, 158 S.C. 471, 485-86, 155 S.E. 849, 855 (1930) ("if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments"). Counsel further testified he was aware that the presiding judge not only followed that rule, but followed a routine practice of having the State's initial closing argument be only "on the law" in such a circumstance, saving argument on the facts of the case for the end. *State v. Lee*, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971) (holding "a solicitor is no longer required to make an opening argument to the jury on issues of fact" even where requested by defense counsel); Rule 37, SCRCrimP ("where no provision is made by statute or these rules, the procedure shall be according to the practice as it has heretofore existed in the courts of the State"). Counsel also testified that when he made the

⁸ To the extent Applicant again further alleges that the State's closing argument misstated testimony presented at trial, Respondent points this court to its above analysis of the propriety of the State's closing.

in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial.

Id. (also holding the appellant in that case, who had introduced evidence and lost the right to the last argument, was not prejudiced by the State's closing).

In the context of a PCR action, our courts have "never required an attorney to be clairvoyant or anticipate changes in the law." *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). Even if the edict in *Beaty* could be construed as a change in the law, trial counsel in this case is not ineffective for failing to request the last argument before the jury. *Beaty* does not authorize the right to final closing in this case even if trial counsel had requested it. Trial counsel put in evidence and waived his right to last closing. Not even today's precedent allows Applicant the last closing argument after he introduces evidence at trial. *Id.* at *8 (citing *Gellis, supra*). Counsel further did not prejudice Applicant by failing to ask for another word before the jury. The closing argument last delivered by the State was permissible for the reasons delineated at an earlier point in this brief.

- o) Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in this case, which denied Mr. Garrick's right to a fair and impartial grand jury presentment.*

Applicant asserts Trial Counsel was ineffective for failing to move to quash the indictment in this case. This allegation is meritless. First, Applicant has failed to meet his burden of proving that there was a grand juror who testified as a witness at trial which would affect the grand jury proceedings. Regardless, Trial Counsel did move to quash the indictment in a pre-trial motion dated May 30, 2013. His motion was based on the assertion that the indictment was not issued by the Second Circuit grand jury during a regular term of court, and because of the conflict with the Second Circuit Solicitor's Office which resulted in their recusal from this case.

should examine “the totality of the circumstances” to determine if the defendant was cognizant of the crimes for which he was charged. *Id.*

Because Applicant failed to prove a flaw in the indictment, and because there is no resulting prejudice as Applicant was on notice of the charges against him, this allegation should be denied.

p) Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

Applicant asserts Trial Counsel was ineffective for failing to use a third-party guilt defense at trial. This allegation is meritless, as Trial Counsel articulated valid strategic reasoning for not presenting any evidence of third-party guilt.

Before his trial, Applicant convinced two separate people who were incarcerated with him, Early Glover and Dustin Williams, to write a note falsely confessing to the crime for which Applicant was charged. Dustin Williams’ note included information alleging that he killed the victim in Santee, and the body was moved to the gravesite. In order to attempt to corroborate this information, Trial Counsel did an extensive investigation on the possibility that the victim was killed elsewhere and moved. He testified that he consulted with a friend who was a forestry major to analyze the bright green leaves found around the victim’s body which did not match the surrounding leaves. Trial Counsel also hired an expert from Clemson to come out to the scene during the trial. He stated the result of this investigation showed that the leaves could be Laurel Oak leaves rather than Sweetgum leaves, so they could actually have come from the Laurel Oak trees at the gravesite.

Based on the results of this investigation, Trial Counsel strategically chose not to use this argument to assert third-party guilt. Furthermore, Applicant admitted in a statement to law

conviction violated the Constitution, laws, or treaties of the United States.”). “Federal habeas courts are without authority to correct a simple misapplication of state criminal law or procedure ‘but may intervene only to correct wrongs of [a federal] constitutional dimension.’” *Luchenburg v. Smith*, 79 F.3d 388, 391 (4th Cir. 1996) (quoting *Smith v. Phillips*, 455 U.S. 209, 221 (1982)).

Based on the face of this allegation, it appears that Applicant alleges that trial counsel prejudiced Applicant by failing to provide some federal constitutional basis for the objections which were preserved and pursued on appeal. Applicant has not at this time proffered the federal nature of the claims he perceives should have been pursued on appeal. Applicant also failed to proffer any testimony in furtherance of this allegation at the evidentiary hearing. Respondent therefore initially submits that Applicant has failed to present any factual support for this claim and has thus failed to meet his burden of proof.

In any event, no grant of post-conviction relief is warranted in regards to trial counsel’s pursuit and treatment of the issues pursued on direct appeal before the South Carolina Court of Appeals. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Strickland v. Washington*, 466 U.S. at 697, 104 S. Ct. at 2069. To demonstrate prejudice here, Applicant must prove that, if counsel had objected in a way that “federalized” the issues above, that “‘there is a reasonable probability the outcome of the [appellate] proceeding would have been different.’” *Stone v. State*, 419 S.C. 370, 390, 798 S.E.2d 561, 572 (2017) (quoting *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)). Applicant must meet the high burden of showing that the “ignored issues are clearly stronger than those presented[.]” *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 726, 766 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (prejudice standard for ineffective assistance of appellate

opinion in this case, but to Respondent's appellate brief previously incorporated as part of the record in this action. *Also available at* <https://ctrack.sccourts.org/public/caseSearch.do> (enter appellate case number 2014-000385) (deselect "exclude closed cases"). Applicant cannot in any circumstance demonstrate how the evidentiary rulings in this case caused some fundamental unfairness in the trial which would warrant relief. Not only were the trial court rulings upheld as a matter of state law, but the record evidences overwhelming evidence of guilt. (Br. of Respondent at pp. 17-47). Therefore, even had the South Carolina Court of Appeals determined the trial court erred in respect to one or more of the existing appellate claims, the error would not warrant reversal. *State v. Thompson, supra*, 352 S.C. 552, 562, 757 S.E.2d 77, 83 (Ct. App. 2003) (improperly admitted evidence and the denial of a mistrial only constitute reversible error when the admissions cause prejudice).

Moreover, even on later collateral review, the United States District Court may reach the direct appeal claims *as they exist* to determine whether the admission of the evidence itself so infected the entire trial that the resulting conviction violated due process. *E.g. Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir. 2008) (state-court evidentiary may be considered by federal court if "erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding") (quoting *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir. 2000)); *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993) (relief may be warranted if state court error had "substantial and injurious" effect or influence in determining the jury's verdict); *Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321 (2007) (holding "in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious' standard set forth in *Brecht*").

r) The cumulative effect of trial counsel's error requires a new trial

VI. CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to deny each of Applicant's allegations of ineffective assistance of counsel and dismiss with prejudice the application for post-conviction relief, as Applicant has failed to meet his burden of demonstrating *Strickland* error and prejudice as to any claim pursued in the amended application and not otherwise withdrawn.

Respectfully submitted,

ALAN WILSON
Attorney General

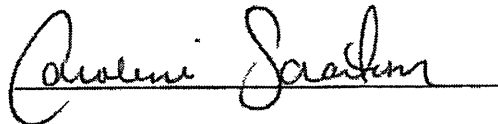
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June 15, 2018
Columbia, South Carolina

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June 20, 2018

The Honorable Rhonda Dale McElveen
Clerk of Court, Barnwell County
PO Box 723
Barnwell, SC 29812-0723

Re: *Sammie Lee Gerrick v. State of South Carolina*
Case Number 2016-CP-06-00111

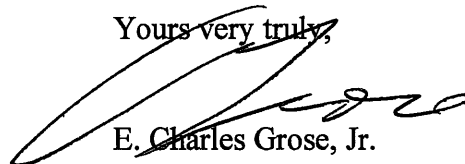
Dear Ms. McElveen:

Enclosed please find Mr. Gerrick's response to the State's post-hearing brief.

Thank you for your attention to this matter. Please let me know if you have any questions or if I can provide additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: The Honorable R. Scott Sprouse (via email and US Mail)
Mr. Sammie Gerrick (via US Mail)
Julie A. Coleman, Esquire (via email and US Mail)

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL	)	
	)	Case No. 2016-CP-06-00111
Sammie Lee Gerrick,	)	
	)	Response to State's Post-Hearing Brief
Applicant,	)	
	)	
vs.	)	
	)	
	)	
State of South Carolina,	)	
	)	
Respondent	)	
_____	)	

Sammie Gerrick responds to the State's post-hearing brief ("State's Brief").¹

I. FACTUAL BACKGROUND.

A. Trial.

The State concedes it relied on "a large amount of circumstantial evidence" during Mr. Gerrick's jury trial. State's Brief at 3.

The State acknowledges it used the testimony of Dr. Janice Ross to lead the jurors to believe Tyrone Donaldson died as a result of being strangled with some sort of item other result of being incapacitated and then buried. State's Brief at 9. As will be discussed in more detail below, Dr. Ross's testimony at the evidentiary hearing revealed she could not offer an opinion, to a reasonable degree of medical certainty, about the time of death, location of death, or cause of death.

¹ At the conclusion of the evidentiary hearing, this Court requested both parties submit post-hearing briefs within thirty days and responsive briefs within five days after services of the post-hearing briefs. This Court extended the deadline for submitting post-hearing briefs until Friday, June 15, 2018.

The State's brief recounts Mr. Gerrick's statements at great length. State's Brief at 11-15. Significantly, Mr. Gerrick always maintained his innocence. The State does not have overwhelming evidence pointing to Mr. Gerrick's guilt.

B. PCR Hearing.

The State suggests Charlene Gerrick "agreed that her trial testimony did not pertain to communications with her husband that would have been covered by the privilege she invoked." State's Brief at 18. Although technically true, this statement overlooks Ms. Gerrick's testimony that law enforcement never would have discovered her trial testimony but for threats and violations of the spousal privilege.

The State acknowledges trial counsel did not interview Ms. Gerrick about the "root." State's Brief at 19-20.

The State minimizes Dr. Ross's inability to testify to a reasonable degree of medical certainty about the time, location, and cause of death of Tyrone Donaldson. State's Brief at 21-22.

II. STANDARD OF REVIEW.

The standard of review section of the State's brief, State's Brief at 16-17, omits a discussion of the burden it must carry to excuse trial counsel's deficient performance as a strategic decision. "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768

(2014). As discussed in more detail below, many of trial counsel's so-called strategic decisions resulted from his ignorance of the law or failure to investigate.

Although discussing the requirement that trial counsel's deficient performance must also prejudice the accused, the State omits a discussion of our Supreme Court's recent decision in *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). When responding to most of Mr. Gerrick's post-conviction relief ("PCR") claims, the State does not argue the strength of the State's case as a reason why Mr. Gerrick did not establish prejudice, which suggests the State recognizes this argument does not have merit in this case. However, in two instances, the State does make that argument. As will be discussed in those sections, *Smalls* is dispositive.

Our appellate courts find prejudice when credibility is an issue for the jurors to determine. See e.g. *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was "no physical evidence of sexual abuse"); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when "credibility was the most critical determination of this case"); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) ("These credibility questions and inconsistencies in the witnesses' testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry's guilt is overwhelming or that Berry's guilt is the only rational conclusion that could be reached from the evidence presented.").

III. ARGUMENT.

A. Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.

The State contends Judge Early's "curative instruction" cured any error resulting from his presiding over Mr. Gerrick's jury trial despite the plea for his intervention in the "root." State's

Brief at 26. As a threshold matter, the cited instruction was not a “curative instruction.” It did not address the evidence of the “root” or instruct the jurors not to form any inference about the trial judge’s opinion from the evidence. More importantly, not every error can be cured by a curative instruction. The prosecution emphasized the root in its closing argument, and the State continues to emphasize it in this PCR.

The State argues “there is no resulting prejudice” from this error, but the State does not offer any analysis to support that assertion. This Court should deem the State’s argument about lack of prejudice abandoned.

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

B. Failing to investigate and present available evidence explaining the “root.”

The State again acknowledges that trial counsel did not interview Ms. Gerrick about the “root.” State’s Brief at 26-27. The State then argues that trial counsel was more credible when he testified Mr. Gerrick “told him that the root was his and he had written the note.” State’s Brief at 27. This testimony must be rejected because the trial record unequivocally established that SLED handwriting examiners determined Mr. Gerrick did not write the note that is part of the “root.” On cross-examination, Investigator Harley acknowledged SLED handwriting experts determined Mr. Gerrick did not write the note, and law enforcement did not know how the note got into Mr. Gerrick’s vehicle. Tr. 387-89.

The admitted failure to investigate establishes deficient performance. Trial counsel did not offer a valid reason for not interviewing Ms. Gerrick about the “root.” *See Freiburger and Ingle,*

supra. Trial counsel could not have made a reasonable strategic decision when his strategy was controlled by ignorance of the facts. *See Wiek, supra*.

Finally, the State argues, “[T]here can be no prejudice given the weight of the strong evidence against” Mr. Gerrick. State’s Brief at 28. As discussed above, the State’s brief does not acknowledge our Supreme Court’s recent opinion in *Smalls* discussing the role of the strength of the State’s evidence in a *Strickland* prejudice analysis. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Smalls*. 422 S.C. at 191, 810 S.E.2d at 845. Such is not the case here, where the Mr. Gerrick always maintained his innocence and the State relied on “a large amount of circumstantial evidence.”

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

- C. Failing to object to the trial judge’s opening comments and final instruction on the law, instructing the jurors to find the “true facts,” including but not limited to the opening instruction, “[A]t the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict;” and the final instructions to the jurors, “It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;” “That is your sole responsibility, your sole duty to determine what the true facts are in this case:” and “You’re here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I’ve given it to you.”**

The State acknowledges trial counsel was not aware of the relevant law, State's Brief at 29, so he could not have made a strategic decision not to object, *see Weik, supra*. *See also Freiburger and Ingle, supra*.

Additionally, the State tries to limit Mr. Gerrick's claim to *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) and *State v. Beaty*, No. 2015-000718, 2018 WL 1938544 (S.C. Apr. 25, 2018). The State overlooks the numerous cases cited in Section IV(C) of Mr. Gerrick's post-hearing brief, including but not limited to *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), which placed trial counsel on notice to object to these instructions.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

D. Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.

The State concedes Mr. Gerrick was not present when the trial judge excluded Jurors 9 and 23. The State further concedes the error is structural. State's Brief at 33.

Regarding Juror Number 9, the State points to her alleged mental health infirmities, but it offers no evidence she was not qualified to serve as a juror. The trial transcript, likewise, is void of any evidence of her lack of qualifications to serve as a juror.

Regarding Juror 23, the State attempts to recast the claims as trial counsel's "decision to keep Juror #23 as an alternate." State's Brief at 33. The trial record actually demonstrates that, after the trial judge removed a sleeping juror from the case, Juror Number 23 was elevated to a regular juror. Tr. 281-82. The State then argues, "Trial Counsel explained that Juror #23 could

help their case if they found the testimony from the witness she knew more credible.” State’s Brief at 33. Undersigned counsel does not recall this testimony. However, if trial counsel testified in this manner, then it was not only an unreasonable but an absurd strategy. *See also Freiburger and Ingle, supra*. Taylor White is the witness at issue. She was a witness for the State, not Mr. Gerrick. The State used Ms. White to establish circumstantial evidence that Mr. Gerrick washed clothes and took a shower to conceal the crime. A witness believing this testimony is more likely to convict Mr. Gerrick.² The decision to retain Juror Number 23, therefore, constitutes deficient performance.

The State concedes this error to be structural error. This Court should order a new trial.

E. Failing to object to or make an offer to stipulate to graphic photographs of the victim’s body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors’ minds as to deny Mr. Gerrick due process.

The State’s argument rests on its assertion the photographs were admissible. Once this argument is rejected, the need to grant a new trial is apparent.

F. Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.

The State argues, “Trial counsel correctly testified at the evidentiary hearing that he believed he had no basis on which to move to suppress any of [Ms. Gerrick’s] testimony as ‘fruit of the poisonous tree’ because he did not have standing to raise that issues; only Charlene herself had standing, as it was her right that was allegedly violated.” State’s Brief at 37. This assertion overlooks the fact that Charlene Gerrick did, in fact, assert her privilege. Once she asserted her privilege, trial counsel had not only the standing, but also the obligation, to argue the effect of Ms.

² As seen, the prosecutor misrepresented Ms. White’s testimony during his closing argument.

Gerrick assertion on the trial. Trial counsel's failure to advocate for his client after Ms. Gerrick asserted her privilege establishes deficient performance. Ms. Gerrick's testimony was a critical to the prosecution's case, and without it there is a reasonable probability of a different result.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

G. Failing to object to improper victim impact evidence that was not relevant and which were intended to arouse sympathy, passion, and prejudice in the jurors' minds.

The State acknowledges "victim impact evidence should be reserved for the court's consideration at sentencing." State's Brief at 38. The State makes three arguments why this court should overlook this error.

First, the State argues the evidence "was not offered as victim impact evidence," State's Brief at 38-39, but the State does not make any argument about how proving Tyrone Donaldson was a good father to his children establishes any element of the crime alleged.

Second, the State tries to pass off trial counsel's failure to object as trial strategy. State's Brief at 39. However, the State acknowledges—and trial counsel testified—that trial counsel did not recognize this testimony as victim impact evidence.

Third, the State acts like Mr. Gerrick opened the door to this evidence. Mr. Gerrick, however, did not introduce his statements. The State did. The State does not get to open its own door to impermissible evidence.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and*

Berry, supra, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

H. Failing to object to testimony that violated the confrontation clauses of the state and federal constitutions.

Mr. Gerrick withdrew this claim at the evidentiary hearing.

I. Failing to object to impermissible character testimony that violated Rule 404, SCRE.

The State argues:

Any testimony regarding [Mr. Gerrick] being incarcerated before the crime in question is admissible as *res gestae* evidence. The State's theory of the case was that [Mr. Gerrick] killed the victim after the victim loaned him money to bail [Mr. Gerrick] out of jail. The testimony presented about [Mr. Gerrick's] imprisonment at that time set up the facts and was relevant to show [Mr. Gerrick's] motive in the crime. Because this evidence was admissible, any further evidence of prior bad acts or incarceration from other charges likely had no prejudicial effect on the outcome of the trial, as the jury was already away [sic] that [Mr. Gerrick] had served time in jail for other crimes.

State's Brief at 42. The State, accordingly, concedes this evidence introduced at trial exceeded what was necessary to present *res gestae* evidence. As seen in Mr. Gerrick's post-hearing brief, some of this impermissible evidence was presented by Mr. Gerrick's own trial counsel, meaning it cannot be explained as necessary for the State's presentation of its case. The State's argument about "further evidence of prior bad acts or incarceration from other charges likely had no prejudicial effect on the outcome of the trial" additionally overlooks our Court of Appeals recent decision in *State v. Lawson*, No. 2015-002467, 2018 WL 2708761 (S.C. Ct. App. June 6, 2018) explaining how evidence implying a prior criminal record is impermissible and requires reversal.

The State then argues, "[C]ompared to the strength of the evidence of [Mr. Gerrick's] guilt, any potential error in the admission of this evidence could not have changed the outcome of the trial." As discussed above, the State's brief does not acknowledge our Supreme Court's recent opinion in *Smalls* discussing the role of the strength of the State's evidence in a *Strickland*

prejudice analysis. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Smalls*. 422 S.C. at 191, 810 S.E.2d at 845. Such is not the case here, where the Mr. Gerrick always maintained his innocence and the State relied on “a large amount of circumstantial evidence.”

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

(K), (M), & (N)

Failing to object to the prosecutor’s statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

Failing to object to statements by the prosecutor during closing argument which were intended to arouse sympathy, passion, and prejudice in the jurors’ minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof.

Failing to object to inflammatory statements by the prosecutor which were intended to arouse sympathy, passion, and prejudice in the jurors’ minds and were so defamatory to Mr. Gerrick that it denied him due process.

The State chose to address these three arguments in one section. State’s Brief at 42-49. This Court should not allow the combination of these arguments to lessen the significance of each error. The State combining these arguments, however, shows why a cumulative error analysis (discussed *infra*) is appropriate in this case.

The State tries to justify trial counsel's failure to object as a reasonable strategic decision. *Id.* at 44. The State once again overlooks the fact that trial counsel was unaware of important legal principles. For example, PCR counsel expressly asked trial counsel if he was aware of a line of cases prohibiting prosecutors from calling an accused a "liar." He was not. *But see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002) and *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449 (1937). Trial counsel's ignorance of the law cannot be a valid strategic decision. *See Weik, supra*.

The State suggests the prosecutor was merely responding to Mr. Gerrick's closing argument. Trial counsel limited his argument to the evidence and did not argue that Mr. Gerrick did not make inconsistent statements. The prosecutor's argument, however, went far beyond a passing reference to an inconsistency. It struck at the core of Mr. Gerrick's character. The repeated attacks on Mr. Gerrick's character compounded the prejudice.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

O. Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

The argues, "In the context of a PCR action, our courts have 'never required an attorney to be clairvoyant or anticipate changes in the law.'" *Beaty*, however, was not a change in the law, and Mr. Gerrick does not argue that it was. Our Supreme Court made it clear in *Beaty* that trial judges—and therefore trial counsel—always had an obligation to ensure the prosecution's closing

argument did not violate due process. Trial counsel testified that this particular trial judge had a rule that did not allow the defense to respond to the State's best argument. Such a rule violates due process.

P. Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in the case, which denied Mr. Gerrick's right to a fair and impartial grand jury presentment.

The State argues Mr. Gerrick "has failed to meet his burden of proving that there was a grand juror who testified as a witness at trial which would affect the grand jury proceedings. State's Brief at 51. As a threshold matter, Mr. Gerrick only has to prove that a potential state's witness sat on the grand jury. This fact is proven by the prosecutor's statement to the Court: "As we were here for trial prep we – Lieutenant Harley realized that one of the individuals on the grand jury had – was a witness in the case. Not -- just kind of an auxiliary fact witness." Tr. 136-37. If the State has information that the prosecution misrepresented this fact to the trial judge, then it should provide it. Otherwise, this fact stands. *See* Rule 801(d)(2), SCRE.

The State makes the same error as trial counsel—that an indictment is merely a notice document. *See State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). An indictment is not merely a notice document as the State is required to present testimony to the grand jury establishing probable cause. The right of an accused to have a grand jury review the charges against him is a Constitutional right enumerated in the Fifth Amendment to the United States Constitution as well as in Article I, §11 of the South Carolina Constitution. "It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment." *State v. Rector*, 158 S.C. 212, 236, 155 S.E. 385, 394 (1930) (quoting *Crowley v. United States*, 194 U.S. 461, 473 (1904)).

Finally, the State's reliance of cases holding the indictment to be sufficient because it tracked the language of the statute, once again, overlooks to role of the presentment of the indictment in our criminal justice system.

P. Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

Mr. Gerrick stands on his post-trial brief.

Q. Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal.

Trial counsel should have argued these errors denied Mr. Gerrick his fundamental due process right to a fair trial, applicable to the states through the Fourteenth Amendment. U.S. Const. Am. V and XIV.

R. The cumulative effect of trial counsel's errors requires a new trial.

The State argues the application of the cumulative error doctrine is unsettled in South Carolina. State's Brief at 58. As discussed in Mr. Gerrick's post-hearing brief, the cumulative error doctrine is a standard recognized by the Supreme Court of the United States in ineffective assistance of counsel claims and, therefore, applicable to Mr. Gerrick's application for post-conviction relief.

IV. CONCLUSION.

For the reasons set forth in his post-hearing brief and this reply, the Court should grant Sammie Garrick's application for post-conviction relief, vacate his conviction and sentence, and remand this matter to the Court of General Sessions for a new trial.

(signature on next page)

Respectfully Submitted,

By 

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June 20, 2018
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Sammie Lee Gerrick,

Applicant,

vs.

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2016-CP-06-00111

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Julie A. Coleman, Esquire
S.C. Attorney General's Office
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By



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June 20, 2018
Greenwood, South Carolina

**IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT**

Sammie Lee Gerrick, #165940,

Applicant,

v.

State of South Carolina,

Respondent.

a) *Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.*

A. 1202

proceed. (Applicant's Br. at 20). But our courts "presume juries follow their instructions." *State v. Young*, 420 S.C. 608, 623, 803 S.E.2d 888, 898 (Ct. App. 2017); *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702 (1987) (noting "the almost invariable assumption of the law that jurors follow their instructions"). See also *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) ("A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission."); *State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998) (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission). As discussed in Respondent's post-hearing brief, the trial court's jury instructions directed the jury to disregard any act or appearance on his own part that may intimate to a juror that he has any opinion about the facts. (Tr. pp. 749-50). Thus, as argued in Respondent's initial post-hearing brief, there can be no error or prejudice from the failure to move for judicial recusal. Respondent further submits that this claim is attenuated in its base assertion that reasonable jurors would interpret the presence of the only resident circuit court judge's name on the "root" constituted any specific comment by the court on the facts of the case.

b) Failing to investigate and present available evidence explaining the "root."

Applicant argues that trial counsel was deficient for failing to interview Applicant's wife about the "root." (Applicant's Br. at 21-22). Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim. Additionally, Respondent utilizes this reply to clarify one factual point. Trial counsel testified at PCR that Applicant told him, pre-trial, that he had obtained the root. It was not contested at trial that Applicant himself did not write the words found on the "root" – Applicant's trial counsel in fact

pointed this out during his cross-examination of one of the State's investigators. (Tr. p. 388). But this ineffective assistance of counsel claim does not turn upon who is responsible for writing the words on the "root." Trial counsel's testimony at PCR explained that his concern during his investigation was the inevitable impression upon the jury that the "root" constituted evidence of consciousness of guilt. Accordingly, counsel moved to exclude it but was ultimately unsuccessful. (Tr. pp. 36-47, *see id.* pp. 132-33).

"Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'" *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986)); *see also Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. 2052. Where a significant investigation has been conducted, and a defendant raises a collateral challenge to the strong presumption that the attorney's investigation was reasonable, a court must look to the specific facts of the case, as well as the decisions of the defendant that may have hindered trial counsel's preparation. *Campbell v. Coyle*, 260 F.3d 531, 553 (6th Cir. 2001). "When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" *Ard v. Catoe*, *supra* (quoting *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. 2052). To establish deficient performance, it is not enough for the petitioner to show that his attorney's strategy was merely wrong, or his actions unsuccessful; he must demonstrate that the actions his attorney took were "completely unreasonable." *See Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997).

The record in this case is clear that trial counsel investigated the issue of the "root" and was informed by his client that he knew about it. Given that information, trial counsel assessed

that the root could not assist his client in any way. This determination was reasonable and sufficient in light of the evidence at issue, concluding in an unsuccessful motion to exclude the “root” and the related novelty item—and the post-trial motions that followed on the same bases. Moving to exclude the “root” was an exercise in reasonable trial strategy, as was counsel’s strategy to thereafter minimize any mention of the “root” or its implications. Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995).

- c) *Failing to object to the trial judge's opening comments and final instruction on the law, instructing the jurors to find the "true facts" in the opening and closing instructions.*

Respondent herein reincorporates its prior argument on this claim and asks this Court to deny relief. The instructions at issue are distinguishable from those cautioned against in the relevant case law for the reasons stated in Respondent’s Post-Hearing brief. On this record, there exists no fact or precedent to support a finding of ineffective assistance for the failure to object to the instructions rendered. *Weik v. State* is further inapposite. 409 S.C. 214, 234-35, 761 S.E.2d 757, 767-68 (2014) (finding “there simply was no strategy” regarding presentation of evidence).

- d) *Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.*

Applicant’s argument on this issue is limited to a freestanding allegation of a due process violation. (Applicant’s Br. pp. 26-27). That claim is barred by the *Simmons* doctrine. When a PCR claim was proper on direct appeal, it is not cognizable in the present action. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”). An action for PCR “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.” S.C. Code Ann. § 17-27-20(B). When the *Simmons*

doctrine applies, summary dismissal is appropriate. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005).

In the alternative, Respondent furthers that Applicant's right to be present¹ was not violated in this case because of the record made by the trial court regarding the initial in-chambers discussions. "A defendant has the right to be present at any stage of the criminal proceeding that is *critical to its outcome* if his or her presence would contribute to the fairness of the procedure." *Starnes v. State*, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991) (emphasis in original). This may include "when a trial judge conducts voir dire during the course of the trial to determine the jury's continued impartiality." *State v. Rivers*, 294 S.C. 123, 125, 363 S.E.2d 105, 106 (1987). A violation of the right to be present may occur when a court's mid-trial voir dire of a juror occurs in the jury room *without the presence of counsel*. *Id.* (emphasis added). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 105-08, 54 S.Ct. 330, 332-33 (1934).

Here, the alleged due process violation does not form a basis for relief. *State v. Caldwell*, 300 S.C. 494, 500, 388 S.E.2d 816, 819 (1990), *overruled on other grounds by State v. Evans*, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006) ("the exclusion of a defendant from a trial proceeding should be considered in light of the whole record"). The in-chambers discussions included counsel for both parties and were revisited on the record. (Tr. pp. 139-41, 481-82). Thus, the in-chambers talks were not in and of themselves critical to the outcome of the

¹ The alleged violation as defined in Applicant's Post-Hearing Brief does not relate to whether Applicant received a public trial, but whether he was present at all critical stages. In any event, there is no evidence that Applicant suffered a violation of his right to public trial. *Weaver v. Massachusetts*, *infra*, is instructional on the point of the application of the *Strickland* standard, but does not otherwise govern the type of violation alleged to have occurred in this case. Thus, there is no basis for a finding of structural error, nor does the State posit that one occurred.

proceedings. The trial court presented the context of those discussions on the record, lending counsel an opportunity to agree or disagree with the characterization, and further lending an opportunity for counsel to alter his course after consulting with his client. *See State v. Faries*, 125 S.C. 281, 118 S.E. 620, 621 (1923) (“At the hearing of these motions the defendant was represented, and was fully heard by his able counsel. His personal presence could have subserved no useful purpose. It cannot be assumed, certainly in the absence of an affirmative showing, that he would have elected, if present, to be heard by himself as well as by counsel.”).

As to the ineffective assistance of counsel allegation framed in the application, Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim. *Weaver v. Massachusetts*, __ U.S. __, __, 137 S.Ct. 1899, 1910 (2017) (applying *Strickland* error-and-prejudice standard to claim of ineffective assistance of counsel for an alleged violation of the defendant’s right to public trial). Counsel established through his PCR testimony a strategic decision as to each Juror #23 and #9 which is entitled to deference in this action. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (“There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.”).

Juror #23 was elevated from an alternate to the regular jury panel “and as she was going home [one] night [after trial] she informed one of the deputies that on her Facebook account she was a [“]friend[”] to one of the witnesses who had testified yesterday. . . . And she said that she really didn’t even know that particular witness, they just happened to be on Facebook.” (Tr. p. 481). There had been no correspondence between them on that social media platform. (Tr. p. 482). The initial in-chambers discussion concerning this information about Juror #23 was

revisited on the record, at which time Applicant was present and trial counsel had an opportunity to alter his position regarding whether the juror should continue or be excused. (Tr. p. 482). At PCR, trial counsel testified that he took the position that he wished to keep Juror #23 on the jury because it thought that the fact that the juror had come forward about being Facebook friends with the witness indicated that Juror #23 was a good, honest juror. Thus, her continuing on the jury did not concern counsel. Given that the juror candidly expressed that she could be impartial, did not have any communication with the witness and that any interaction was limited to a simple “connection” via a social media platform, counsel made an objectively reasonable decision to retain that juror.²

In a similar vein, Juror #9 was released on after an on-the-record discussion regarding the concerns leading to the juror’s excusal. The trial record reflects that this juror appeared before trial counsel’s wife, who was a probate judge, for “mental health issues,” and some of the issues presented to the court left it with “great concern as to her ability to serve as a juror.” (Trial Tr. p. 14). Ultimately, the trial court decided that this juror should not continue.³ (Tr. pp. 139-41). At PCR, trial counsel testified that he did not wish to have a juror whose competency may be questioned due to a known history of mental health issues, and that he in fact preferred the alternate juror who was elevated in place of Juror #9. Again, counsel calculated a reasonable reaction to the court’s concerns with the jurors and in fact ended up with a juror he assessed was more favorable to his client.

² Applicant’s assertions regarding Taylor White’s testimony are not dispositive on this issue as they are not supported by the record. As addressed at the relevant point in this Reply, the State did not mischaracterize White’s testimony at closing—Applicant himself offered a statement, introduced at trial, that he took a shower on the afternoon in question. White’s testimony provided corroboration to that statement.

³ The trial court decided on another occasion to remove a juror who was sleeping. Counsel for neither side objected. (Trial Tr. p. 281). The excusal of this juror mid-service led to the elevation of Juror #23 (Trial Tr. p. 282).

Thus, as to both jurors, the record developed at PCR evidences another series of decisions made by able, credible counsel with thirty years of practice experience, and no finding of ineffective assistance is warranted. *Strickland, supra*.

Further, Applicant was not prejudiced by the excusal of Juror #9 and retention of Juror #23. Applicant must demonstrate he was actually prejudiced by the inclusion and exclusion of the cited jurors. *Weaver v. Massachusetts, supra*. The relevant question on whether juror's service prejudiced a defendant is whether there is any indication in the record that the challenged jurors, or the jurors who did serve, did so without impartiality. *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 326 (2002); *see State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247–48 (2002) (finding that a juror's "scant acquaintance" with the defendant's family would not have prejudiced the State had the juror remained on the jury); *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict."); *Williams*, 321 S.C. 455, 460, 469 S.E.2d 49, 52 (1996) ("[W]e discern no prejudice to [the defendant] from the seating of the alternate juror here."); *State v. McDaniel*, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980) ("The alternate juror had been approved by both sides at the inception of the trial, and there is no showing that appellant withdrew that approval at the time of substitution. Moreover, appellant has failed to establish in what manner this procedure prejudiced him."). Otherwise, there is no right to be tried by a jury composed of particular individuals. *State v. McDaniel*, 275 S.C. 222, 268 S.E.2d 585 (1980).

Given the foregoing, Applicant's claim is speculative at best. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); *see also*

Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden). Applicant makes no showing of prejudice and the record likewise supports none. Thus, there exists no basis in the record for a grant of post-conviction relief. *Strickland, supra*.

- e) *Failing to make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors' minds as to deny Mr. Gerrick due process*

Applicant alleges that trial counsel failed to object or to stipulate to photographs of the body. (Applicant's Br. at 27-28). Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim. The trial record evidences that counsel in fact acted in the manner alleged deficient, filing a motion to exclude photographs of the autopsy and the victim at the crime scene, and also stipulating to the introduction of others (some in lieu of publishing the physical ligatures removed from the victim's body). (Trial Tr. pp. 33-36). The application of the *Strickland* standard to this claim provides no basis for relief.

- f) *Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.*

The claim in this instance pertains to the failure to move to exclude the testimony of Charlene Gerrick from trial. Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim. Additionally, Applicant's reliance on *State v. Corns*, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), is distinguishable from the case at bar. *Corns* pertains to threats made to the defendant standing trial, not an allegation pertaining to a spouse. 310 S.C. at 552, 426 S.E.2d at 327 (citing "other cases in which statements were found

to be involuntary involved the threat of specific tangible consequences *to the defendant*"); *State v. Osborne*, 301 S.C. 363, 366-67, 392 S.E.2d 178, 179-80 (1990); *State v. Hook*, 348 S.c. 401, 413-14, 559 S.E.2d 856, 862 (Ct. App. 2001).

Respondent maintains that the spousal privilege applied to Mrs. Gerrick such that only Mrs. Gerrick could invoke it. S.C. Code Ann. § 19-11-30; *State v. Motes*, 264 S.C. 317, 324, 215 S.E.2d 190, 192-93 (1975) ("the right to exercise the privilege against disclosing marital communications is solely that of the witness spouse from whom the privileged information is being sought"). "[A] defendant challenging the admissibility of evidence obtained in violation of constitutional rights must often show he is challenging the evidence based on a personal violation of *his* rights by the manner in which the evidence was obtained[.]" *State v. Miller*, 359 S.C. 589, 598-99, 598 S.E.2d 297, 302 (Ct. App. 2004), *aff'd*, 367 S.C. 329, 626 S.E.2d 328 (2006) (emphasis added) ("Thus, where one does not have an expectation of privacy, he may not challenge the admission of evidence based on the violation of another's right to privacy.").

Trial counsel testified at PCR that he was aware of the statements Mrs. Gerrick had provided to law enforcement as part of the investigation. He testified he advised Mrs. Gerrick of her right to seek representation by independent counsel. She did not do so until the PCR hearing. And, to the extent Mrs. Gerrick testified at trial, the court and the parties respected her invocation the spousal privilege and her testimony did not divert from the boundaries prescribed. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). No communications between Charlene and Sammie Gerrick were made to be placed on the record. She served solely as a fact witness. (Tr. pp. 302-10; *see id.* pp. 294-98). Any statement(s) Mrs. Gerrick submitted to law enforcement were not made part of the trial record.

Finally, Respondent submits that Mrs. Gerrick's testimony concerning the alleged threat is not credible. Trial counsel credibly testified at PCR that Mrs. Gerrick made a video-recorded statement that he reviewed and discerned to contain no evidence of threat or intimidation. Mrs. Gerrick did not act upon the alleged receipt of any threat until the PCR hearing, despite meeting with multiple law enforcement agencies over the course of investigation and being advised by trial counsel that she could retain counsel in regards to any threat received.

- g) *Failing to object to improper victim impact evidence that was not relevant and which were intended not arouse sympathy, passion, and prejudice in the jurors' minds.*

Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim. Because the evidence at issue was not victim impact evidence, but rather evidence corroborative of other material facts before the jury's consideration, it was reasonable for trial counsel to interpret that evidence as background and elect not to object for the reasons testified to at PCR and recounted in Respondent's post-hearing brief.

- i) *Failing to object to impermissible character testimony that violated Rule 404, SCRE*

Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application post-conviction for relief as to this claim. Any testimony regarding Applicant being incarcerated before or during the crime in question is admissible as *res gestae* evidence, such that no error or prejudice flows from its introduction by either the State or by trial counsel. "Under the *res gestae* theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct.App. 2004); *State v.*

Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct .App. 2002) (finding evidence of burglary occurring the same night as the burglary for which defendant was convicted “was necessary for a full presentation of the case without fragmentation.”). *Res gestae* provides for the admissibility of other bad acts when such evidence is close in time to the charged crime and “‘furnishes part of the context of the crime’ or is necessary to a ‘full presentation’ of the ‘case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case” that its proof completes “the story of the crime on trial by proving its immediate context” *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (quoting *United States v. Masters*, 622 F.3d 86 (4th Cir. 1980)).

The evidence at trial which reflected that Applicant was in custody at various times was relevant to the investigation into the victim’s death because the circumstances under which the victim was last seen alive directly pertained to his bailing the Applicant out of jail. (*See* Tr. pp. 179-85, 214-18). Some of the evidence subject to this allegation was contained within, or pertained to the circumstances in which Applicant provided, a number of statements to law enforcement over the course of the investigation. (Trial Tr. pp. 269, 333). As to the testimony of Shaneka DeLoach cited by Applicant, her testimony was in relation to her identification of Applicant and was challenged on cross-examination by trial counsel when he pointed out that this witness was way across the road from where she saw Applicant, whom she did not know well. (Trial Tr. pp. 239-40 (Q: “But you don’t know Sammie Gerrick that well; right”? A: No, I don’t. Q. And some people move their arms like this (indicating) when they talk and some people don’t; correct? A: Yes. . . .)). Respondent submits there is no deficient performance or prejudice flowing from counsel’s representation in regards to this allegation and, on the prejudice prong, relies on the complete analysis falling at the conclusion of this reply.

(k), (m), (n) Applicant raises a conglomerate of claims addressing trial counsel's failure to object to the State's closing argument which Respondent addresses in tandem.

On these claims, Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to each specific closing-argument-related claim raised by Applicant. Further, to the extent Applicant contests that evidence does not conclusively demonstrate that Applicant took a shower on the afternoon in question, a statement by Applicant admitted at trial stated that the victim bailed him out of jail and took him home, where Applicant took a shower. (Tr. pp. 270-71 ("I then went in, shave, cut my hair and showered.")). Also, as to the State's referencing Taylor White's testimony in closing, the State argued that White's testimony about changing clothes and walking into the laundry room circumstantially corroborated Applicant's own statement that he took a shower. (Tr. pp. 721-22). The argument matches the substance of White's trial testimony in this regard. (Tr. pp. 222-23). Moreover, the portion of the State's closing which addresses the condition of the victim's body also aligns with the testimony delivered by the forensic pathologist at trial. (Tr. pp. 731). Dr. Ross testified at trial that the body was in a moderate-to-advanced state of decomposition at the time of autopsy, that she could identify "probable defensive wounds" on the victim, that there was evidence the victim had been bound, and that "it is most likely that there was some kind of asphyxiation" or "strangulation around the neck . . . as a cause of death." (Tr. pp. 439-48). The record, therefore, directly reflects the facts and reasonable inferences therefrom which were argued by the State in closing. (Trial Tr. pp. 696-740). Trial counsel's PCR testimony that he felt the State's closing argument was within the bounds of the evidence presented at trial, and therefore did not warrant objection, is wholly supported by the record.

- (l) *Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.*

Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim. Additionally, on June 13, 2018, the South Carolina Court of Appeals addressed an argument concerning the order of closing argument discussion from *State v. Beaty* in its opinion *State v. Shands*, Op. No. 5569, Adv. Sh. p. 63 (S.C. Ct. App. filed June 13, 2018) (Shearouse Adv. Sh. No. 24 at 59). In *Shands*, the Court of Appeals held that the closing argument delivered by the State, which was the final closing in that case, did not violate the defendant's due process rights because the defense was aware of the State's theory of the case at the time it delivered its closing argument and thus "could have used his closing argument to respond to them." *Id.* at 77. Further, that the State's comments during its reply closing argument "were arguably in response to Shands's closing argument" and thus were not prejudicial. *Id.* at 78. Respondent submits the same findings apply to the State's closing in this case, especially considering trial counsel's argument that Applicant was the boy who cried wolf, and that Applicant "was not denied 'the fundamental fairness essential to the concept of justice'" by nature of the order of closing argument and trial counsel's failure to ask for the last word in reply. *Id.* at 79 (quoting *State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse Adv. Sh. No. 17 at 27)).

To the extent Applicant, in reply, argues that the trial judge erred, that allegation is again barred by the *Simmons* doctrine. S.C. Code Ann. § 17-27-20(B); 264 S.C. at 423, 215 S.E.2d at 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."); *Dempsey v. State*, *supra*

- o) Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in this case, which denied Mr. Garrick's right to a fair and impartial grand jury presentment.*

Applicant submits that a grand juror was also a witness in Applicant's case and that "[o]nce the grand juror discussed the case with the other grand jurors, empaneling a new grand jury was the only way to cure the error." (Applicant's Br. p. 37). Respondent reincorporates its arguments submitted within its Post-Hearing Brief and takes this first opportunity to reply to Applicant's full argument on this claim.

Applicant cites to pages 136-37 of the trial transcript and characterizes that portion of the record as being an unrebutted admission that the grand jury proceedings were tainted in this case. Applicant does not cite to the record in its full and proper context. During pre-trial matters, the Assistant Attorney General prosecuting this case brought to the court's attention:

And lastly, Your Honor, we did push through or have the grand jury rule on a new indictment last week. As we were here for trial prep we -- Lieutenant Harley realized that one of the individuals on the grand jury had -- was a witness in the case. Not -- just kind of an auxiliary fact witness. **And so fortunately the grand jury was in session. So we put the indictment through and she had recused herself obviously for that, but I've served that indictment on Mr. Williams.** He's aware of that, but I just wanted to make --

(Trial Tr. p. 136).

The trial record reflects that the State acknowledged a potential defect in the latest indictment issued in this case and cured it prior to the start of trial because the grand jury was in session at the time the potential defect came to light. At the PCR hearing, trial counsel testified that he believed the defect in the indictment was cured on the third indictment which was issued in this case. This claim, therefore, lies solely on Applicant's speculation that there was an error in the grand jury proceedings. Yet the record affords no basis to "presume that the State abused

the grand jury process in order to obtain a finding of probable cause to prosecute.” *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991).

“Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary.” *Id.* Where a defendant does not present clear evidence of an abuse of the grand jury proceedings, a motion to quash the indictment will not prevail. *See State v. Shands*, Op. No. 5569, Adv. Sh. Pp. 63-65 (S.C. Ct. App. filed June 13, 2018) (Shearouse Adv. Sh. No. 24 at 59) (“Without any clear evidence, Shands’s argument that there was a grand jury abuse in his case is pure speculation.”). “Speculation about ‘potential’ abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment.” *State v. Thompson, supra* at 502, 409 S.E.2d at 424. Given that Applicant produced no evidence in support of this allegation at PCR, it follows that counsel cannot be found deficient for failing to move to quash the indictment for the reason briefed, or that any purported deficiency prejudiced Applicant. *See State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (affirming the trial court’s denial of the defendant’s motion to quash the indictments even though direct evidence “is difficult to provide due to the secretive nature of the grand jury proceedings”).

Applicant has failed to provide a concrete basis upon which trial counsel should have moved, for an additional time, to quash the indictment in this case. Applicant’s speculative argument fails to prove any defect in Applicant’s latter indictment. Moreover, if any credence were lent to Applicant’s presentation of the facts pertaining to this claim, the same witness testified before the jury, and the jury thoroughly explored that testimony as a predicate to returning a verdict of guilt beyond a reasonable doubt, which is a much higher burden than probable cause. *See Thompson, supra*.

Not only does Applicant fail to demonstrate error on the part of trial counsel, but Applicant has likewise failed to make any showing of prejudice caused by the alleged abuse of the grand jury process in this case. He did not even name the witness he alleges tainted the proceedings. *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809 (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); *Glover v. State*, 318 S.C. at 498-99, 458 S.E.2d at 540 (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden).

p) Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

On this claim, Applicant merely argues that because trial counsel testified at PCR that he "was aware of evidence establishing that someone other than Sammie Gerrick killed Tyrone Donaldson," he "was ineffective for not presenting this evidence to the jurors." (Applicant's Br. at 37). Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim. Even by citing to trial counsel's PCR testimony, Applicant has wholly failed to present any specific evidence of third-party guilt which could have been used at trial, and thus this Court cannot speculate as to the prejudice prong of *Strickland*. *Bannister v. State, supra*; *Glover v. State, supra*.

In addition to trial counsel's testimony concerning the investigation into the vegetation surrounding the victim's gravesite, which was an effort by counsel to corroborate a possible lead that would exculpate Applicant by showing that the victim was killed elsewhere, trial counsel also explained that he had prepared to put forward a witness in Applicant's defense who would testify that he killed the victim in Santee and came and buried the body in Barnwell County.

However, the note written by this witness that would corroborate this defense lost all credibility when the trial testimony of Early Glover came to light. As trial counsel recalled, Early Glover testified at trial that Applicant paid him \$1000 to write a note providing Applicant with an alibi. Trial counsel testified that he had to make a strategic decision as to whether, after Glover's testimony, his own defense witness would be credible. He decided it would not be credible, but would rather corroborate Glover's testimony delivered on behalf of the State. Moreover, that potential witness invoked his Fifth Amendment privilege during *in limine* hearings at trial. In sum, trial counsel explained that he could not corroborate the letter from this witness or the leaves found in the gravesite, and thus decided to abandon this potential defense because in his assessment it would have done more harm than good.

In short, these investigations dead-ended and trial counsel exercised a strategic decision in not presenting evidence of third-party guilt because he could not credibly corroborate it. 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. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992); *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).

q) Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal

Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim.

r) *The cumulative effect of trial counsel's error requires a new trial*

Respondent herein reincorporates its arguments submitted within its Post-Hearing Brief and submits that this Court should, for the reasons set forth therein, deny the application for post-conviction relief as to this claim. Applicant is not entitled to a grant of post-conviction relief on any one allegation pursued at the evidentiary hearing. The cumulative error doctrine need not apply.

As to all PCR allegations:

Applicant has at each stage in his post-hearing brief argued that the State's case against Applicant "was not overwhelming." Respondent disagrees. Respondent has neither abandoned nor conceded any argument as to the prejudice prong of *Strickland* as Applicant contends. Applicant's assertion in this regard is not supported by the record in this action. "To satisfy the prejudice prong, an applicant must demonstrate 'there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "As the Supreme Court of the United States explained in *Strickland*, 'the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 695, 104 S.Ct. at 2068-69). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068).

The PCR court's prejudice determination must include a consideration (1) as to the specific impact of any error determined to have been made by counsel on the outcome of the trial, as well as (2) a consideration of "the strength of the State's case in light of all the evidence

presented to the jury.” *Smalls v. State*, 422 S.C. at 188, 810 S.E.2d at 843 (also stating that to *categorically* preclude a prejudice finding, “the evidence must include something conclusive”).

Respondent submits there is no deficient performance as to any claim raised in the instant application, and further submits that the State presented a strong case of guilt such that, even given a finding of error, there exists no reasonable probability of a different result at trial. The evidence presented allows for the connection of collateral facts which paints a narrative of guilt. *See State v. Logan*, 405 S.C. 83, 97-98, 747 S.E.2d 444, 451-52 (2013); *State v. Rogers*, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). Here, there is no other reasonable explanation. First, Applicant’s incarceration and his need for bail and bill money give rise to the inception of the investigation and establishes motive. Because Applicant could not pay his bills, he also could not refund the victim and his friend Maurice Williams for their bonding Applicant out of jail.

The victim followed behind Applicant after the bailout with the expectation that Applicant was collecting money for repayment. The two were spotted in tandem the remainder of that afternoon. First they left Applicant’s house, but not before Applicant put two shovels in the bed of his truck (the victim was recovered from a shallow grave). (Tr. p. 230, l. 24 – p. 231, l. 9). Then they were seen at the Enterprise Bank ATM and at the Junior Food Mart, both in Blackville. (Tr. p. 236, ll. 1-23; Tr. p. 537, ll. 17-34). Joe Thomas saw Applicant drive past Thomas’ house with another car close behind around 3:00 that afternoon, which is corroborated by a call from that friend to Applicant. (Tr. p. 574, l. 4 – p. 575, l. 18). Applicant said during an interview with law enforcement that he went by Thomas’ house to get sand, but according to Thomas, that never happened. (Tr. p. 575, l. 19 – p. 576, l. 3). Thomas’ house lies within a mile or so of the crime scene. (Tr. p. 576, ll. 4-16).

No one heard from the victim afterwards, and then the victim's cell phone permanently goes off the grid, as evidenced by undelivered text messages. (Tr. p. 476, l. 18 – p. 478, l. 19; State's Exhibit 72). Cell phone records show that the last four phone calls the victim ever makes are to Applicant. (Tr. p. 612, l. 24 – p. 614, l. 21; Tr. p. 705, ll. 3-11; State's Exhibits 71 and 72). After that last phone call, made from the Blackville area, Applicant's phone escaped from the grid for two hours during the same time period as when the victim's phone forever lost service. (Tr. p. 461, l. 4 – p. 470, l. 1; Tr. p. 705, l. 12 – p. 707, l. 1; State's Exhibits 71 and 72).

Applicant resurfaced that evening, telling Maurice Williams that he and the victim dug up a safe full of money to reimburse him for the bailout, but that the victim drove off with it. (Tr. p. 189, l. 2 – p. 190, l. 20). Also that night, a visitor at Applicant's residence saw him change clothes around 7:30 and place his other clothes in the laundry room. (Tr. p. 222, l. 5 – p. 223, l. 17). This was after Applicant came home to shower after being bailed out of jail. (Tr. pp. 270-71 ("I then went in, shave, cut my hair and showered.")).

The next day, an ATM camera catches Applicant using the victim's debit card to withdraw money. The victim's card was also used several times the day the victim disappeared, including paying energy bills around midnight. (Tr. p. 545, l. 6 – p. 546, l. 25; Tr. p. 552, l. 1 – p. 554, l. 23; Tr. p. 555, ll. 2-14). The victim went missing long before midnight. The victim's sister-in-law, with whom he lived, testified that the victim would never lend his debit card or PIN number to anyone. (Tr. p. 261, ll. 19-23).

Maurice Williams also sees Applicant the next day and notices scratches on his chest. (Tr. p. 200, ll. 19-25). When questioned about those scratches by law enforcement, who also noticed them, Applicant stated that a lightbulb burst overhead in his jail cell days prior, causing injury. Jailhouse employees testified that Applicant did not report any injury during his

incarceration, nor did it appear that he had any scratches. (Tr. p. 216, l. 1 – p. 218, l. 20; Tr. p. 272, ll. 13-15; Tr. p. 402, ll. 10-17; Tr. p. 487, l. 3 – p. 488, l. 25).

The victim's friends also received a mysterious text message purporting to be from the victim, but from an unknown number, claiming that the victim was hurt and asking for help. (Tr. p. 195, ll. 4-17; Tr. p. 246, l. 18 – p. 247, l. 1). When one recipient asked Applicant about the text, Applicant replied that it might take the heat off of him. (Tr. p. 248, l. 22 – p. 249, l. 14). The texts incorrectly used "am" as a substitute for "I'm," just like Applicant consistently did as well. (Tr. pp. 197-200). Those texts came from a trac phone pinging from the same location as Applicant's phone at the time the texts were sent. (State's Exhibit 73; Tr. p. 611, ll. 3-18; Tr. p. 719, l. 13 – p. 720, l. 11).

Of import, Applicant's wife testified that late during the night of the victim's disappearance, she followed Applicant out to the woods near Sunshine Road so that the Applicant could collect the victim's car, drive it to Orangeburg, and park it at the China Express. (Tr. pp. 303-309). She took law enforcement to the woods where the Applicant initially retrieved the victim's car; those woods proved to be the crime scene. (Tr. pp. 327-29). The victim was found in a shallow grave, face-down, with asphyxiation the probable cause of death. (Tr. p. 417, ll. 1-4; Tr. p. 445, ll. 1-18). Autopsy results showed defensive lacerations on the victim's left arm. (Tr. p. 441, ll. 1-7).

Investigators found full set of Applicant's fingerprints on the victim's car. (Tr. p. 525, ll. 1-10; Tr. p. 532, ll. 1-8). Also apparent at the crime scene was some green netting. (Tr. p. 411, ll. 15-18). That same type of netting was present in Applicant's yard from sod which was laid about a year prior, and more green netting was collected from Applicant's other Blackville residence. (Tr. p. 231, l. 25 – p. 232, l. 10; Tr. p. 427, ll. 16-20; Tr. p. 429, l. 25 – p. 430, l. 2).

Adding insult to injury, Applicant provides a series of voluntary, yet incongruent statements to law enforcement. Each time law enforcement received a new tip in their investigation, Applicant came forward with “a new story which would explain the new information.” (Tr. p. 605, ll. 13-20). Applicant first explained that the victim bailed him out of jail and took him home, where the Applicant took a shower. (Tr. pp. 270-71). Applicant said that went to Enterprise Bank and the Junior Food Mart with the victim, but then went home. (Tr. pp. 266-67). Then Applicant said he has access to the victim’s bank account because they had joint ownership of \$18,000 from a backhoe. (Tr. p. 322-24). Days later, Applicant contacted Chief Holston to say that “Black” held the victim for \$25,000 ransom, but did not re-contact the Chief with proof of life or contact information as requested. (Tr. p. 274-79).

Having discovered the victim’s body, law enforcement brought in Applicant for another interview, confronting him with the information about the victim’s car. (Tr. p. 333). The victim admitted to being in Orangeburg, but did not come forward with information that he was at the crime scene. (Tr. p. 350). It was not until Applicant was served with the murder warrant that he began to claim that he remained with the victim after their stop at the Junior Food Mart. (Tr. pp. 361-62). After Lieutenant Harley told him homeowners on the road saw his truck, Applicant changed his initial story about never being present at the crime scene. (Tr. p. 369, l. 14 – p. 371, l. 8).

Applicant next divulged a drug deal which allegedly also involved Andre Hightower and O’Shane Dixon. (Tr. pp. 509-604). Both Hightower and Dixon testified that they had no knowledge or involvement with a drug deal; they had an alibi for the day the victim disappeared. (Tr. pp. 558-66). Dixon added that Applicant kept calling him after the victim disappeared to see if Dixon knew anything about the investigation. (Tr. p. 565, l. 18 – p. 566, l. 25). Applicant

instead stated that he was instructed by Hightower to move the victim's car to Orangeburg in exchange for \$400. (Tr. pp. 364-68).

The morning after his arrest, Applicant asked to speak with law enforcement again, now claiming he looked on as the others involved in the drug deal beat the victim. (Tr. pp. 599-604). The victim allegedly arranged the drug deal with "Big Joe" from Georgia, and Applicant stated that he went along on the deal because he was supposed to receive some of the funds. (Tr. p. 363). However, the victim had no connection to drugs, nor did he test positive for any drugs during autopsy. (Tr. p. 376, ll. 11-22 Tr. p. 453, ll. 5-17).

Then, Early Glover testified that months after the crime, Applicant promised him \$1000 in exchange for copying a statement that said Glover and Applicant were present when the victim was beaten, but that neither of them had anything to do with it. Applicant wrote the statement and Glover copied and signed it. Applicant never mentioned Early Glover in any prior statement, but did send a letter to SLED stating that somebody could vouch for his innocence. (Tr. pp. 372-74; Tr. pp. 583-88).

Finally, law enforcement discovered the "root" and a novelty canister labeled "Law Stay Away" during the execution of a search warrant on Applicant's vehicle. Lieutenant Shaun Harley with SLED first testified as to examining "like a brown piece of paper bag, looked like." "It was just taped up . . . with dust, weed, twigs and a penny inside." (Tr. p. 344, ll. 7-10). Harley testified as to the handwriting on each side of the brown paper, which on one side exhibited the contents of Psalms 130, and on the other appeared as a prayer, which Harley referred to as a letter: "Set me Sammie Gerrick free from murder and revoke bond. Jack Early set me free now . . . Amen." (Tr. p. 346, l. 4 – p. 347, l. 15). SLED crime scene investigator Melissa Skipper Wallace found the items in the center console of Applicant's truck. Through Wallace, the State

introduced photographs of the undisturbed contents of the open center console, the novelty canister of incense powder labeled “Law Stay Away,” and close-ups of the brown paper parcel both opened and unopened. The items themselves were not introduced. (Tr. p. 425, l. 4 – p. 426, l. 24).

The evidence in this case constitutes a strong case of substantial circumstantial evidence. Whether by motive, opportunity, or acts of guilt, when one strings it together, all evidence points to the Applicant as the sole perpetrator.⁴ Applicant has failed to specifically analyze or prove that any one alleged deficiency would have changed the outcome of the case in light of the strong evidence against him, as is his burden. *See Smalls v. State, supra; Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (at all times during the proceeding a PCR applicant maintains the burden of establishing that he is entitled to relief under *Strickland’s* error-and-prejudice standard).

WHEREFORE, having made the reply to Applicant’s Post-Hearing Brief, Respondent respectfully reincorporates its arguments in favor of the denial of post-conviction relief asks this Court to deny each of Applicant’s allegations of ineffective assistance of counsel and dismiss with prejudice the application pending before it.

⁴ Even if this case were prosecuted under the theory of the hand of one, hand of all, the evidence points to Applicant’s guilt as he was instrumental in leading Applicant to, and was present at, the site of the deadly drug deal Applicant eventually alleged to have occurred. *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) (“Under the ‘hand of one is the hand of all’ theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.”).

Respectfully submitted,

ALAN WILSON
Attorney General

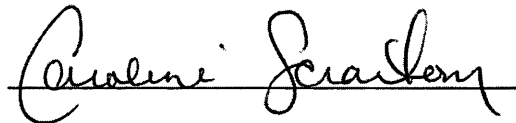
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ATTORNEYS FOR RESPONDENT

June 22, 2018
Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0600111

Rec
8/6/18
mon

Sammie Lee Gerrick

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/A. Scott Sprouse
Circuit Court Judge

2752
Judge Code

8/3/2018
Date

For Clerk of Court Office Use Only

This judgment was entered on **August 3, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **August 3, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Carter

Court Reporter

Constance B. Carter - Deputy Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Sammie Lee Gerrick, #165940,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

C/A No. 2016-CP-06-0111

ORDER OF DISMISSAL

FILED FOR RECORD
2018 AUG -3 AM 11:24
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY S.C.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed by Sammie Lee Gerrick (Applicant) on March 15, 2016. Respondent made its return on September 30, 2016. Applicant submitted an amended application on May 3, 2018. An evidentiary hearing into the matter was convened on Wednesday, May 9, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and represented by E. Charles Grose, Jr., Esquire. Assistant Attorneys General Julie A. Coleman and Caroline Scrantom appeared on behalf of Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant also presented testimony from Charlene Gerrick, Daniel Williams, Esquire (Trial Counsel), and Dr. Janice Ross. This Court had before it the records of the Barnwell County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the record on appeal, Applicant's direct appeal records, and the pleadings.

Following the hearing, both parties submitted post-hearing briefs at the instruction of the undersigned. Both parties were also permitted to file a response to the opposing brief. After carefully considering the arguments presented, this Court finds the application for post-conviction relief should be denied.

RSS

I. THE ALLEGATIONS BEFORE THIS COURT

By and through PCR counsel and pursuant to Rule 71.1, SCRCP, Applicant served an amended application on May 3, 2018, containing the following allegations which were exclusively pursued at the evidentiary hearing before this Court:

1. Ineffective Assistance of Counsel

- a. Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.
- b. Failing to investigate and present available evidence explaining the "root."
- c. Failing to object to the trial judge's opening comments and final instruction on the law, instructing the jurors to find the "true facts," including but not limited to the opening instruction, "[A]t the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict;" and the final instructions to the jurors, "It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;" "That is your sole responsibility, your sole duty to determine what the true facts are in this case;" and "You're here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I've given it to you."
- d. Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.
- e. Failing to make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the juror's minds as to deny Mr. Gerrick due process.
- f. Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witnessed intimidation.
- g. Failing to object to improper victim impact evidence that was not relevant and which were intended to arouse sympathy, passion, and prejudice in the juror's minds.
- h. Failing to object to testimony that violated the confrontation clauses of the state and federal constitutions.
- i. Failing to object to impermissible character testimony that violated Rule 404, SCRE.
- j. [no allegation "j"]

- k. Failing to object to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.
- l. Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.
- m. Failing to object to statements by the prosecutor during closing argument which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof.
- n. Failing to object to inflammatory statements by the prosecutor which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and were so defamatory to Mr. Gerrick that it denied him due process.
- o. Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in the case, which Denied Mr. Gerrick's right to a fair and impartial grand jury presentment.
- p. Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.
- q. Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal.
- r. The cumulative effect of trial counsel's errors requires a new trial.

II. STANDARD OF REVIEW

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different." *Smalls v. State*,

422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)).

At all times during the proceeding, the applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with “a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate 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.’” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). 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. at 697, 104 S.Ct. at 2069.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and arguments presented in their entirety. This Court has before it the pro se PCR application and subsequent filings by the parties to the PCR action, as well as the Barnwell County Clerk of Court records pertaining to Applicant's indictment and sentencing, Applicant's South Carolina Department of Corrections records, the appellate filings and opinion affirming Applicant's conviction and sentence, and a complete transcript of the General Sessions proceedings. This Court has further heard the testimony and argument presented at the PCR hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and has weighed their testimony accordingly.

At the outset, this Court finds that Applicant proceeded at the evidentiary hearing on the totality of the claims as presented in the Amended Applicant for PCR served May 3, 2018. Also at the evidentiary hearing, Applicant expressly withdrew claim (h), that trial counsel was ineffective for failing to object to testimony that violated the confrontation clauses of the state and federal constitutions. This Court finds claim (h) and all claims from the pro se petition not duplicated in the amended application waived and abandoned. S.C. Code Ann. § 17-27-90.

As to the remaining claims, the undersigned makes the following findings of fact and conclusions of law in accord with S.C. Code Ann. § 17-27-80:

Procedural History

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment by the Barnwell County Clerk of Court. He is serving a life sentence without the possibility of parole.

During its November 2013 term, the Barnwell County Grand Jury indicted Applicant for the murder of Tyrone Donaldson. Daniel W. Williams, Esquire, represented Applicant at a jury trial which began November 18, 2013, before the Honorable Doyet A. Early, III in Barnwell County. Assistant Deputy Attorney General S. Creighton Waters and Assistant Attorney General Jason Anders prosecuted the case, which lasted four days. The jury convicted Applicant of murder and he was sentenced to life imprisonment.

Appellant appealed his conviction and sentence. Lara Caudy, Esquire, with the South Carolina Commission on Indigent Defense, perfected the appeal. By and through the Attorney General's Office, the State made its brief in response. Without oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. *State v. Gerrick*, Op. No. 2016-UP-092 (S.C. Ct. App. filed Feb. 24, 2016) (unpublished). The court issued the Remittitur on March 25, 2016.

Facts Presented at Trial

This Court presents the following summary of facts from Applicant's underlying jury trial as an overview of the evidence presented against him. This Court considered the evidence presented at trial in its determination that Applicant has failed to meet his burden of proving prejudice on any of his allegations addressed below. The evidence includes, but is not limited to, the following:

Tyrone Donaldson was last seen by family and friends on July 21, 2011. At that time, Donaldson lived with his sister-in-law, Kelsea Hallingquest, who last saw him when he left their home that morning. (Tr. p. 255, ll. 8-22). John Rice, a friend of Applicant, called Donaldson sometime that morning. Rice called on Applicant's behalf to tell Donaldson that Applicant

needed bail money. (Tr. p. 214, ll. 8-25). Donaldson's friend Maurice Williams also received a phone call from Applicant, again asking for bail money. (Tr. p. 179, ll. 4-9).

Williams and Donaldson met at the bank the morning of July 21, deciding they would bail Applicant out of jail for a total of \$6600 in exchange for a promise by Applicant that he would pay them back on the same day. (Tr. p. 179, l. 19 – p. 181, l. 4). Williams gave Donaldson his half of the bail money then went back to work. (Tr. p. 182, l. 11 – p. 184, l. 17).

Donaldson bailed Applicant out of jail, and they called Williams to let him know. (Tr. p. 184, l. 20 – p. 185, l. 11). Applicant expressed appreciation, stating he would "bless" them. (Tr. p. 185, ll. 7-15). The bailout occurred between 11:00 AM and noon that day. (Tr. p. 215, ll. 22-25). According to county jail employees, Applicant was free of scratches or bruising upon his release, although a ceiling lightbulb did bust and fall into his cell at some point during Applicant's detention. (Tr. p. 216, l. 1 – p. 218, l. 20; p. 487, l. 3 – p. 488, l. 25).

Early that afternoon, Williams and Donaldson touched base again, and Donaldson told him he intended to drop Applicant off, go home, and then go pick Applicant back up so Applicant could reimburse the \$6600 as promised. (Tr. p. 185, l. 19 – p. 186, l. 14). Between 1:00 and 2:00 PM, Donaldson did return home, picked up a shotgun, and left. (Tr. p. 256, ll. 4-25). Donaldson was also seen by Applicant's girlfriend's son dropping Applicant off at his girlfriend's home. Donaldson returned to pick Applicant up less than an hour later. (Tr. p. 230, ll. 12-24). When Donaldson got to Applicant's location, Applicant placed two shovels from the barn behind his house into the bed of his own pickup truck, and they two men left in separate vehicles. (Tr. p. 230, l. 24 – p. 231, l. 9). Donaldson followed behind Applicant's truck. (Tr. p. 231, ll. 9-11).

Donaldson and Gerrick were next seen at 2:54 PM, which was determined from the timestamp on security camera footage at the Enterprise Bank on Main Street in Blackville. (Tr. p. 537, ll. 17-34). Security footage shows a Honda Accord following a Burgundy pickup truck out of the bank parking lot. (Tr. p. 542, l. 1 – p. 543, l. 16). At 3:15 PM at a local gas station/Subway, Shaneka DeLoach, a relative of Donaldson's and someone who knows Applicant from the community, witnessed Applicant standing outside of Donaldson's driver's side window speaking to Donaldson and "moving his hands." (Tr. p. 234, l. 11 – p. 236, l. 17). "He could have been looking mean." (Tr. p. 236, l. 23). DeLoach, who was across the street in another parking lot, could identify Donaldson's white Honda and Applicant in a burgundy Dodge truck. (Tr. p. 236, ll. 1-7).

Sometime between 3:00 and 4:00 that same afternoon, Applicant's friend Joe Thomas saw Applicant speed past his house in a gray and burgundy truck; there was another car behind him. (Tr. p. 574, l. 4 – p. 575, l. 11). Thomas called Applicant's cell phone, and Applicant replied he was busy. (Tr. p. 574, l. 5 – p. 575, l. 18). Applicant was headed north; a rural area demarcated by Sunshine Road sits about a mile north of Thomas' house. (Tr. p. 576, ll. 4-16).

No one saw Donaldson later that evening and into the night. His girlfriend, Kim Smith, received a final text message from him around 1:30 that afternoon, but when she called his cell later that evening she received no answer. (Tr. p. 165, ll. 2-21; p. 167, l. 2 – p. 168, l. 3). Williams, who was looking to be reimbursed for his bail contribution when he finished with work for the day, could not get Donaldson to answer his phone. (Tr. p. 186, ll. 15-22). Some text messages sent to Donaldson expressing worry were not received; phone records would later show that his cell phone was turned off or was outside of a service area for at least 72 hours. (Tr. p. 476, l. 18 – p. 478, l. 19). After a night passed without contact, Donaldson's mother contacted

the police department because no one had heard from Donaldson since he was last seen with Applicant. (Tr. p. 254, ll. 17-25). Blackville Police Department Chief John Holston began a missing person's case on Donaldson the following day. (Tr. p. 265, ll. 5-13).

On the same night that no one could get in touch with Donaldson, mutual friends did see and speak with Applicant. After work, Williams, Applicant's neighbor, met Applicant outside. Applicant explained to him that he and Donaldson dug up a safe containing \$90,000 to \$100,000, "loaded that little Honda down with money," and Donaldson drove off with all of it. (Tr. p. 189, l. 2 – p. 190, l. 20). The next day, Williams saw Applicant again and noticed "scratch marks on his chest." (Tr. p. 200, ll. 19-25).

The next day, Williams, Hallingquest, and a third mutual friend Jamaal Berry each received a text message from an unknown phone number, 347-8647. (Tr. p. 196, ll. 9-13; Tr. p. 247, ll. 9-16). Williams' and Berry's read "help me this Tyrone am hurt Kim ex got me help please." (Tr. p. 195, ll. 4-17; Tr. p. 246, l. 18 – p. 247, l. 1). Hallingquest's text stated "help me sister-in-law Kim ex-husband got me am hurt." (Tr. p. 258, l. 10). Each recipient noticed oddities about the text message, in addition to its receipt from an unknown number. The sender incorrectly spelled "I'm" in this manner: "am." (Tr. p. 197, ll. 18-19). Additionally, Donaldson never called Hallingquest his "sister-in-law," he referred to her as either Kelsea or simply as his sister. (Tr., p. 258, ll. 11-20). Williams knew Applicant would spell "I'm" as "am" on a regular basis, and had many comparisons from past messages in his own phone. (Tr. p. 197, l. 20 – p. 198, l. 21; Tr. p. 199, ll. 17-23; Tr. p. 200, ll. 3-12). When Berry called Applicant to ask if he sent the text message, Applicant's response was along the lines of "it wasn't me, maybe this will take some heat off me." (Tr. p. 248, l. 22 – p. 249, l. 14). When Applicant provided law

enforcement with a handwritten statement, he spelled "I'm" as "am."¹ (Tr. p. 318, ll. 2-9). The texts came from a trac phone. (Tr. p. 611, ll. 3-18). Applicant later asked others if they had heard from Donaldson, or what they might have heard about Donaldson's disappearance. (Tr. p. 194, ll. 3-15; Tr. p. 565, l. 18 – p. 566, l. 25).

Also occurring one day after the disappearance, Lana Joyner, a friend of Donaldson and Hallingquest, took a detour home from work, spotted Donaldson's white Honda parked at the China Express in Orangeburg, and called Hallingquest to tell her. (Tr. p. 498, l. 23 – p. 500, l. 10). Applicant's wife Charlene testified at trial as to how the Honda appeared at the Orangeburg China Express. Between nine and ten on the night Donaldson went missing, Applicant asked Charlene to drive him to retrieve a white Honda Civic "off a paved road, back up in the woods," and Charlene obliged. (Tr. p. 303, l. 10 – p. 304, l. 24). Applicant had the key to the Honda Civic and drove it over to Orangeburg, parking it at the China Express. (Tr. p. 305, l. 8 – p. 306, l. 25). Charlene followed behind and then drove Applicant home. (Tr. p. 307, ll. 4-21). According to Charlene, they arrived home late that night, and recalled that Applicant did not stay with her for long. (Tr. p. 308, l. 23 – p. 309, l. 4). Gerrick was seen back at his girlfriend's house later that night by her son. (Tr. p. 231, ll. 12-13). He said Applicant was sitting outside on the steps between ten and midnight and "looked like he was facing – like he had a lot on his mind." (Tr. p. 231, ll. 14-24; Tr. p. 233, ll. 1-3).

Several days later on August 3, Charlene took law enforcement to the place in the woods where Applicant recovered Donaldson's car. (Tr. p. 310, ll. 2-9). The spot was located off of Sunshine Road, where there is another "little dirt road called One Way." (Tr. p. 327, ll. 8-16).

¹ Evidence at trial established that Applicant utilized other phonetic spellings, such as spelling "right" r-a-t ("rat") and using "no" where "know" was the appropriate form in context. (Tr. p. 318, line 10 – Tr. p. 319, line 11).

They made a left onto One Way, driving past where "there's an open field. And then it goes into a heavy wooded area." (Tr. p. 327, ll. 14-19). Based upon this information, law enforcement assembled a search in that area beginning August 4. (Tr. p. 328, ll. 3-10). One officer eventually came across a disturbance underfoot, "and when he poked his [search] stick into the ground . . . an odor came up." (Tr. p. 329, ll. 7-13). SLED was contacted and a crime scene technician later recovered the body of a black male later identified by a right forearm tattoo as Tyrone Donaldson. (Tr. p. 329, l. 23 – p. 331, l. 25; Tr. p. 443, ll. 12-20).

Upon recovery, Donaldson's body "was face down and the knees were bent as if put into the ground on the stomach with the legs bent up." (Tr. p. 415, ll. 15-17). Donaldson had been buried in a two-foot grave. (Tr. p. 417, ll. 1-4). Also apparent were bindings which had once bound Donaldson's knees and ankles; "his arms were underneath his chest." (Tr. p. 415, ll. 14-22). "There was a piece of root that actually went through his arms. And it was connected on both ends so his arm had gone through and around the root." (Tr. p. 416, ll. 2-5). SLED agents also found burned charcoal in the soil, a fired shotgun shell, an unfired shotgun shell, a logging chain, a cigar butt, gloves, and "a white appliance top that looked like it had burned charcoal around in it." (Tr. p. 416, ll. 9-10; Tr. p. 420, l. 25 – p. 421, l. 8).

At the gravesite, investigators found green netting, which they initially believed to be trash. (Tr. p. 411, ll. 15-18). Investigators also collected green netting and fishing lures at Applicant's Blackville residence, "similar to what [they] had seen at the body." (Tr. p. 427, ll. 16-20; Tr. p. 429, l. 25 – p. 430, l. 2). Trial testimony from Applicant's girlfriend's son showed that green netting was also present approximately a year prior to Donaldson's disappearance as part of some sod laid at Applicant's girlfriend's home. (Tr. p. 231, l. 25 – p. 232, l. 10).

Forensic Pathologist Dr. Janice Ross conducted an autopsy on Donaldson's body the day after its discovery. (Tr. p. 438, ll. 6-25). The body, "very much covered with dirt," had decomposed in a moderate-to-severe, or "fairly advanced" fashion due to it being buried for ten to twelve days in July. (Tr. p. 439, ll. 5-21). Dr. Ross discovered neither fractures nor bullets, and could not clearly identify any bruising or other soft-tissue injury due to the extent of the body's decomposition. (Tr. p. 440, ll. 2-20). Ross found no visible particles of dirt in the throat or nostrils. (Tr. p. 451, ll. 13-17). In addition to the ligatures or bindings, Dr. Ross did identify "some defects in the back of the left forearm. They were splits in the skin consistent with a laceration." (Tr. p. 441, ll. 1-7). Dr. Ross identified these forearm lacerations as defensive wounds, such as the scratches that may be obtained by shielding oneself from harm with his or her arms. (Tr. p. 447, l. 22 – p. 448, l. 22). In conclusion, Dr. Ross determined based upon "[t]he fact that he was buried underneath dirt, and without evidence of shooting or fractured skull, for instance from a beating, it is most likely that there was some kind of asphyxiation," strangulation, and a homicide. (Tr. p. 445, ll. 1-11). Such a homicide, given the circumstances and burial scenario, could result "either from being strangled with some sort of soft item" or "result from somebody being incapacitated and then buried." (Tr. p. 445, ll. 9-18).

On August 5, law enforcement executed search warrants for Applicant's Dodge pickup truck as well as for places he was known to reside. (Tr. p. 332, ll. 10-14; p. 343, l. 23 – p. 344, l. 1). Applicant was in custody at that time. (Tr. p. 392, l. 19 – p. 393, l. 5). Law enforcement found in the center console of Gerrick's truck a "brown package, like a brown piece of paper bag It was just taped up. Once you open it, it had some dust, weed, twigs, and a penny in it." (Tr. p. 344, ll. 2-10). It was taped up like a capsule. (Tr. p. 344, ll. 18-20). Law enforcement opened the capsule to find the handwritten words:

Set me Sammie Gerrick free from murder and revoke bond.
Jack Early set me free now.
Jack Early set me free now.
Jack Early set me free now.
Sammie Gerrick, Sr.
Sammie Gerrick, Sr.
Sammie Gerrick, Sr.
So shall it be.
So shall it be.
So shall it be.
Amen.
Amen.
Amen.

(Tr. p. 346, ll. 4-18).

On the other side there was a selection resembling Psalm 130:

Out of the depths[sic], have I cried unto thee, O Lord. Lord hear my viouce[sic]:
ut[sic] think ears, be attentive to the voice of my supplications, if that Lord
shouldest mark iniquities O Lord, who shall stand? But there is forgiveness with
thee that there inaqest[sic] be feared. I wait for the Lord, my sould doth wait, and
in his word do I hope my soul waiteth for the Lord more than they that watch for
the morning I saw, more than they that watch for the morning. Let Israel hope in
the Lord. For with the Lord there is mercy. And with him is plenteous[sic]
redemptions. And he shall redeem Israel from all his inguities[sic].

(Tr. p. 347, ll. 7-15).

Also found in the center console was a small canister labeled "Law Stay Away." (Tr. p.
425, l. 16 – p. 426, l. 13).

Law enforcement did not process Applicant's vehicle for prints because it had been
washed and because Donaldson and Applicant "had knowledge of each other" such that law
enforcement characterized it "not a big deal" if Donaldson's fingerprints were found in
Applicant's vehicle. (Tr. p. 427, ll. 2-12). But Lieutenant Schultz with the Orangeburg
Department of Public Safety recovered five of Applicant's fingerprints from the front right
passenger door of Donaldson's white Honda Civic. (Tr. p. 525, ll. 1-10; Tr. p. 532, ll. 1-8).

Further DNA testing inside the Honda Civic showed no contributions from either Applicant or Charlene Gerrick. (Tr. p. 507, l. 17 – p. 510, l. 3).

Over the course of the investigation into Donaldson's disappearance, Applicant made a series of voluntary statements to law enforcement. They were introduced in segments at trial. (Court's Exhibit 2). He made his first statement on July 22, the day after commencement of the missing persons investigation. (Tr. p. 266, l. 16). Blackville Police Chief John Holston first spoke with Applicant because Donaldson was last seen in his company. (Tr. p. 266, ll. 18-21). Applicant told Chief Holston that Donaldson bailed him out of jail on July 21, they went to Enterprise Bank together sometime afterwards so that Applicant could cash a check, and then they went to the BP station in Blackville. Applicant said they remained at the BP and Junior Food Mart convenience store for a while talking and were not together any time thereafter. (Tr. p. 266, l. 25 – p. 267, l. 9).

After law enforcement got the tip about Donaldson's Honda Civic from the China Express in Orangeburg, Chief Holston again spoke with Applicant. (Tr. p. 267, ll. 10-20). Chief Holston wanted to know whether Applicant knew about Donaldson's ATM card. (Tr. p. 268, ll. 1-2). Chief Holston included SLED Lieutenant Shaun Harley in this second interview, which began late into the night on July 22 and bled into early the next morning. (Tr. p. 314, ll. 13-24). Applicant went into the details of his initial arrest,² his attempts to contact Donaldson for bail money, and Donaldson ultimately bailing him out. (Tr. p. 269, l. 1 – p. 270, l. 20). Applicant's statement included more minutia about his July 21 contact with Donaldson: Donaldson drove him home from jail, Applicant went inside and cleaned up, then Donaldson and Applicant went

² The chain of events arose from Applicant's Bamberg County incarceration following a wholly separate child support issue. Once Applicant received that sentence, he attempted to escape the courthouse and was apprehended in the Piggly Wiggly parking lot. (Tr. p. 269, ll. 1-11).

to Enterprise Bank so Applicant could cash a check for \$104, then Applicant "went to JRs Mart driving [his] 1998 Dodge pickup to put \$30 worth of gas in [his] truck while Tyrone was still driving the white Honda Civic." (Tr. p. 270, l. 21 – p. 271 l. 6). Applicant referenced his use of Donaldson's ATM card. (Tr. p. 271, ll. 22-24). Then, according to Applicant, each told the other they were going home. (Tr. p. 271, ll. 7-9). During this interview, Chief Holston "did notice that there w[ere] some scratches across . . . Applicant's arms and across his chest." (Tr. p. 272, ll. 13-15). Holston photographed the marks. (Tr. p. 273, ll. 2-13).

Applicant gave a third statement to Lieutenant Harley at the Barnwell County Sheriff's Office during an interview with Harley and SLED agent John Burnett. (Tr. p. 320, l. 3 – p. 321, l. 18). In this statement, Applicant went into details on how he got in touch with Williams about needing bail money, and then went on to explain how he and Donaldson jointly received \$18,000 from a backhoe. Applicant did not want to tell Williams about that money because "he didn't think that [he] need to bring that up." (Tr. p. 322, p. 14 – p. 323, l. 3). Applicant expounded upon financial calculations he made with Donaldson regarding repayment for bail and admits in that statement: "So I received the [ATM] card from there and went to the bank." (Tr. p. 323, ll. 4-16; Court's Exhibit 2). Applicant stated he was given Donaldson's ATM card because they shared joint ownership of the backhoe funds. (Tr. p. 323, l. 20 – p. 324, l. 23).

On July 25, SLED agent John Burnett interviewed Applicant again. (Tr. p. 394, ll. 19-23). Applicant stated he had the economic means to get out of jail but was not allowed to make the requisite calls to arrange his bond, and eventually the bail arrangement with Donaldson worked out ten days after Applicant's initial incarceration. (Tr. p. 400, l. 20 – p. 401, l. 1). Applicant said he had tardy bills totaling somewhere between \$1500 and \$1800, that he fronted Donaldson some money at an earlier time, and he had no reason for meeting Donaldson post-

bailout at Enterprise Bank. (Tr. p. 401, l. 2 – p. 402, l. 9; Tr. p. 403, ll. 10-17). Agent Burnett also noticed scratches “visible to the eye” on Applicant’s arms and chest “consistent with having been exposed to the outdoors.” (Tr. p. 402, ll. 10-17).

Also, one week after Donaldson’s disappearance, Applicant called Chief Holston’s cell phone. (Tr. p. 274, ll. 8-12). When Holston picked up the phone, Gerrick said “Tyrone’s not dead. . . . Black’s got Tyrone and they want \$25,000 in cash for him” (Tr. p. 274, ll. 13-19). Applicant requested “backup” to get Donaldson back, explained that Donaldson must be “over around Springfield” where “Black was from.” (Tr. p. 274, ll. 20-23). Chief Holston told Applicant that if he could send him more information and proof of life, they would “go from there.” (Tr. p. 275, ll. 1-7). Applicant sent no additional information. (Tr. p. 279, ll. 12-18).

After law enforcement recovered Donaldson’s body, they had Applicant transported from the Charleston County Detention Center³ to Barnwell County for a fifth interview. (Tr. p. 333, ll. 1-21). Applicant started providing answers to information presented to him by law enforcement at this time. Applicant said he went to the BP station to visit with Donaldson, then visited his father’s house in Bamberg County, and then walked from there to his wife’s house. (Tr. p. 350, ll. 16-24). This time, Applicant for the first time said that he went to Orangeburg, but did not mention the Honda Civic. (Tr. p. 350, l. 25 – p. 351, l. 3). Applicant was arrested for Donaldson’s murder. (Tr. p. 358, ll. 21-25).

A few hours after arrest, Applicant requested to speak with law enforcement again. (Tr. p. 359, ll. 8-18). Applicant imparted upon the officers that he wanted to tell the whole story truthfully, opening with “I’m going to put it all out there.” (Tr. p. 361, l. 24 – p. 362, l. 3). Applicant then told the events in a different light, stating that he and Donaldson planned a drug

³ Applicant’s Charleston County incarceration stemmed from a bond violation. (Tr. p. 351, ll. 11-14).

transaction while riding back from jail. Donaldson was supposed to purchase a kilo of cocaine from Andrew Hightower, O'Shane Dixon and "Big Joe." (Tr. p. 362, ll. 4-12). Applicant previously mentioned a Big Joe to Lieutenant Harley, (p. 358, ll. 5-11), but Big Joe was identified slightly differently this time. (Tr. p. 362, l. 21 – p. 363, l. 3; Tr. p. 600, ll. 14-21). All Applicant knew about Big Joe was that he was from Georgia and drove a Denali. (Tr. p. 362, l. 13 – p. 363, l. 3). Applicant talked about a drug deal set to occur after he and Donaldson departed from the BP and Junior Food Mart, wherein Donaldson was supposed to give Applicant some of the proceeds, even though Applicant owed Donaldson \$3300 in bail money. (Tr. p. 363, ll. 7-23). Andre Hightower then instructed Applicant to move Donaldson's car in exchange for \$400, and Applicant admitted to driving the Honda to Orangeburg. (Tr. p. 364, l. 2 – p. 368, l. 24).

During the same interview, Applicant first maintained that he never traveled to the "wooded areas on that one-way dirt road where the car was located and the body was discovered." But Applicant changed his story after Lieutenant Harley told him homeowners on the road saw his truck. (Tr. p. 369, l. 14 – p. 371, l. 8). In a follow-up August 18 interview with SLED agent Jeff Croft, Applicant "began to explain how his truck could have possibly been found or seen in the area." (Tr. p. 599, ll. 9-21). Now placing himself at the crime scene, Applicant declared that the drug deal involving a kilo of cocaine became fumbled and Applicant looked on while Big Joe, Andre Hightower and O'Shane Dixon began to beat Donaldson. (Tr. p. 599, l. 22 – p. 601, l. 24). The weapon was a pipe or a gun. (Tr. p. 604, ll. 10-13).

On yet another occasion in October 2011, Applicant sent a letter to SLED requesting a further interview during which "he stated that he had somebody that could vouch for his innocence." (Tr. p. 372, l. 5 – p. 373, l. 25). Another inmate at Lieber, Early Glover, wrote a

statement on Applicant's behalf because Applicant told him he "was in a bind." (Tr. p. 374, ll. 3-12; Tr. p. 583, ll. 1-25). Applicant promised Glover he would pay him \$1000 to copy a statement Applicant scripted and passed through the jail cells, and Applicant practiced writing the statement to Applicant's satisfaction, signing Glover's name at the bottom. (Tr. p. 584, l. 3 – p. 587, l. 5). The statement dealt with Donaldson, who "was supposed to be the main man," meeting two other men in the woods, when an argument ensued involving Applicant, and whereupon Applicant was told to stay in the car. (Tr. p. 587, ll. 6-24). "None of it never[sic] happened" in reality. (Tr. p. 588, l. 1).

Upon further investigation, zero evidence corroborated other individuals in Donaldson's disappearance. (Tr. p. 376, l. 2 – p. 377, l. 2). Donaldson had no community reputation for or connection with drugs. (Tr. p. 376, ll. 11-22). In regards to the drug deal narrative, Andre Hightower testified at trial that he hardly knew Applicant and had never heard about a Big Joe. (Tr. p. 558, l. 12 – p. 559, l. 16). He also did not know O'Shane Dixon. (Tr. p. 561, l. 25 – p. 562, l. 1). Hightower was in Greenville with his girlfriend and her son on July 21. (Tr. p. 558, l. 21 – p. 559, l. 9), and he stayed in Greenville for about two days. (Tr. p. 563, ll. 2-9). O'Shane Dixon, fishing buddies with Applicant, also testified. (Tr. p. 564, ll. 13-21). Dixon was at home watching his children all day on July 21, heard about Donaldson's disappearance that evening, and began receiving phone calls from Applicant that night onward asking about what Dixon may have heard about it. (Tr. p. 565, l. 18 – p. 566, l. 25). Applicant also called off their fishing trip on July 22 without reason. (Tr. p. 567, ll. 1-21).

Also, just as Applicant and Donaldson went to the Enterprise Bank ATM on the day of Donaldson's disappearance, Applicant returned to that same ATM alone at 8:00 that same night in his burgundy Dodge Ram and used Donaldson's ATM card. (Tr. p. 545, l. 6 – p. 546, l. 25).

p. 555, ll. 15 – 20). Donaldson's card was also used on July 22 at 7:50 PM at Bamberg Auto Parts, at 8:00 PM at the Palm Pantry in Bamberg, twice more at the in-store ATM at the Palm Pantry, and that morning at the Bank and Trust on North Main Street in Bamberg. (Tr. p. 552, l. 1 – p. 554, l. 23). Donaldson's same account was used to pay bills for SCANA Energy around midnight on July 22. (Tr. p. 555, ll. 2-14).

Finally, cell phone records evidence that Donaldson's cell phone permanently left the grid at the same time as Applicant's, but Donaldson's phone never regained service. (Tr. p. 461, l. 4 – p. 470; Tr. p. 476, l. 18 – p. 478, l. 19; Tr. p. 705, l. 24 – p. 706, l. 9). The last four phone calls ^{that} ~~the~~ Donaldson made were to Applicant. (Tr. p. 469, l. 15 – p. 470, l. 1; Tr. p. 612, l. 24 – p. 614, l. 21; Tr. p. 705, ll. 3-11). After that last phone call, made from the Blackville area, Applicant's phone escaped from the phone grid for two hours. (Tr. p. 461, l. 4 – p. 470; Tr. p. 705, ll. 12-25). Other records show that the mysterious "help me am hurt" text messages derived from a trac phone pinging from the same location as Applicant's phone at the time the texts were sent. (Tr. p. 611, ll. 3-18; Tr. p. 719, l. 13 – p. 720, l. 11).

Testimony Presented at the PCR Evidentiary Hearing

In addition to his own testimony, Applicant presented three witnesses at the evidentiary hearing. Charlene Gerrick offered testimony chiefly in regards to her invocation of the marital privilege at trial. She invoked the marital privilege for the purposes of this PCR hearing as well. C. Rauch Wise appeared at the evidentiary hearing on her behalf in this regard. Gerrick established that she has been married to Applicant since 1995.

Charlene Gerrick testified that when law enforcement interviewed her as part of the investigation into the prosecution of this case, they delivered threatening statements to induce her to tell them her husband committed the murder. She alleged that law enforcement told her that

she would lose her daughter and could be charged with murder. She also testified that her interviews with them were recorded. She testified that law enforcement did not notify her of the marital privilege. She recalled being interviewed on two occasions by local law enforcement agents. She also recalled a search warrant being executed upon her home.

Charlene Gerrick also testified that she met with the prosecutors who tried the case, Applicant's trial counsel Daniel Williams, and other law enforcement agents, but never told anyone about the alleged threatening statements from local law enforcement. She testified that this evidentiary hearing was the first time she was disclosing this information.

Charlene Gerrick also recalled meeting with Applicant's trial counsel Daniel Williams prior to trial. Gerrick testified that she recalled her trial testimony being limited to actions she took as part of the investigation. She agreed that her trial testimony did not pertain to communications with her husband that would have been covered by the privilege she invoked.

Charlene Gerrick offered testimony concerning the "root" which was discovered by law enforcement in the center console of Applicant's truck. Gerrick testified that she made the "root" and placed it there on August 1, 2011. She speculated that Applicant did not know it was there. Gerrick also briefly stated she believed in the doctrine and that she wrote Judge Early's name on the "root" because he previously presided over a bond hearing Applicant had.

Charlene Gerrick also testified that a person named Gerard Saxon told investigator Kenny Bamberg that Applicant did not kill the victim. This was the only testimony on this point offered at the evidentiary hearing. Saxon did not testify and was not otherwise identified to the court.

Trial Counsel also testified. Due to the length of Counsel's testimony and the number of allegations raised in the amended PCR application, Trial Counsel's testimony is included in more

detail herein where each individual PCR claim is addressed. However, the following constitutes a general summary of Trial Counsel's qualifications and preparation for trial,

Trial Counsel Williams testified that he was appointed to Applicant's case as a member of the private bar. He represented Applicant for over a year prior to trial. This case was a conflict case from the Second Circuit Public Defender's Office due to the hiring of one former public defender by the Second Circuit Solicitor's Office. He has been practicing law for thirty years.

Trial Counsel testified that he prepared for trial by speaking with Applicant about the charge and evidence, reviewing all of the documents provided by the State in discovery, and by hiring a series of individuals to assist in the investigation of a defense. He hired a medical examiner to review the autopsy in this case. He hired Roger Sharp as an investigator to speak with witnesses that Applicant himself had pointed counsel in the direction of. This included Applicant's wife Charlene Gerrick, though he never talked to her about the "root" which was at issue at trial. Trial counsel did explain that he informed Mrs. Gerrick that she could retain counsel.

Trial Counsel also testified about consulting with a qualified friend concerning the vegetation surrounding the victim's gravesite. He explained that he did so in an effort to follow a possible lead that would exculpate Applicant by showing that the victim was killed elsewhere. Trial Counsel testified that his investigation ultimately dead-ended.. Related to this investigation, Trial Counsel also explained that he had prepared to put forward a witness in Applicant's defense who would testify that he killed the victim in Santee and came and buried the body in Barnwell County. However, the note written by this witness that would corroborate this defense lost all credibility when the trial testimony of Early Glover came to light. As Trial Counsel recalled, Early Glover testified at trial that Applicant paid him \$1000 to write a note

providing Applicant with an alibi. Trial Counsel testified that he had to make a strategic decision as to whether, after Glover's testimony, his own defense witness would be credible. He decided it would not be credible, but would rather corroborate Glover's testimony delivered on behalf of the State. Moreover, that potential witness invoked his Fifth Amendment privilege during *in limine* hearings at trial. In sum, Trial Counsel explained that he could not corroborate the letter from this witness or the leaves found in the gravesite, and thus decided to abandon this potential defense because in his assessment it would have done more harm than good.

Applicant's testimony chiefly addressed the "root" evidence. He testified that he did not believe in it. He testified that he did not tell his trial counsel that it was in his truck. Applicant was aware that a handwriting expert consulted by his trial counsel confirmed that Applicant himself did not write the note made part of the "root." He testified he did not learn that his wife made it until after he was convicted at trial.

Applicant also testified that he disagreed with trial counsel's decisions about specific jurors excused or elevated from the panel of alternates during the course of trial. He stated that he wanted to keep seated the juror who was dismissed for having a history of mental health issues and that his trial counsel instead made that determination for him. Applicant expressed that he did not see anything about this juror that made her disqualified to serve. Applicant also testified that he did not want to retain Juror 23, who was subject to an in-chambers discussion between the attorneys, but that counsel told the trial court it was okay if that juror stayed on the jury. Applicant expressed he felt that it was a violation of his Constitutional rights to be excluded from decisions regarding these jurors' service.

Applicant called as his final PCR witness Dr. Ross, the forensic pathologist who conducted the victim's autopsy and testified at trial. She testified about the state of

decomposition of the victim's body at the time she conducted the autopsy on August 5, 2011. Referencing her file, she stated the victim was affected by discoloration and skin slippage at the autopsy. His fingernails were falling off. She testified that external factors affect the rate of decomposition such as air type and temperature, body temperature at the time of death, and the location of the body in relation to outdoor elements. Ross stated there was no way to determine precisely how long the victim had passed prior to autopsy. She noted that such a determination would not be for her to conclude, but rather could be done by examining when the victim was last seen or contacted.

Dr. Ross provided PCR testimony about the manner and cause of death. She reported the manner of death as homicide. She testified that in making this determination she considered that the victim's hands and feet were bound and that he was discovered in a shallow grave. She testified the ligatures binding the victim were not part of a consideration of where he was killed. As for the cause of death, Dr. Ross stated it was undetermined. The victim did not show signs of internal bleeding. She stated he may have had defensive wounds but because of the extent of the decomposition, specifically skin slippage, she could not determine them to a precise certainty. Also because of the decomposition, Dr. Ross could not determine whether the victim had sustained a blow to the head, which would have left bruising. Dr. Ross cited asphyxiation as another possible cause of death. The victim did not sustain any visible evidence of choking. He had no inhaled dirt or particles from the earth such that they could be found during autopsy.

The PCR Allegations

The Court now turns to the allegations on the merits in the order presented in the amended application:

- a) *Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.*

Applicant alleges Trial Counsel is ineffective for failing to move for the recusal of Judge Early from the trial based on a conflict of interest with the "root" presented at trial. Applicant argues that the writing on the "root" led reasonable jurors to conclude that the trial court "declined to 'help' Mr. Gerrick keep the law away or obtain his freedom," constituting a judicial opinion that Applicant's trial should proceed. (Applicant's Br. at 20). This Court finds this allegation without merits as no basis for recusal can be found in the record which would lead to a finding of deficient performance or prejudice.

The "root" was found during the execution of a search warrant in Applicant's vehicle. Law enforcement found it in the center console of Applicant's truck and some of the writing on the root included the name of the trial judge presiding over Applicant's case. (Tr. p. 344-47). Trial Counsel moved to suppress the evidence found in the vehicle, arguing it was overly prejudicial and would cause the jury to act on emotion or prejudice. (Tr. p. 36.) The trial court denied the motion to suppress and allowed the "root" in as evidence of consciousness of guilt. Trial Counsel did not move for the trial court to recuse himself from the case based on the root, and the trial court made no mention of the inclusion of his name in the capsule.

At the evidentiary hearing, Trial Counsel testified he saw no reason to move for judicial recusal, and he did not believe the court's failure to *sua sponte* recuse had any effect on the

jurors. He explained that he did not see the trial judge's name on the "root" as the real issue at hand, and that the real issue was Applicant's admission of guilt. On that basis, Trial Counsel did not move for recusal.

Though Applicant now asserts the trial court should have been recused from the case, this argument is meritless, as the mention of his name in the "root" does not create an actual conflict of interest. Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." Canon 3(E)(1), Rule 501, SCACR. "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citation omitted); *Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct.App.2008); see also *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) ("In cases involving a violation of Canon 3, this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice.") (citations omitted). Appellate courts "accord great weight to the trial judge's assurance of his own impartiality." *Id.* It is the movant's responsibility to provide some evidence of the existence of the judge's impartiality. *Lyvers v. Lyvers*, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct.App.1984) (citation omitted).

This Court finds that the presence of the trial judge's name on the root does not form a basis for judicial recusal such that Trial Counsel performed in a deficient manner by failing to move for the trial court to recuse on Applicant's case. The judicial canons do not otherwise provide a basis for recusal fitting of the facts of Applicant's case. Canon 3(E)(1)(a)-(d). The use of the trial judge's name in the "root" introduced at trial does not create any kind of conflict or the appearance of a personal bias or prejudice on the judge's behalf. The trial court made no

mention of his personal opinion on the root during trial and carefully avoided all potentially prejudicial of the root as evidence of “witchcraft.” This Court finds Applicant’s claim attenuated in its base assertion that reasonable jurors would interpret the presence of the only resident circuit court judge’s name on the “root” constituted any specific comment by the court on the facts of the case. As Trial Counsel testified, Applicant’s trial judge was, and is, the only resident judge in the Second Circuit of South Carolina, so it would not be unusual or notable that the note included his name rather than another judge’s name. There is no basis in the record from which one could conclude the trial court reasonably questioned or should have questioned his impartiality, nor was any comment made about the text included in the root which would convey to the jury that the trial court itself had an opinion about the root evidence. Trial Counsel was not deficient as Applicant alleges.

As to any potential prejudice caused by Trial Counsel’s failure to move for judicial recusal, even if, as Applicant asserts, the fact the trial judge’s presiding over Applicant’s case somehow conveyed a personal opinion about the root evidence to the jury, any potential prejudice was cured by the judge’s jury instructions during his charge:

Now, if at any time during the trial of the case you’ve seen me smile or frown or roll my eyes or yawn or stretch or do anything that you think that I have an opinion about the facts, disregard that. I cannot and I do not. I try cases all over the State, day in and day out, week in and week out. And my position does not allow me to have any opinion whatsoever about the facts. That is your sole responsibility, your sole duty to determine what the true facts are in the case.

(Tr. p. 749, line 18 – p. 750, line 1.) This language cured any possibility that the jury could assume the trial judge had a personal opinion about the case and use that to sway their verdict. Our courts “presume juries follow their instructions.” *State v. Young*, 420 S.C. 608, 623, 803 S.E.2d 888, 898 (Ct. App. 2017); *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702 (1987) (noting “the almost invariable assumption of the law that jurors follow their

instructions”). *See also State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (“A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.”); *State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998) (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission). The trial court’s jury instructions directed the jury to disregard any act or appearance on his own part that may intimate to a juror that he has any opinion about the facts. (Tr. pp. 749-50).

Accordingly, because there was no conflict of interest requiring the trial court to recuse, and because that court’s curative jury instructions cured any possible effect the appearance of the judge’s name in the “root” could have had on Applicant’s jury, this Court finds Applicant has failed to demonstrate *Strickland* error-and-prejudice warranting a grant of post-conviction relief on this ground.

b) Failing to investigate and present available evidence explaining the “root.”

Applicant alleges Trial Counsel was ineffective for failing to investigate and present evidence explaining the “root,” which consisted of testimony from Applicant’s wife, Charlene Gerrick, explaining that she created the “root” capsule and placed it in Applicant’s car without his knowledge. Applicant alleges Trial Counsel should have interviewed Charlene Gerrick about the “root.” It was not disputed at trial that Applicant himself did not write the words on the “root,” Trial Counsel himself established this un rebutted fact during his cross-examination of one of the State’s investigators. (Tr. p. 388).

At PCR, Trial Counsel testified that he spoke with Charlene Gerrick about the case, but he did not speak with her specifically about the root because Applicant told him that the “root” was his. Trial counsel’s PCR testimony explained that his concern during his investigation was

the inevitable impression upon the jury that the “root” constituted evidence of consciousness of guilt. Accordingly, Counsel moved to exclude it but was ultimately unsuccessful. (Tr. pp. 36-47, see id. pp. 132-33). Counsel’s pre-trial motion sought to exclude the “root” under SCRE 403 as overly prejudicial by arousing passion in the jury; he renewed the motion post-trial. The motion was denied, and that denial affirmed on direct appeal. Trial Counsel explained that when his motion was denied and the “root” was admitted into evidence, his trial strategy was to try to minimize the “root” as much as possible because it was damaging to his client.

Also at PCR, Charlene Gerrick testified that she put the “root” and the Law Stay Away canister in her husband’s truck, and she did it because she kept hearing around town that her husband killed the victim. She testified that Trial Counsel never interviewed her and had no knowledge about her creation of the “root.” Applicant later testified that he does not believe in “roots,” and he did not write the note around the root in this case or put it in his car. He testified that he did not tell his attorney that he wrote the note.

This Court finds Charlene Gerrick and Applicant’s testimony not credible on this subject, as their testimony directly contradicted Trial Counsel’s credible testimony that Applicant admitted to him during their pre-trial consultations that he was aware of the “root” and that it belonged to him.

This Court further finds Trial Counsel is not deficient for failing to investigate any further information about the “root.” “Without a doubt, ‘[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.’” *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597 (2007) (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986)); see also *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. 2052. Where a significant investigation has been conducted, and a defendant raises a collateral challenge to the strong

presumption that the attorney's investigation was reasonable, a court must look to the specific facts of the case, as well as the decisions of the defendant that may have hindered trial counsel's preparation. *Campbell v. Coyle*, 260 F.3d 531, 553 (6th Cir. 2001). "When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" *Ard v. Catoe, supra* (quoting *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. 2052). To establish deficient performance, it is not enough for the petitioner to show that his attorney's strategy was merely wrong, or his actions unsuccessful; he must demonstrate that the actions his attorney took were "completely unreasonable." See *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997).

The record in this case is clear that trial counsel investigated the issue of the "root" and was informed by his client that he knew about it. Given that information, trial counsel assessed that the root could not assist his client in any way. This determination was reasonable and sufficient in light of the evidence at issue, concluding in an unsuccessful motion to exclude the "root" and the related novelty item—and the post-trial motions that followed on the same bases. This Court finds trial counsel exercised reasonable trial strategy when he moved to exclude the "root" and continued to exercise reasonable trial strategy when he was not successful in his motion and accordingly decided to minimize at trial any mention of the "root" or its implications.

Trial Counsel cannot be deficient where he articulated a valid trial strategy in attempting to minimize the root as much as possible so as not to further harm his client's case. Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995). *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*, 466 U.S. at 688-689. "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).

This Court further notes that in order to present the breadth of the PCR testimony about the "root" at trial, Charlene Gerrick would likely have had to waive her invocation of the spousal privilege to testify to the facts she presented at the PCR. Additionally, Applicant would have had to make the decision to testify at trial, opening him up to cross-examination on a variety of subjects at issue in the case as well as to impeachment. Based on how the trial proceeded, it seems extremely unlikely that either witness would have chosen to testify in this manner under those circumstances. Not to mention that this course runs afoul of the strategic decision-making by Trial Counsel regarding the minimization of the "root" and the attempt to exclude it based on arousal of passion and prejudice.

This Court additionally finds no prejudice flowing from Trial Counsel's performance in regards to his investigation of, and trial treatment of, the "root" given the weight of the evidence against Applicant. Applicant gave multiple statements to law enforcement, all different from the

last, and each admitted at trial. In light of the varying statements and the remainder of the circumstantial evidence presented by the state and outlined above the by undersigned, any additional evidence explaining the root would not have made a difference in the jury's verdict. "As a general rule, any guilty act, conduct or statements on the part of the accused are admissible as some evidence of consciousness of guilt." *State v. McDowell*, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (rule consistently applied thereafter). The root showed consciousness of guilt after the crime was committed, but the other evidence presented was relevant to Applicant's guilt in committing the crime itself. Finally, as held in the direct appeal, the root was admissible in the manner utilized by the State at trial, so it was valid evidence of consciousness of guilt, and any evidence presented to "explain" it likely would not have affected the outcome of the trial.

Accordingly, Applicant cannot prove either prong of the *Strickland* test, and this allegation is denied and dismissed with prejudice.

- c) *Failing to object to the trial judge's opening comments and final instruction on the law, instructing the jurors to find the "true facts" in the opening and closing instructions.*

Applicant alleges trial counsel failed to object to certain instructions to the jury regarding their role in determining the "true facts." Specifically, Applicant points this opening instruction:

... at the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict.

(Trial Tr. p. 145, lines 7-11). Applicant additionally points to two final instructions to the jurors:

It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;

That is your sole responsibility, your sole duty to determine what the true facts are in this case; and

You're here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I've given it to you.

(Trial Tr. p. 748, line 14 – p. 749, line 1; Trial Tr. p. 756, line 23 – p. 757, line 1).

Applicant premises his ineffective assistance of counsel argument on *State v. Aleskey*, 343 S.C. 20, 538 S.E.2d 248 (2000), and the recent decision in *State v. Beaty*, 813 S.E.2d 502 (2018) *reh'g denied* (May 25, 2018) (S.C. citation not yet available). At the evidentiary hearing, this claim was primarily addressed through testimony by Trial Counsel. Trial Counsel testified that while he was not discretely aware of the holding from *Aleksey*, he did not identify a big distinction between an instruction telling the jurors to find the “true facts” or just “the facts.” Trial Counsel later testified that he did not identify the cited jury instructions as misleading or confusing the jury regarding the State’s burden of proof.

On this issue, our State Supreme Court has cautioned that “[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 that 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. That 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* revisited the *Aleksey* decision and held that 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*, 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. 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 instructions Applicant cited do not form the basis for a grant of post-conviction relief. The instructions delivered in this case does not mirror either *Aleksey's* "seek the truth" or "search for the truth" language, or *Beaty's* "just verdict." The language at issue is limited to the phrase "true facts." 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 counsel's performance deficient. As trial counsel's testimony touched upon, the addition of the word "true" as a modifier of the word "facts" does not carry same connotation as instructing the jury that the trial is a search for the truth. "True facts" merely indicates there may be incongruent testimony and they may have to weigh credibility of evidence in reaching their conclusion, which is indeed the jury's role.

Furthermore, 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. *Strickland v. Washington*, 466 U.S. at 697, 104 S. Ct. at 2069. ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."). The

cited preliminary instructions were issued by the trial court in introduction and explanation of courtroom procedure, not as a means of explaining the burden of proof by which they must decide the case. (Trial Tr. p. 145). In the closing charge, the cited instruction regard only the jury's role in the greater scheme of the trial (compared with the court's role as the judge of the law) and role to deliver a unanimous verdict. (Trial Tr. p. 747, line 25 – p. 749, line 1; Trial Tr. p. 756, line 6 – p. 757, line 8). The relevant case law makes it clear that the instructions did not prejudice Applicant because they spoke only generally to the jury's role as the factfinder. Neither *Beaty* nor *Aleksey* contain a mandate that makes their holdings retroactive. *Id.* Moreover, even if counsel had objected and preserved the issue for appellate review, there is no reasonable likelihood of success on direct appeal given the previous findings of the South Carolina Supreme Court in regards to a nearly identical instruction. *See State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994) (jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error). There is no reasonable possibility of a different outcome had counsel lodged an objection to the "truth facts" phrasing.

Accordingly, pursuant to *Aleksey* and *Beaty*, this Court finds Applicant has failed to demonstrate *Strickland* error-and-prejudice warranting a grant of post-conviction relief.

- d) *Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.*

Applicant alleges a due process violation occurred when he was excluded from discussions about possible excusal of two jurors during the trial. He further frames this allegation as one of ineffective assistance of counsel for failing to object to his exclusion from the proceedings. This Court finds he has failed to meet his burden of proving either allegation.

First, this court notes Applicant's due process violation allegation is barred by the *Simmons* doctrine. When a PCR claim was proper on direct appeal, it is not cognizable in the present action. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). An action for PCR "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B). When the *Simmons* doctrine applies, summary dismissal is appropriate. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005).

Regardless, this Court finds Applicant has failed to prove a due process violation occurred. Applicant's right to be present was not violated in this case because of the record made by the trial court regarding the initial in-chambers discussions. "A defendant has the right to be present at any stage of the criminal proceeding that is *critical to its outcome* if his or her presence would contribute to the fairness of the procedure." *Starnes v. State*, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991) (emphasis in original). This may include "when a trial judge conducts voir dire during the course of the trial to determine the jury's continued impartiality." *State v. Rivers*, 294 S.C. 123, 125, 363 S.E.2d 105, 106 (1987). A violation of the right to be present may occur when a court's mid-trial voir dire of a juror occurs in the jury room *without the presence of counsel*. *Id.* (emphasis added). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 105-08, 54 S.Ct. 330, 332-33 (1934).

Here, the alleged due process violation does not form a basis for relief. *State v. Caldwell*, 300 S.C. 494, 500, 388 S.E.2d 816, 819 (1990), *overruled on other grounds by State v. Evans*, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006) ("the exclusion of a defendant from a trial

proceeding should be considered in light of the whole record”). The in-chambers discussions included counsel for both parties and were revisited on the record. (Tr. pp. 139-41, 481-82). Thus, the in-chambers talks were not in and of themselves critical to the outcome of the proceedings. The trial court presented the context of those discussions on the record, lending counsel an opportunity to agree or disagree with the characterization, and further lending an opportunity for counsel to alter his course after consulting with his client. *See State v. Faries*, 125 S.C. 281, 118 S.E. 620, 621 (1923) (“At the hearing of these motions the defendant was represented, and was fully heard by his able counsel. His personal presence could have subserved no useful purpose. It cannot be assumed, certainly in the absence of an affirmative showing, that he would have elected, if present, to be heard by himself as well as by counsel.”).

As to the ineffective assistance of counsel allegation framed in the application, this Court finds Applicant has failed to meet either prong of the *Strickland* test. *See Weaver v. Massachusetts*, __ U.S. __, __, 137 S.Ct. 1899, 1910 (2017) (applying *Strickland* error-and-prejudice standard to claim of ineffective assistance of counsel for an alleged violation of the defendant’s right to public trial).⁴ Counsel established through his PCR testimony a strategic decision as to each Juror #23 and #9 which is entitled to deference in this action. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (“There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.”).

Juror #23 was elevated from an alternate to the regular jury panel “and as she was going home [one] night [after trial] she informed one of the deputies that on her Facebook account she

⁴ *Weaver v. Massachusetts*, *infra*, is instructional on the point of the application of the *Strickland* standard, but does not otherwise govern the type of violation alleged to have occurred in this case.

was a [“friend”] to one of the witnesses who had testified yesterday. . . . And she said that she really didn’t even know that particular witness, they just happened to be on Facebook.” (Tr. p. 481). There had been no correspondence between them on that social media platform. (Tr. p. 482). The initial in-chambers discussion concerning this information about Juror #23 was revisited on the record, at which time Applicant was present and trial counsel had an opportunity to alter his position regarding whether the juror should continue or be excused. (Tr. p. 482). At PCR, trial counsel testified that he took the position that he wished to keep Juror #23 on the jury because it thought that the fact that the juror had come forward about being Facebook friends with the witness indicated that Juror #23 was a good, honest juror. Thus, her continuing on the jury did not concern counsel. Given that the juror candidly expressed that she could be impartial, did not have any communication with the witness and that any interaction was limited to a simple “connection” via a social media platform, counsel made an objectively reasonable decision to retain that juror.

In a similar vein, Juror #9 was released after an on-the-record discussion regarding the concerns leading to the juror’s excusal. The trial record reflects that this juror appeared before trial counsel’s wife, who was a probate judge, for “mental health issues,” and some of the issues presented to the court left it with “great concern as to her ability to serve as a juror.” (Trial Tr. p. 14). Ultimately, the trial court decided that this juror should not continue.⁵ (Tr. pp. 139-41). At PCR, trial counsel testified that he did not wish to have a juror whose competency may be questioned due to a known history of mental health issues, and that he in fact preferred the alternate juror who was elevated in place of Juror #9. Again, counsel calculated a reasonable

⁵ The trial court decided on another occasion to remove a juror who was sleeping. Counsel for neither side objected. (Trial Tr. p. 281). The excusal of this juror mid-service led to the elevation of Juror #23 (Trial Tr. p. 282).

reaction to the court's concerns with the jurors and in fact ended up with a juror he assessed was more favorable to his client.

Thus, as to both jurors, the record developed at PCR evidences another series of strategic decisions made by able, credible counsel with thirty years of practice experience, and no finding of ineffective assistance is warranted. *Strickland, supra*. *Whitehead v. State, supra* (addressing deference owed strategic decisions by trial counsel); *Roseboro v. State, supra*; *Underwood v. State, supra*; *Stokes v. State, supra*.

Furthermore, Applicant was not prejudiced by the excusal of Juror #9 and retention of Juror #23. Applicant must demonstrate he was actually prejudiced by the inclusion and exclusion of the cited jurors. *See Weaver v. Massachusetts, supra*. The relevant question on whether juror's service prejudiced a defendant is whether there is any indication in the record that the challenged jurors, or the jurors who did serve, did so without impartiality. *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 326 (2002); *see State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247-48 (2002) (finding that a juror's "scant acquaintance" with the defendant's family would not have prejudiced the State had the juror remained on the jury); *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("Unless the misconduct affects the jury's²⁵⁵ impartiality, it is not such misconduct as will affect the verdict."); *Williams*, 321 S.C. 455, 460, 469 S.E.2d 49, 52 (1996) ("[W]e discern no prejudice to [the defendant] from the seating of the alternate juror here."); *State v. McDaniel*, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980) ("The alternate juror had been approved by both sides at the inception of the trial, and there is no showing that appellant withdrew that approval at the time of substitution. Moreover, appellant has failed to establish in what manner this procedure prejudiced him."). There is no right to be tried by a jury composed of particular individuals. *State v. McDaniel*, 275 S.C. 222, 268 S.E.2d 585 (1980). This Court

finds the record in this case void of any inference of actual prejudice caused by the excusal of Juror #9 and retention of Juror #23, as there exists no evidence of bias or other improvident mindset.

Given the foregoing, Applicant's claim is speculative at best and Applicant has failed to meet his burden of demonstrating *Strickland* error-and-prejudice. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial); *see also Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden). Thus, there exists no basis in the record for a grant of post-conviction relief, and this allegation is denied and dismissed with prejudice.

- e) *Failing to make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors' minds as to deny Mr. Gerrick due process*

Applicant alleges Trial Counsel was ineffective for failing to object or to stipulate to photographs of the victim's body. However, he has failed to meet his burden of proving counsel was ineffective in this regard. The trial record evidences that counsel in fact acted in the manner alleged deficient, filing a motion to exclude photographs of the autopsy and the victim at the crime scene, and also stipulating to the introduction of others (some in lieu of publishing the physical ligatures removed from the victim's body). (Trial Tr. pp. 33-36). This Court finds the application of the *Strickland* standard to this claim provides no basis for relief.

At trial, Trial Counsel objected to the photographs of the body at the time they were offered by the State. The parties immediately conferred and agreed upon which photos the State

would introduce. (Trial Tr. pp. 411-13). The record also evidences that some photographs were eliminated from the State's intended introduction. (Trial Tr. p. 419). The photographs entered into evidence depicted the condition of the victim as discovered and the process by which he was withdrawn from the shallow grave, including details associated with the condition of the gravesite. (Trial Tr. pp. 410-21).

At PCR, Counsel recalled the photographs coming in, commenting that the State had an issue regarding the origin of the ligatures found on the victim's body. Trial Counsel testified that he did not want the ligatures themselves introduced. Trial Counsel testified he conferred with the State as well as the trial court regarding what photographs would be excluded, and that the total number of photos the State sought to introduce was in fact reduced. Counsel testified that he gave consideration to the total number of photographs and thought the best course of action was to limit that number since he was aware the court would allow at least some into evidence. Trial Counsel expressed he was cognizant that the photos of the victim are ordinarily relevant to the case, and were in this particular case as well.

On this record, there can be no finding of deficient performance or prejudice. First, as to counsel's decision to confer with the State and consent to the limitation of photographs, that course of action denotes a reasonable exercise of valid trial strategy. Any post-conviction relief court 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). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). Trial counsel did not act unreasonably by expecting that the

trial court would find some photographs of the body admissible. He testified that, in his experience, some photographs would be coming in regardless of the extent of his objection.

Applicant also has not met his burden of establishing prejudice in regards to this claim. The photographs were ⁷⁵⁵inadmissible so that, even had trial counsel taken some alternate course of action, there remains no reasonable probability of a different result at trial. Photographs "are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (no abuse of discretion in admission of pre-autopsy photographs of child victim mauled by dogs); *see also State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) (in prosecution for murder and lynching, gruesome autopsy photographs held more probative than prejudicial and relevant to issue of malice). When photographs, even gruesome ones taken prior to autopsy, corroborate witness testimony and illustrate the circumstance of the crime, they will be deemed admissible. *State v. Collins*, 409 S.C. at 536, 763 S.E.2d at 28. "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996).

Notably, Applicant did not incorporate the photographs into the PCR record in this case. However, the remainder of the record demonstrates that the photographs identified by Applicant served to corroborate other circumstantial evidence. Applicant was seen putting two shovels in the back of his truck and driving towards the area where the body was found. The victim was seen following Applicant in that direction. (Trial Tr. pp. 230-31, 234-36, 542-43, 574-76). The victim was located in a shallow grave, his arm outstretched around an underground root. (Trial Tr. pp. 410-21). The discovery of the victim's body in a shallow grave was not disputed at trial, but the location and condition of the body and gravesite were relevant to the State's case.

Photographs of that gravesite and of the victim's body during autopsy were probative of factual issues before the jury such as the timing and manner of death. The forensic pathologist in this case could not determine, to any reasonable degree of certainty, how the victim died. "Where the State had the burden of proving the elements of the offenses charged and there were no eyewitnesses to the incident resulting in the victim's death, the photos here provided concrete evidence as to what transpired on that fateful day." *State v. Collins, supra* at 536, 763 S.E.2d at 28. The photographs were relevant to the integrity of the investigation as well.

Given the status of South Carolina jurisprudence on this issue, any likelihood that Applicant would have prevailed in eliminating the photographs in some other manner is substantially low. Though this Court concludes that Trial Counsel did not render deficient performance in the manner in which he objected to and resolved the admission of the photographs at trial, even assuming Trial Counsel acted in error, there can be no prejudice from his tactical decision in this regard because there is no likelihood of a different result at trial. Accordingly, this allegation is denied.

f) Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.

Applicant alleges Trial Counsel was ineffective for failing to move to exclude from trial the testimony of his wife Charlene Gerrick as "fruit of the poisonous tree" obtained in violation of her spousal privilege and as a result of improper witness intimidation. Charlene Gerrick testified at PCR that she was interviewed by SLED investigators, and she was not advised during these interviews of her spousal privilege rights. She stated that she asserted her privilege at trial, but she testified about moving the victim's car from the woods to a Chinese restaurant in

Orangeburg. She testified law enforcement would not have known about the car without the information she gave them during her interview.

This Court finds no deficient performance or prejudice in regards to Trial Counsel's failure to move to exclude Charlene Gerrick's trial testimony. The trial record reflects that Charlene Gerrick's trial testimony remained within the boundaries allowed by a witness who has invoked the spousal privilege. South Carolina Code Section 19-11-30 provides that, in criminal proceedings, "no husband or wife may be required to disclose any communication made by one to the other during their marriage." The privilege belongs to the witness and cannot be invoked by the other spouse. *State v. Motes*, 264 S.C. 317 (1975). The spousal privilege applied to Charlene Gerrick such that only Charlene Gerrick could invoke it, which she did. S.C. Code Ann. § 19-11-30; *State v. Motes*, 264 S.C. 317, 324, 215 S.E.2d 190, 192-93 (1975) ("the right to exercise the privilege against disclosing marital communications is solely that of the witness spouse from whom the privileged information is being sought").

Invocation of the privilege does not stop law enforcement officer testimony regarding what transpired after speaking with the witness who invoked the privilege. *State v. Copeland*, 321 S.C. 318, 468 SE2d 620 (1996). Gerrick's invocation of the privilege did not preclude fact testimony about what transpired and formed no basis for a motion to exclude. *Id.*

Trial Counsel did move pre-trial to exclude Charlene Gerrick's testimony about her communications with her husband. The trial court ruled that the privilege was the witness's to invoke, and she would need to invoke it at the proper time. Trial Counsel ensured Charlene Gerrick was given the opportunity to invoke her right during the trial outside the presence of the jury. However, her assertion of the spousal privilege did not prevent the State from questioning her as a fact witness about events in which she partook that were directly relevant to the

investigation into the victim's disappearance and the discovery of his body. *State v. Copeland, supra.*

Trial counsel testified at PCR that he was aware of the statements Charlene Gerrick had provided to law enforcement as part of the investigation. He testified he advised Charlene Gerrick of her right to seek representation by independent counsel. She did not do so until the PCR hearing. And, to the extent Charlene Gerrick testified at trial, the record reflects that the court and the parties respected her invocation the spousal privilege and her testimony did not divert from the boundaries prescribed. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). No communications between Charlene and Sammie Gerrick were made to be placed on the record. She served solely as a fact witness. (Tr. pp. 302-10; *see id.* pp. 294-98). Any statement(s) Charlene Gerrick submitted to law enforcement were not made part of the trial record.

Trial Counsel also testified at the evidentiary hearing that he believed he had no basis on which to move to suppress any of this testimony as "fruit of the poisonous tree" because he did not have standing to raise that issue; only Charlene herself had standing, as it was her right that was allegedly violated.

This Court finds no error or prejudice related to Trial Counsel's failure to move to exclude Charlene Gerrick's testimony as "fruit of the poisonous tree" because Trial Counsel could not have successfully moved to suppress on this basis. Thus, he cannot be deficient for failing to do so. "[A] defendant challenging the admissibility of evidence obtained in violation of constitutional rights must often show he is challenging the evidence based on a personal violation of *his* rights by the manner in which the evidence was obtained[.]" *State v. Miller*, 359 S.C. 589, 598–99, 598 S.E.2d 297, 302 (Ct. App. 2004), *aff'd*, 367 S.C. 329, 626 S.E.2d 328

(2006) (emphasis added) (“Thus, where one does not have an expectation of privacy, he may not challenge the admission of evidence based on the violation of another’s right to privacy.”).

Furthermore, as a result of *Copeland*, any error in Charlene Gerrick’s testimony would not change the outcome of the trial because the law enforcement testimony about taking Charlene to the white Honda at the Chinese restaurant was still admissible, so there can be no prejudice. This Court further finds that Mrs. Gerrick’s testimony concerning the alleged threat is not credible. Trial counsel credibly testified at PCR that Mrs. Gerrick made a video-recorded statement that he reviewed and discerned to contain no evidence of threat or intimidation. Mrs. Gerrick did not act upon the alleged receipt of any threat until the PCR hearing, despite meeting with multiple law enforcement agencies over the course of investigation and being advised by trial counsel that she could retain counsel in regards to any threat received. Because neither prong of the *Strickland* test is met, this allegation is denied and dismissed with prejudice.

g) Failing to object to improper victim impact evidence that was not relevant and which were intended not arouse sympathy, passion, and prejudice in the jurors’ minds.

This Court finds without merit Applicant’s allegation that Trial Counsel failed to object to improper victim impact testimony. Ordinarily, true victim impact evidence should be reserved for the court’s consideration at sentencing. S.C. Code § 16-3-1550(F) (“The circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing. . . . The victim impact statement and its contents are not admissible as evidence in any trial.”); *State v. Hill*, 331 S.C. 94, 105, 501 S.E.2d 122, 128 (1998) (addressing admissibility of victim impact evidence at sentencing phase of capital trial).

This Court finds that the evidence Applicant alleges was improper victim impact evidence was not offered as victim impact evidence at trial. Rather, the record evidences that the

State extracted the cited testimony to corroborate circumstantial evidence for the purpose of establishing Applicant's guilt beyond a reasonable doubt.

This case was based upon circumstantial evidence. "Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct.App.2013). "The State must prove the *corpus delicti* of the murders with evidence from a source other than" a defendant's extrajudicial statements. *Hill v. State*, 415 S.C. 421, 433–34, 782 S.E.2d 414, 420-21(Ct. App. 2016) ("The corroboration rule applies whether a statement amounts to a confession or merely constitutes an admission of essential facts from which guilt might be inferred."); *State v. Osborne*, 335 S.C. 172, 179–80, 516 S.E.2d 201, 204–05 (1999) (. . . the corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred."); *see also Oppen v. United States*, 348 U.S. 84, 92-93, 75 S.Ct. 158, 164 (1954) (exculpatory statements are not an exception to rule that an accused person's extrajudicial, post facto admissions of essential facts or elements of a crime must be corroborated).

The evidence this Court can identify as being construed by Applicant as "victim impact evidence" was on each account not offered as the type of evidence deemed inadmissible by statute. Consider the following testimonies from the trial transcript in relation to the State's case at large.

The first witness to testify, the victim's girlfriend, mentioned the victim having children and that he was their main caretaker because his wife and mother-in-law had passed away. He

testified he also cared for his sister-in-law. (Trial Tr. pp. 160-163). Maurice Williams, a friend of the victim and acquaintance of Applicant, testified that on the day of the victim's disappearance, he had confided in Williams that he was interested in remarrying and moving to Aiken or Myrtle Beach. (Trial Tr. pp. 183-184). Williams also testified that Applicant took care of his children, that his wife had died, and that he had received a settlement as a result. (Trial Tr. pp. 176-77). Lana Joyner's testimony established that she was friends with the victim and knew that he had received a monetary settlement from his wife's death. She said she had known him her entire life and during that time had never known him to be involved with drugs. She testified that "he was nice, he was caring. He loved his kids, [and] he ain't never bothered nobody." (Trial Tr. pp. 493-94).

On each account, these blips of testimony were offered as probative evidence of whether the victim would have conformed with the versions of events put forward by Applicant throughout the course of the investigation. Did the victim have money to lend Applicant to bail him out of jail, and where did it come from? Would it have come from making an honest living? Is it credible that the victim would have engaged in a drug deal that resulted in his death? The jury learned through Joyner and Williams that Applicant had received a monetary settlement from his wife's wrongful death; any money he had to lend Applicant came from honest means. They heard from Joyner that the victim was not known to have been involved with drugs. Would the victim ordinarily have gone "off the grid," refusing to return phone calls and text messages from the loved ones in his life? Was it credible to believe he would have skipped town without informing those closest to him or taking them with him? Each witness testified this was not ordinary for the victim. Williams and the victim's girlfriend established that the victim was responsible for a family; he was the primary caretaker of his children. A series of witnesses

testified at trial that they engaged in regular two-way communication with Applicant throughout the day.

In a case where the victim disappeared without a trace and was found days later face-first in a shallow grave, these witnesses' testimonies established particulars about the victim's daily life which assisted the jury in assessing the weight of the swath of circumstantial evidence introduced in this case, specifically, the credibility of Applicant's versions of events. Because the evidence at issue was not offered as victim impact evidence but rather was offered as corroboration, the testimony was admissible as proof of the *corpus delicti*. Accordingly, this Court finds trial counsel did not render deficient performance or prejudice Applicant by failing to object to the above-cited testimony as victim impact evidence. When evidence admitted without objection is admissible, "then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001).

Also on this issue, Trial Counsel testified that he perceived this testimony to be background about the victim. He testified he did not object to the limited nature of this testimony because he did not want the jury to think he was trying to hide something. Counsel said that had the evidence at issue implied more, he would have objected. His testimony on this point evidences an exercise of valid trial strategy which cannot now, in hindsight, be deemed deficient. *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) ("when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel"). This Court therefore finds that because the evidence at issue was evidence corroborative of other material facts before the jury's consideration, it was

reasonable for trial counsel to interpret, as he testified to at PCR, that evidence was background and elect not to object for the reasons testified to at the evidentiary hearing.

Accordingly, Applicant failed to meet his burden of demonstrating *Strickland* error and prejudice on this allegation of ineffective assistance of counsel for the failure to object.

i) Failing to object to impermissible character testimony that violated Rule 404, SCRE

Applicant alleges Trial Counsel was ineffective for failing to object to instances characterized as evidence of prior bad acts which were not properly admitted under Rule 404, SCRE. He points to testimony that Applicant had "been in a little trouble before." (Tr. p. 205, line 12.) He likewise points to Applicant's statement read at trial which included an admission that he picked up an escape charge for running through the door of the courthouse and pushing down a sheriff. (Tr. p. 269, line 1-6.) There was also testimony about Applicant being transported by the U.S. Marshal's Task Force when he was incarcerated at the Charleston County Detention Center. (Tr. p. 333, line 7-12.) As to the testimony of Shaneka DeLoach cited by Applicant in his Post-Hearing Brief, she offered testimony at ^{trial in} ~~trial in~~ relation to her identification of Applicant and was challenged on cross-examination by trial counsel when he pointed out that this witness was way across the road from where she saw Applicant, whom she did not know well. (Trial Tr. pp. 239-40 (Q: "But you don't know Sammie Gerrick that well; right"? A: No, I don't. Q. And some people move their arms like this (indicating) when they talk and some people don't; correct? A: Yes. . . .))).

This Court finds Applicant was not prejudiced by the lack of objection to the introduction of this evidence. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 ("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 . . .") Any testimony regarding Applicant being

incarcerated before or during the crime in question is admissible as *res gestae* evidence, such that no prejudice flows from its introduction by either the State or by trial counsel. "Under the *res gestae* theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct.App. 2004); *State v. Simmons*, 352 S.C. 342, 573 S.E.2d 856 (Ct .App. 2002) (finding evidence of burglary occurring the same night as the burglary for which defendant was convicted "was necessary for a full presentation of the case without fragmentation.")). *Res gestae* provides for the admissibility of other bad acts when such evidence is close in time to the charged crime and "'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the 'case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case" that its proof completes "the story of the crime on trial by proving its immediate context" *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (quoting *United States v. Masters*, 622 F.3d 86 (4th Cir. 1980)).

The evidence at trial which reflected that Applicant was in custody at various times was relevant to the investigation into the victim's death because the circumstances under which the victim was last seen alive directly pertained to his bailing the Applicant out of jail. (See Tr. pp. 179-85, 214-18). Because this evidence was admissible as *res gestae*, any mention characterized by Applicant as evidence of "prior bad acts" likely had no prejudicial effect on the outcome of the trial, as the jury was already aware that Applicant had served time in jail for other crimes. The crux of the case was that the victim had to bail Applicant out of jail and then the victim went missing when it was time for Applicant to pay him back. Some of the evidence subject to this PCR allegation was also contained within, or pertained to the circumstances in which Applicant

provided, a number of statements to law enforcement over the course of the investigation. (Trial Tr. pp. 269, 333). Furthermore, compared to the amount of corroborative evidence of Applicant's guilt as delineated in the undersigned's above statement concerning the facts presented at trial, any potential error in the admission of the "prior bad acts evidence" cannot be said to have prejudiced Applicant under *Strickland*.

This Court finds there is no deficient performance or prejudice flowing from counsel's representation in regards to this allegation. Accordingly, this Court denies and dismisses this allegation with prejudice.

(k), (m), (n) Trial Counsel's failure to object to the State's closing argument

Applicant alleges that counsel failed to object to the portions of the State's closing argument which Applicant now identifies as: (k) being unsupported by the evidence in the case and misstating testimony presented at trial; (m) intended to arouse sympathy, passion, and prejudice among the jurors and urging them to seek justice for the victim rather than determine whether the State met its burden of proof; and (n) intended to arouse sympathy, passion, and prejudice among the jurors due to their defaming Applicant. This Court finds Applicant has failed to meet his burden as to these claims.

Regarding prejudice, the underlying question before this Court on this conglomerate of allegations is "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998). "Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). "[I]ts content should stay with

the record and reasonable inferences to it.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor’s closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

However, any excerpt of the State’s closing exists as “one moment in an extended trial.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). Accordingly, a court must conduct an “examination of the entire proceedings” in context. *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* (“We must review the [closing] argument in the context of the entire record.”); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990). Even “[i]mproper comments do not require reversal if they are determined not to be prejudicial to the defendant.” *State v. Navy*, 370 S.C. 398, 412, 635 S.E.2d 549, 556 (Ct. App. 2006), *aff’d in part, rev’d in part on other grounds*, 386 S.C. 294, 688 S.E.2d 838 (2010). “Arguments of counsel are not considered so inflammatory as to require a reversal where ‘counsel responds in kind to a previous argument of opposing counsel.’” *Id.* (quoting *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 258, 509 S.E.2d 269, 271 (1998)).

Regarding the alleged failure to object, there exists in this action the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant’s trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). “[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel’s strategy is viewed under an ‘objective standard

of reasonableness.” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). 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. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Any post-conviction relief court must be wary of second-guessing trial counsel’s tactics. *Whitehead v. State*, 308 S.C. at 122, 417 S.E.2d at 531. “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Smith v. State*, 386 S.C. at 567, 689 S.E.2d at 632 (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

In support of these allegations, Applicant referred at the evidentiary hearing to a series of instances in closing argument where the State referred to Applicant as lying and concealing the truth. (See Trial Tr. pp. 696-740). Trial Counsel, however, testified that he did not recognize anything particularly inflammatory within the State’s closing. He credibly testified he felt that the State’s closing permissibly commented on the record established at trial. He testified he felt that objecting to the State’s closing would draw negative attention and may damage his own credibility with the jury. He explained that his general trial strategy is not to object where counsel believed the jury may interpret the objection as an attempt to hide something. Trial counsel further testified that he was acutely aware that the problem inherent in defending Applicant was the number of inconsistent statements he made to law enforcement. In his final statement to law enforcement, Applicant placed himself at the scene. Trial counsel could not corroborate his statements during his investigation into Applicant’s defense. In order to retain his credibility with the jury, counsel testified, he had to concede that the Applicant indeed changed his story over time and not all statements could be explained. Trial counsel also credibly testified that in his analysis of the case, Applicant’s inability to refrain from giving statements to law

enforcement harmed his defense. Based on the record established by Trial Counsel at PCR, this Court finds that counsel exercised objectively reasonable trial strategy in refusing to object to the State's characterization of Applicant during closing argument such that the failure to object was not deficient performance. *Smith v. State, supra*; *Lounds v. State, supra*; *Whitehead v. State, supra*.

This Court further finds the failure to object cannot be determined to have prejudiced Applicant in any event. Ineffective assistance claims based on failure to object can reasonably be tied to the admissibility of the underlying evidence. *Hough v. Anderson*, 272 F.3d 878 (7th Cir. 2001); *see Thompson v. State*, Op. No. 27785, 2018 WL 1404480 at *2 (Mar. 21, 2018) (Shearouse Adv. Sh. No. 12 at 14) (deficient performance found for failure to object to inadmissible hearsay evidence), *pet. for reh'g pending* (June 6, 2018); *see also, Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"). On a similar closing argument allegation, the South Carolina Court of Appeals has held that, while the State delivered an "aggressive" closing when it referenced the defendant as a liar on multiple occasions, the closing was not so inflammatory as to require reversal. *State v. Navy, supra* at 414, 635 S.E.2d at 557. This was because, in the context of the evidence presented at trial, "the solicitor's closing argument was a direct response to [the] defense and merely pointed out the problems with [the defendant's] argument based on the evidence of record." *Id.* The closing argument delivered in Applicant's case was comparably permissible, as it was confined to the unique record developed at trial.

The trial record demonstrates Applicant provided a series of voluntary, yet incongruent statements to law enforcement. Each time law enforcement received a new tip in their investigation, Applicant came forward with "a new story which would explain the new

information.” (Trial Tr. p. 605). Applicant first explained that the victim bailed him out of jail and took him home, where Applicant took a shower. Trial Tr. pp. 270-71 (“I then went in, shave, cut my hair and showered.”)). Applicant said that went to Enterprise Bank and the Junior Food Mart with the victim, but then went home. (*Id.*; Trial Tr. pp. 266-67). Then Applicant said he has access to the victim’s bank account because they had joint ownership of \$18,000 from a backhoe. (Trial Tr. p. 322-24). Days later, Applicant contacted Chief Holston to say that “Black” held the victim for \$25,000 ransom, but did not re-contact the Chief with proof of life or contact information as requested. (Trial Tr. p. 274-79).

Even later, having discovered the victim’s body, law enforcement brought Applicant in for another interview, confronting him with the information about the victim’s car. (Trial Tr. p. 333). Applicant admitted to being in Orangeburg, but did not come forward with information that he was at the crime scene. (Trial Tr. p. 350). It was not until he was served with the murder warrant that Applicant began to claim that he remained with the victim after their stop at the Junior Food Mart. (Trial Tr. pp. 361-62). After Lieutenant Harley told him homeowners on the road saw his truck, Applicant changed his initial story about never being present at the crime scene. (Trial Tr. pp. 369-71).

Applicant next divulged a drug deal which allegedly also involved Andre Hightower and O’Shane Dixon. (Trial Tr. pp. 509-604). Both Hightower and Dixon testified that they had no knowledge or involvement with a drug deal; they had an alibi for the day the victim disappeared. (Trial Tr. pp. 558-66). Dixon added that Applicant kept calling him after the victim disappeared to see if Dixon knew anything about the investigation. (Trial Tr. pp. 565-66). Applicant instead stated that he was instructed by Hightower to move the victim’s car to Orangeburg in exchange for \$400. (Trial Tr. pp. 364-68). He was arrested at this point, and on the morning after his arrest

asked to speak with law enforcement again, now claiming he looked on as the others involved in the drug deal beat the victim. (Trial Tr. pp. 599-604). The victim allegedly arranged the drug deal with "Big Joe" from Georgia, and Applicant stated that he went along on the deal because he was supposed to receive some of the funds. (Trial Tr. p. 363). However, the victim had no connection to drugs, nor did he test positive for any drugs during autopsy. (Trial Tr. pp. 376, 453).

Then, Early Glover testified at trial that months after the crime, Applicant promised him \$1000 in exchange for copying a statement that said he and Glover were present when the victim was beaten, but that neither of them had anything to do with it. Applicant wrote the statement and Glover copied and signed it. Applicant never mentioned Early Glover in any prior statement, but did send a letter to SLED stating that somebody could vouch for his innocence. (Trial Tr. pp. 372-74, 583-88).

Further, to the extent Applicant contests that evidence does not conclusively demonstrate that Applicant took a shower on the afternoon in question, a statement by Applicant admitted at trial stated that the victim bailed him out of jail and took him home, where Applicant took a shower. (Tr. pp. 270-71 ("I then went in, shave, cut my hair and showered.")). Also, as to the portion of Applicant's Post-Hearing Brief which takes issue with the State's reference to witness Taylor White's testimony in closing, the State argued that White's testimony about changing clothes and walking into the laundry room circumstantially corroborated Applicant's own statement that he took a shower. (Tr. pp. 721-22). The argument matches the substance of White's trial testimony in this regard. (Tr. pp. 222-23).

The portion of the State's closing which addresses the condition of the victim's body also aligns with the testimony delivered by the forensic pathologist at trial. (Tr. pp. 731). Dr. Ross

testified at trial that the body was in a moderate-to-advanced state of decomposition at the time of autopsy, that she could identify “probable defensive wounds” on the victim, that there was evidence the victim had been bound, and that “it is most likely that there was some kind of asphyxiation” or “strangulation around the neck . . . as a cause of death.” (Tr. pp. 439-48). The record, therefore, directly reflects the facts and reasonable inferences therefrom which were argued by the State in closing. (Trial Tr. pp. 696-740).

In light of this evidence and the remainder of the circumstantial evidence presented, (*infra* at pp. 3-16), the State’s closing argument tracked the evidence of (1) motive, (2) opportunity, and (3) guilty acts in the context of the record developed at trial. (*E.g.* Trial Tr. p. 707). The State argued that the number of different statements Applicant provided law enforcement could not be corroborated or squared with the chain of circumstantial evidence presented at trial. (Trial Tr. pp. 696-744). The characterizations singled out by Applicant during the PCR hearing were supported by, and contained to, the record presented. It could reasonably be inferred from the record in this case that Applicant was in fact concealing the truth in the statements he delivered. As law enforcement presented Applicant with more information about the victim’s disappearance, Applicant would deliver a statement which was inconsistent with the last and which would explain away the additional details with which he was confronted.

Additionally, the State’s closing argument was delivered in response to trial counsel’s own closing. Trial counsel’s closing acknowledged that Applicant provided a series of inconsistent statements that counsel himself could not quite square away, but counsel also asked the jury to refuse to believe the State’s chain of events because their version did not quite add up either. (Trial Tr. pp. 687-95). Trial counsel characterized Applicant as “the boy who cried wolf,” arguing to the jury that Applicant may have given inconsistent statements, but that he finally told

the truth at the end. (Trial Tr. pp. 692-94). On June 13, 2018, the South Carolina Court of Appeals addressed an argument concerning the order of closing argument discussion from *State v. Beaty* in its opinion *State v. Shands*, Op. No. 5569, Adv. Sh. p. 63 (S.C. Ct. App. filed June 13, 2018) (Shearouse Adv. Sh. No. 24 at 59). In *Shands*, the Court of Appeals held that the closing argument delivered by the State, which was the final closing in that case, did not violate the defendant's due process rights because the defense was aware of the State's theory of the case at the time it delivered its closing argument and thus "could have used his closing argument to respond to them." *Id.* at 77. Further, that the State's comments during its reply closing argument "were arguably in response to Shands's closing argument" and thus were not prejudicial. *Id.* at 78. This Court finds this principle from *Shands* instructive. Applicant could not be prejudiced by the State's closing argument, which addressed Trial Counsel's theory that Applicant was "the boy who cried wolf."

Given that the trial record reflects that State contained its argument to the record and reasonable inferences therefrom, this Court finds that Trial Counsel was not deficient for failing to object for the reasons alleged and that no prejudice flows from the State's closing argument which was delivered without objection by trial counsel. Accordingly, Applicant's allegation fails to meet *Strickland's* error-and-prejudice standard and this Court denies and dismisses claims (k), (m), and (n) with prejudice.

- (l) *Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.*

Applicant alleges Trial Counsel was ineffective for asking for an opportunity to respond to the prosecutor's closing. As to this specific claim, Trial Counsel testified that he was aware

that there is a rule regarding the order of closing arguments. The rule, counsel correctly testified, is that where the defense put in evidence, the State gets the final closing. *State v. Gellis*, 158 S.C. 471, 485-86, 155 S.E. 849, 855 (1930) (“if a defendant offers any evidence on trial of the case, the state is not deprived of its general right to the opening and concluding arguments”). Counsel further testified he was aware that the presiding judge not only followed that rule, but followed a routine practice of having the State’s initial closing argument be only “on the law” in such a circumstance, saving argument on the facts of the case for the end. *State v. Lee*, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971) (holding “a solicitor is no longer required to make an opening argument to the jury on issues of fact” even where requested by defense counsel); Rule 37, SCRCrimP (“where no provision is made by statute or these rules, the procedure shall be according to the practice as it has heretofore existed in the courts of the State”). Counsel also testified that when he made the strategic decision to put in evidence at trial, he made that decision with awareness that doing so waived his right to have the last word before the jury.

This Court finds no deficient performance or prejudice in regards to this allegation. The order of closing argument has not changed by either judicial opinion or a change in the rules of procedure. *Beaty*, 813 S.E.2d at 510. The recent opinion in *Beaty* did not alter the practice or procedure of closing arguments in a criminal trial.⁶ *Id.* (“Absent authority to formally adopt

⁶ Our current closing argument rules consist of the following patchwork: Pursuant to the common law rule pronounced in *Brisbane* and as clarified in *Garlington*, in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State’s closing argument. Pursuant to the common law rule set forth in *Huckie*, if two or more defendants are jointly tried, if any one defendant introduces evidence, the State has the final closing argument. Pursuant to the common law rule as clarified in *Gellis*, in cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether

procedural rules, our authority—and the authority of the trial court—is but to address due process considerations as they arise.”). Instead, the *Beaty* court stressed “trial judges must, on a case-by-case basis, ensure that a defendant’s due process rights are not violated during the closing argument stage.” *Id.*

While making a plea for the adoption of a procedural rule to address the issue before it, *Beaty* ultimately held:

. . . In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State’s reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge’s authority to ensure that a defendant’s due process rights are not violated during a criminal trial.

Id. (also holding the appellant in that case, who had introduced evidence and lost the right to the last argument, was not prejudiced by the State’s closing).

In the context of a PCR action, our courts have “never required an attorney to be clairvoyant or anticipate changes in the law.” *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). Even if the edict in *Beaty* could be construed as a change in the law, trial counsel in this case is not ineffective for failing to request the last argument before the jury. *Beaty* does not authorize the right to final closing in this case even if trial counsel had requested it. Trial counsel put in evidence and waived his right to last closing. Not even today’s precedent allows Applicant the last closing argument after he introduces evidence at trial. *Id.* at 510 (citing *Gellis, supra*). Counsel further did not prejudice Applicant by failing to ask for another word before the jury.

the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State’s reply argument.

813 S.E.2d at 510 (internal citations omitted).

In light of our State's jurisprudence on this issue, this Court finds no deficient performance or prejudice in regards to the order of closing arguments and trial counsel's failure to ask for the "last word," and denies and dismisses this allegation with prejudice. This Court additionally finds that, to the extent Applicant argues in his post-hearing reply brief that the trial judge erred, that allegation is again barred by the *Simmons* doctrine. S.C. Code Ann. § 17-27-20(B); 264 S.C. at 423, 215 S.E.2d at 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."); *Dempsey v. State, supra*

- o) Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in this case, which denied Mr. Garrick's right to a fair and impartial grand jury presentment.*

Applicant asserts Trial Counsel was ineffective for failing to move to quash the indictment in this case on the basis that a grand juror was also a witness in Applicant's case and that "[o]nce the grand juror discussed the case with the other grand jurors, empaneling a new grand jury was the only way to cure the error." (Applicant's Br. p. 37). This Court finds this allegation without merit; Applicant has not met his burden as to this claim.

In his Post-Hearing Brief, Applicant cites to pages 136-37 of the trial transcript and characterizes that portion of the record as being an unrebutted admission that the grand jury proceedings were tainted in this case. Applicant does not cite to the record in its full and proper context. During pre-trial matters, the Assistant Attorney General prosecuting this case brought to the court's attention:

And lastly, Your Honor, we did push through or have the grand jury rule on a new indictment last week. As we were here for trial prep we -- Lieutenant Harley realized that one of the individuals on the grand jury had -- was a witness in the case. Not -- just kind of an auxiliary fact witness. **And so fortunately the grand jury was in session. So we put the indictment through and she had recused herself obviously for that, but I've served that indictment on Mr. Williams.** He's aware of that, but I just wanted to make --

(Trial Tr. p. 136).

The trial record reflects that the State acknowledged a potential defect in the latest indictment issued in this case and cured it prior to the start of trial because the grand jury was in session at the time the potential defect came to light. At the PCR hearing, trial counsel testified that he believed the defect in the indictment was cured on the third indictment which was issued in this case. This claim, therefore, lies solely on Applicant's speculation that there was an error in the grand jury proceedings. Yet the record affords no basis to "presume that the State abused the grand jury process in order to obtain a finding of probable cause to prosecute." *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991).

"Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary." *Id.* Where a defendant does not present clear evidence of an abuse of the grand jury proceedings, a motion to quash the indictment will not prevail. *See State v. Shands*, Op. No. 5569, Adv. Sh. Pp. 63-65 (S.C. Ct. App. filed June 13, 2018) (Shearouse Adv. Sh. No. 24 at 59) ("Without any clear evidence, Shands's argument that there was a grand jury abuse in his case is pure speculation."). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." *State v. Thompson, supra* at 502, 409 S.E.2d at 424.

Given that Applicant produced no credible evidence in support of this allegation at PCR, it follows that counsel cannot be found deficient for failing to move to quash the indictment for the reason briefed, or that any purported deficiency prejudiced Applicant. *See State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (affirming the trial court's denial of the defendant's motion to quash the indictments even though direct evidence "is difficult to provide due to the secretive nature of the grand jury proceedings").

There can also be no resulting prejudice on this ground, as Trial Counsel testified that he was on notice of the charges before the trial. “An indictment is merely a notice document.” *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing *State v. Gentry*, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005)). The court must look at “the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.” *Id.* (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500).

Moreover, “an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.” *Id.* at 63, 700 S.E.2d at 443 (citing *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007.)) A court reviewing an indictment for sufficiency should consider the indictment “‘on its face,’ and consider the events at trial.” *State v. Reddick*, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). In other words, a court should examine “the totality of the circumstances” to determine if the defendant was cognizant of the crimes for which he was charged. *Id.*

This Court further finds Applicant has failed to prove either deficient performance or prejudice by failing to present any information about the witness who allegedly tainted the proceedings. *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809 (a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure

to testify at trial); *Glover v. State*, 318 S.C. at 498-99, 458 S.E.2d at 540 (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden).

This Court finds Applicant has failed to provide a concrete basis upon which trial counsel should have moved, for an additional time, to quash the indictment in this case. Applicant's speculative argument fails to prove any defect in Applicant's latter indictment. Moreover, if any credence were lent to Applicant's presentation of the facts pertaining to this claim, the same witness testified before the jury, and the jury thoroughly explored that testimony as a predicate to returning a verdict of guilt beyond a reasonable doubt, which is a much higher burden than probable cause. *See Thompson, supra*.

Because Applicant failed to put forth any evidence of a flaw in Applicant's indictment, and because there is no resulting prejudice as Applicant was on notice of the charges against him, this allegation is denied and dismissed with prejudice.

p) Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

Applicant asserts Trial Counsel was ineffective for failing to use a third-party guilt defense at trial. This allegation is meritless, as Trial Counsel articulated valid strategic reasoning for not presenting any evidence of third-party guilt.

At PCR, testimony by Trial Counsel established that Applicant, pre-trial, convinced two separate people who were incarcerated with him, Early Glover and Dustin Williams, to write a note falsely confessing to the crime for which Applicant was charged. Dustin Williams' note included information alleging that he killed the victim in Santee and the body was moved to the gravesite in Barnwell County. In order to attempt to corroborate this information, Trial Counsel testified that he conducted an extensive investigation into the possibility that the victim was

killed elsewhere and moved. He testified that he consulted with a friend who was a forestry major to analyze the bright green leaves found around the victim's body which did not match the surrounding leaves. Trial Counsel also hired an expert from Clemson to come out to the scene during the trial. He stated the result of this investigation showed that the leaves could be Laurel Oak leaves rather than Sweetgum leaves, so they could actually have come from the Laurel Oak trees at the gravesite. This information did not align with his attempt to show the leaves came from another location. Based on the results of this investigation, Trial Counsel strategically chose not to use this argument to assert third-party guilt.

Additionally, the note written by Williams that would have corroborated this defense lost all credibility when the trial testimony of Early Glover came to light. As trial counsel recalled, Early Glover testified at trial that Applicant paid him \$1000 to write a note providing Applicant with an alibi. Trial counsel testified that he had to make a strategic decision as to whether, after Glover's testimony, his own defense witness would be credible. He decided it would not be credible, but would rather corroborate Glover's testimony delivered on behalf of the State. Moreover, that potential witness invoked his Fifth Amendment privilege during *in limine* hearings at trial. In sum, Trial Counsel explained that he could not corroborate the letter from this witness or the leaves found in the gravesite, and thus decided to abandon this potential defense because in his assessment it would have done more harm than good.

Trial Counsel's PCR testimony established that his investigations into third-party guilt dead-ended such that Counsel exercised a strategic decision to not present evidence of third-party guilt because he could not credibly corroborate it. 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. *Roseboro v. State*, 317 S.C. 292, 454

S.E.2d 312 (1996); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992); *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). This Court finds that Trial Counsel's election in this case was made after a thorough investigation and does not constitute deficient performance.

This Court also declines to find that Applicant was prejudiced by Trial Counsel's decision not to present evidence of third-party guilt. Applicant admitted in a statement to law enforcement that he was present at the scene of the crime. Given Early Glover and Dustin Williams, it would have been difficult for Trial Counsel to present any credible evidence of third-party guilt in this case; and, if any were presented, it likely would not have changed the outcome of the trial based on the remainder of the evidence presented at trial.

Furthermore, Applicant failed to present at PCR any specific evidence of third-party guilt which could have been used at trial, and thus this Court cannot speculate as to the prejudice prong of *Strickland*. The South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover v. State*, 318 S.C. at 498-99, 458 S.E.2d at 540. Applicant did not present any testimony from favorable witnesses to show how Trial Counsel should have properly presented the defense, thus he has not proven prejudice.

This allegation is denied and dismissed with prejudice as this Court finds Applicant has failed to meet his burden of demonstrating *Strickland* error-and-prejudice.

q) *Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal*

Applicant's allegation of ineffective assistance of counsel for failure to federalize the issues raised on direct appeal is meritless. If a direct appeal claim (a claim of trial court error) is based solely in state law, it is ordinarily barred from review by the United States District Court should Applicant later pursue the same claim in a collateral federal action seeking a writ of habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480 (1991) ("Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). "Federal habeas courts are without authority to correct a simple misapplication of state criminal law or procedure 'but may intervene only to correct wrongs of [a federal] constitutional dimension.'" *Luchenburg v. Smith*, 79 F.3d 388, 391 (4th Cir. 1996) (quoting *Smith v. Phillips*, 455 U.S. 209, 221 (1982)).

Applicant alleges Trial Counsel prejudiced Applicant by failing to provide some federal constitutional basis for the objections which were preserved and pursued on appeal. Applicant has not proffered the federal nature of the claims he perceives should have been pursued on appeal. Applicant also failed to proffer any testimony in furtherance of this allegation at the evidentiary hearing. Therefore, Applicant has failed to present any factual support for this claim and has thus failed to meet his burden of proof.

This Court declines to grant PCR in regards to trial counsel's pursuit and treatment of the issues pursued on direct appeal before the South Carolina Court of Appeals. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland v. Washington*, 466 U.S. at 697, 104 S. Ct. at 2069. To

demonstrate prejudice here, Applicant must prove that, if counsel had objected in a way that “federalized” the issues above, that “there is a reasonable probability the outcome of the [appellate] proceeding would have been different.” *Stone v. State*, 419 S.C. 370, 390, 798 S.E.2d 561, 572 (2017) (quoting *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)). Applicant must meet the high burden of showing that the “ignored issues are clearly stronger than those presented[.]” *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 726, 766 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (prejudice standard for ineffective assistance of appellate counsel requires applicant to show “that, but for counsel’s error, there is a reasonable probability that he would have prevailed on appeal”).

By and through appellate counsel, Applicant pursued the following evidentiary issues on direct appeal:

1. Whether the court erred by admitting into evidence a “root” associated with witchcraft and a can of “Law Stay Away” that were seized from the center console of Appellant’s truck pursuant to a search warrant because this evidence was not relevant and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant?
2. Whether the court erred by denying Appellant’s motion for a mistrial after a law enforcement officer characterized the “brown piece of paper bag” that was “taped up” to form some sort of “capsule” with weeds, twigs, and a penny inside and the words “Set me Sammie Gerrick free from murder and revoked bonds” written on the outside as “witchcraft root” in front of the jury since this testimony was highly prejudicial and the court’s curative instruction failed to cure the prejudice suffered by Appellant?
3. Whether the court erred by refusing to grant a mistrial after the state showed a videotape of Appellant’s interview with law enforcement before his arrest with a polygraph machine clearly visible on the table since this was unduly prejudicial and denied Appellant a fair trial?

The Court of Appeals affirmed Applicant's conviction and sentence, upholding each of these evidentiary rulings on the merits. *State v. Gerrick*, Op. No. 2016-UP-092 (S.C. Ct. App. filed Feb. 24, 2016) (unpublished).

This Court finds there is no probability that these issues would have been stronger on appeal had they been "federalized" rather than raised simply as state law evidentiary issues. The underlying facts and issues would remain the same on direct appeal to the South Carolina Court of Appeals had they been "federalized."

Also, as the opinion of the South Carolina Court of Appeals is supported by relevant facts and case law, Applicant cannot demonstrate any due process violation or other error of a federal constitutional dimension which would warrant relief had the issues been framed in an alternative way. *Id.* Applicant cannot demonstrate how the evidentiary rulings in this case caused some fundamental unfairness in the trial which would warrant relief. Not only were the trial court rulings upheld as a matter of state law, but the record evidences very strong evidence of guilt. (Br. of Respondent at pp. 17-47). Therefore, even had the South Carolina Court of Appeals determined the trial court erred in respect to one or more of the existing appellate claims, the error would not warrant reversal. *State v. Thompson, supra*, 352 S.C. 552, 562, 757 S.E.2d 77, 83 (Ct. App. 2003) (improperly admitted evidence and the denial of a mistrial only constitute reversible error when the admissions cause prejudice).

Moreover, even on later collateral review, the United States District Court may reach the direct appeal claims *as they exist* to determine whether the admission of the evidence itself so infected the entire trial that the resulting conviction violated due process. *E.g. Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir. 2008) (state-court evidentiary may be considered by federal court if "erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair

proceeding”)) (quoting *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir. 2000)); *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993) (relief may be warranted if state court error had “substantial and injurious” effect or influence in determining the jury’s verdict); *Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321 (2007) (holding “in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the ‘substantial and injurious’ standard set forth in *Brecht*”).

For the foregoing reasons, Applicant cannot establish prejudice flowing from the failure to “federalize” the issues pursued on direct appeal. Therefore, this allegation is denied and dismissed with prejudice. *Strickland, supra*.

r) The cumulative effect of trial counsel’s error requires a new trial

Applicant seeks to invoke the cumulative error doctrine. “Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina.” *Simpson v. Moore*, 367 S.C. 587, 604 S.E.2d 701, 710 (2006). But when a court finds no error by counsel on any claim raised, and finds that counsel’s representation caused the applicant no prejudice on any claim, there can be no sum of either error or prejudice upon which this Court may grant relief. *Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding where none of the errors alleged by the PCR applicant were meritorious, the alleged errors did not have the cumulative effect of denying the applicant effective legal representation to the extent that prejudice was presumed); see *United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) (“When ‘none of [the] individual rulings work[] any cognizable harm, . . . [i]t necessarily follows that the cumulative error doctrine finds no foothold.”) (quoting *United States v. Sampson*, 486 F.3d 13, 51 (1st Cir. 2007))); see also *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004) (errors must “so fatally infect the trial that they

violated the trial's fundamental fairness" for cumulative error to apply in this jurisdiction). For the reasons discussed herein, Applicant has not been awarded a grant of PCR on any one allegation pursued at the evidentiary hearing. This Court thus denies and dismisses this final PCR allegation.

Prejudice

As explained above, this Court finds no resulting prejudice from any allegation presented by Applicant. In addition to the specific reasoning described within this Court's ruling on each individual allegation, this Court also considered the totality of the evidence presented against Applicant at trial. Based on the totality of the evidence presented at trial, this Court makes an additional finding that there exists no probability of a different result at trial had counsel acted in any manner complained of within the individual PCR allegations.

"To satisfy the prejudice prong, an applicant must demonstrate 'there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "As the Supreme Court of the United States explained in *Strickland*, 'the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 695, 104 S.Ct. at 2068-69). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068).

But PCR court's prejudice determination must also include a consideration (1) as to the specific impact of any error determined to have been made by counsel on the outcome of the

trial, as well as (2) a consideration of “the strength of the State’s case in light of all the evidence presented to the jury.” *Smalls v. State*, 422 S.C. at 188, 810 S.E.2d at 843 (also stating that to *categorically* preclude a prejudice finding, “the evidence must include something conclusive”).

The evidence presented allows for the connection of collateral facts which paints a narrative of guilt. See *State v. Logan*, 405 S.C. 83, 97-98, 747 S.E.2d 444, 451-52 (2013); *State v. Rogers*, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). Here, there is no other reasonable explanation. First, Applicant’s incarceration and his need for bail and bill money give rise to the inception of the investigation and establishes motive. Because Applicant could not pay his bills, he also could not refund the victim and his friend Maurice Williams for their bonding Applicant out of jail.

The victim followed behind Applicant after the bailout with the expectation that Applicant was collecting money for repayment. The two were spotted in tandem the remainder of that afternoon. First they left Applicant’s house, but not before Applicant put two shovels in the bed of his truck (the victim was recovered from a shallow grave). (Tr. p. 230, l. 24 – p. 231, l. 9). Then they were seen at the Enterprise Bank ATM and at the Junior Food Mart, both in Blackville. (Tr. p. 236, ll. 1-23; Tr. p. 537, ll. 17-34). Joe Thomas saw Applicant drive past Thomas’ house with another car close behind around 3:00 that afternoon, which is corroborated by a call from that friend to Applicant. (Tr. p. 574, l. 4 – p. 575, l. 18). Applicant said during an interview with law enforcement that he went by Thomas’ house to get sand, but according to Thomas, that never happened. (Tr. p. 575, l. 19 – p. 576, l. 3). Thomas’ house lies within a mile or so of the crime scene. (Tr. p. 576, ll. 4-16).

No one heard from the victim afterwards, and then the victim’s cell phone permanently goes off the grid, as evidenced by undelivered text messages. (Tr. p. 476, l. 18 – p. 478, l. 19;

State's Exhibit 72). Cell phone records show that the last four phone calls the victim ever makes are to Applicant. (Tr. p. 612, l. 24 – p. 614, l. 21; Tr. p. 705, ll. 3-11; State's Exhibits 71 and 72). After that last phone call, made from the Blackville area, Applicant's phone escaped from the grid for two hours during the same time period as when the victim's phone forever lost service. (Tr. p. 461, l. 4 – p. 470, l. 1; Tr. p. 705, l. 12 – p. 707, l. 1; State's Exhibits 71 and 72).

Applicant resurfaced that evening, telling Maurice Williams that he and the victim dug up a safe full of money to reimburse him for the bailout, but that the victim drove off with it. (Tr. p. 189, l. 2 – p. 190, l. 20). Also that night, a visitor at Applicant's residence saw him change clothes around 7:30 and place his other clothes in the laundry room. (Tr. p. 222, l. 5 – p. 223, l. 17). This was after Applicant came home to shower after being bailed out of jail. (Tr. pp. 270-71 ("I then went in, shave, cut my hair and showered.")).

The next day, an ATM camera catches Applicant using the victim's debit card to withdraw money. The victim's card was also used several times the day the victim disappeared, including paying energy bills around midnight. (Tr. p. 545, l. 6 – p. 546, l. 25; Tr. p. 552, l. 1 – p. 554, l. 23; Tr. p. 555, ll. 2-14). The victim went missing long before midnight. The victim's sister-in-law, with whom he lived, testified that the victim would never lend his debit card or PIN number to anyone. (Tr. p. 261, ll. 19-23).

Maurice Williams also sees Applicant the next day and notices scratches on his chest. (Tr. p. 200, ll. 19-25). When questioned about those scratches by law enforcement, who also noticed them, Applicant stated that a lightbulb burst overhead in his jail cell days prior, causing injury. Jailhouse employees testified that Applicant did not report any injury during his incarceration, nor did it appear that he had any scratches. (Tr. p. 216, l. 1 – p. 218, l. 20; Tr. p. 272, ll. 13-15; Tr. p. 402, ll. 10-17; Tr. p. 487, l. 3 – p. 488, l. 25).

The victim's friends also received a mysterious text message purporting to be from the victim, but from an unknown number, claiming that the victim was hurt and asking for help. (Tr. p. 195, ll. 4-17; Tr. p. 246, l. 18 – p. 247, l. 1). When one recipient asked Applicant about the text, Applicant replied that it might take the heat off of him. (Tr. p. 248, l. 22 – p. 249, l. 14). The texts incorrectly used "am" as a substitute for "I'm," just like Applicant consistently did as well. (Tr. pp. 197-200). Those texts came from a trac phone pinging from the same location as Applicant's phone at the time the texts were sent. (State's Exhibit 73; Tr. p. 611, ll. 3-18; Tr. p. 719, l. 13 – p. 720, l. 11).

Of import, Applicant's wife testified that late during the night of the victim's disappearance, she followed Applicant out to the woods near Sunshine Road so that the Applicant could collect the victim's car, drive it to Orangeburg, and park it at the China Express. (Tr. pp. 303-309). She took law enforcement to the woods where the Applicant initially retrieved the victim's car; those woods proved to be the crime scene. (Tr. pp. 327-29). The victim was found in a shallow grave, face-down, with asphyxiation the probable cause of death. (Tr. p. 417, ll. 1-4; Tr. p. 445, ll. 1-18). Autopsy results showed defensive lacerations on the victim's left arm. (Tr. p. 441, ll. 1-7).

Investigators found full set of Applicant's fingerprints on the victim's car. (Tr. p. 525, ll. 1-10; Tr. p. 532, ll. 1-8). Also apparent at the crime scene was some green netting. (Tr. p. 411, ll. 15-18). That same type of netting was present in Applicant's yard from sod which was laid about a year prior, and more green netting was collected from Applicant's other Blackville residence. (Tr. p. 231, l. 25 – p. 232, l. 10; Tr. p. 427, ll. 16-20; Tr. p. 429, l. 25 – p. 430, l. 2).

Adding insult to injury, Applicant provides a series of voluntary, yet incongruent statements to law enforcement. Each time law enforcement received a new tip in their

investigation, Applicant came forward with "a new story which would explain the new information." (Tr. p. 605, ll. 13-20). Applicant first explained that the victim bailed him out of jail and took him home, where the Applicant took a shower. (Tr. pp. 270-71). Applicant said that went to Enterprise Bank and the Junior Food Mart with the victim, but then went home. (Tr. pp. 266-67). Then Applicant said he has access to the victim's bank account because they had joint ownership of \$18,000 from a backhoe. (Tr. p. 322-24). Days later, Applicant contacted Chief Holston to say that "Black" held the victim for \$25,000 ransom, but did not re-contact the Chief with proof of life or contact information as requested. (Tr. p. 274-79).

Having discovered the victim's body, law enforcement brought in Applicant for another interview, confronting him with the information about the victim's car. (Tr. p. 333). The victim admitted to being in Orangeburg, but did not come forward with information that he was at the crime scene. (Tr. p. 350). It was not until Applicant was served with the murder warrant that he began to claim that he remained with the victim after their stop at the Junior Food Mart. (Tr. pp. 361-62). After Lieutenant Harley told him homeowners on the road saw his truck, Applicant changed his initial story about never being present at the crime scene. (Tr. p. 369, l. 14 – p. 371, l. 8).

Applicant next divulged a drug deal which allegedly also involved Andre Hightower and O'Shane Dixon. (Tr. pp. 509-604). Both Hightower and Dixon testified that they had no knowledge or involvement with a drug deal; they had an alibi for the day the victim disappeared. (Tr. pp. 558-66). Dixon added that Applicant kept calling him after the victim disappeared to see if Dixon knew anything about the investigation. (Tr. p. 565, l. 18 – p. 566, l. 25). Applicant instead stated that he was instructed by Hightower to move the victim's car to Orangeburg in exchange for \$400. (Tr. pp. 364-68).

The morning after his arrest, Applicant asked to speak with law enforcement again, now claiming he looked on as the others involved in the drug deal beat the victim. (Tr. pp. 599-604). The victim allegedly arranged the drug deal with "Big Joe" from Georgia, and Applicant stated that he went along on the deal because he was supposed to receive some of the funds. (Tr. p. 363). However, the victim had no connection to drugs, nor did he test positive for any drugs during autopsy. (Tr. p. 376, ll. 11-22 Tr. p. 453, ll. 5-17).

Then, Early Glover testified that months after the crime, Applicant promised him \$1000 in exchange for copying a statement that said Glover and Applicant were present when the victim was beaten, but that neither of them had anything to do with it. Applicant wrote the statement and Glover copied and signed it. Applicant never mentioned Early Glover in any prior statement, but did send a letter to SLED stating that somebody could vouch for his innocence. (Tr. pp. 372-74; Tr. pp. 583-88).

Finally, law enforcement discovered the "root" and a novelty canister labeled "Law Stay Away" during the execution of a search warrant on Applicant's vehicle. Lieutenant Shaun Harley with SLED first testified as to examining "like a brown piece of paper bag, looked like." "It was just taped up . . . with dust, weed, twigs and a penny inside." (Tr. p. 344, ll. 7-10). Harley testified as to the handwriting on each side of the brown paper, which on one side exhibited the contents of Psalms 130, and on the other appeared as a prayer, which Harley referred to as a letter: "Set me Sammie Gerrick free from murder and revoke bond. Jack Early set me free now . . . Amen." (Tr. p. 346, l. 4 – p. 347, l. 15). SLED crime scene investigator Melissa Skipper Wallace found the items in the center console of Applicant's truck. Through Wallace, the State introduced photographs of the undisturbed contents of the open center console, the novelty canister of incense powder labeled "Law Stay Away," and close-ups of the brown paper parcel

both opened and unopened. The items themselves were not introduced. (Tr. p. 425, l. 4 – p. 426, l. 24).

This Court finds persuasive the evidence in this case and finds that it constitutes a strong case of substantial circumstantial evidence. Whether by motive, opportunity, or acts of guilt, when one strings it together, all evidence points to the Applicant as the sole perpetrator.⁷ Applicant has failed to specifically analyze or prove that any one alleged deficiency would have changed the outcome of the case in light of the strong evidence against him, as is his burden.

IV. CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf.

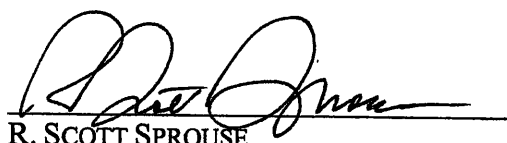
⁷ Even if this case were prosecuted under the theory of the hand of one, hand of all, the evidence points to Applicant's guilt as he was instrumental in leading Applicant to, and was present at, the site of the deadly drug deal Applicant eventually alleged to have occurred. *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.").

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

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 27 day of July, 2018.


R. SCOTT SPROUSE
Presiding Judge
Second Judicial Circuit

Walhalla, South Carolina

The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

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August 16, 2018

The Honorable Rhonda Dale McElveen
Clerk of Court, Barnwell County
PO Box 723
Barnwell, SC 29812-0723

Re: *Sammie Lee Gerrick v. State of South Carolina*
Case Number 2016-CP-06-00111

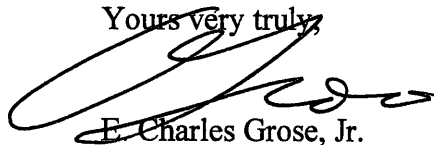
Dear Ms. McElveen:

Enclosed please find Mr. Gerrick's Rule 59(e), SCRCF motion, along with a certificate of service. By copy of this letter, I am serving a copy of the State of South Carolina and providing a copy to Judge Sprouse.

Thank you for your attention to this matter. Please let me know if you have any questions or if I can provide additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: The Honorable R. Scott Sprouse (via email and US Mail)
Mr. Sammy Gerrick (via US Mail)
Julie A. Coleman, Esquire (via email and US Mail)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Barnwell)

2nd JUDICIAL CIRCUIT

Sammie Gerrick)

CASE NO.: 2016-CP-06-00111

Plaintiff,)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

vs.)

State of South Carolina)

Defendant.)

Plaintiff's Attorney:

Charles Grose , Bar No. 66063

Address:

404 Main Street, Greenwood, SC 29646

Phone: 864-538-4466 Fax 864-538-4405

E-mail: charles@groselawfirm.com Other: _____

Defendant's Attorney:

Julie A. Coleman, Bar No. _____

Address:

S.C. Attorney General's Office, Columbia, Sc

Phone: _____ Fax _____

E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59(e), SCRCP Motion

Estimated Time Needed: 30 min

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

Aug. 16, 2018

Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: \$ _____

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF BARNWELL	)	
	)	Case No. 2016-CP-06-00111
Sammie Lee Gerrick,	)	
	)	Rule 59(e), SCRCP Motion
Applicant,	)	
	)	
vs.	)	
	)	
	)	
State of South Carolina,	)	
	)	
Respondent	)	
_____	)	

Pursuant to Rule 59(e), SCRCP, Sammie Gerrick moves this Court for an order altering and amending the order of dismissal dated July 27, 2018, filed August 3, 2018, and received by underanged counsel on August 6, 2018. This motion is based on the following grounds.

I. THRESHOLD MATTER.

As a threshold matter, the procedure followed by this Court denied Mr. Gerrick an opportunity to have his post-conviction relief claims adjudicated by a judicial officer. “S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated that responsibility to the Attorney General’s Office. Mr. Gerrick does not know this Court’s reasons for denying his post-conviction relief application because this Court did not provide any instructions to the Attorney General’s Office regarding the reasoning to include in its proposed order.

Although the Attorney General addressed the merits of each issue presented during the hearing, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, §8. Addressing section 17-

27-80 in the context of a capital post-conviction relief case, our Supreme Court “strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). As a result of the error, the order of dismissal reads like an advocate trying to “save” the conviction that a judicial officer “safeguard[ing] the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

II. STANDARD OF REVIEW.

Under the first prong of *Strickland v. Washington*, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “Decisions made in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. “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.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government’s case ...,” and “we must consider the totality of the evidence before 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.* “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Id.* 422 S.C. at 189, 810 S.E.2d at 844. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

The order of dismissal, at 3-4, is a verbatim copy of the standard of review section contained in the State’s post-hearing brief, at 16-17. As pointed out in Mr. Gerrick’s reply brief, the standard of review section of the State’s brief omits a discussion of the burden it must carry to excuse trial counsel’s deficient performance as a strategic decision. “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

“Decisions made in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). As discussed in more detail in prior briefing and below, many of trial counsel’s so-called strategic decisions resulted from his ignorance of the law or failure to investigate. Although the order of dismissal attributes the errors to trial counsel’s strategic decisions, the order does not consider the reasonableness of the decisions.

Also, as discussed in Mr. Gerrick’s reply brief, although discussing the requirement that trial counsel’s deficient performance must also prejudice the accused, the State omitted in its brief—and in the standard of review portion of the order of dismissal—a discussion of our Supreme Court’s recent decision in *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). The State included a discussion of *Smalls* in the final portion of the order of dismissal, at 71-77, but the order never applies *Smalls* to the specific errors alleged in Mr. Gerrick’s PCR application. The State’s case was based almost entirely on circumstantial evidence. As much as the State tries to state otherwise, this prosecution was not a case of overwhelming guilt.

Also, as discussed in Mr. Gerrick’s reply brief, our appellate courts find prejudice when credibility is an issue for the jurors to determine. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was “no physical evidence of sexual abuse”); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when “credibility was the most critical determination of this case”); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) (“These credibility questions and inconsistencies in the witnesses’ testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry’s guilt is overwhelming or that Berry’s guilt is the only

rational conclusion that could be reached from the evidence presented.”). The order of dismissal overlooks these principals.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Facts Presented at Trial.

Except for a few minor stylistic changes, the order of dismissal, at 6-19, is a verbatim copy of the State’s post-hearing brief, at 3-16, captioned, “Respondents Statement of Facts Presented at Trial.” Mr. Gerrick pointed out in his reply brief:

The State concedes it relied on “a large amount of circumstantial evidence” during Mr. Gerrick’s jury trial. State’s Brief at 3.

The State acknowledges it used the testimony of Dr. Janice Ross to lead the jurors to believe Tyrone Donaldson died as a result of being strangled with some sort of item other result of being incapacitated and then buried. State’s Brief at 9. As will be discussed in more detail below, Dr. Ross’s testimony at the evidentiary hearing revealed she could not offer an opinion, to a reasonable degree of medical certainty, about the time of death, location of death, or cause of death.

The State’s brief recounts Mr. Gerrick’s statements at great length. State’s Brief at 11-15. Significantly, Mr. Gerrick always maintained his innocence. The State does not have overwhelming evidence pointing to Mr. Gerrick’s guilt.

The order of dismissal does not address any of these concerns. The wholesale adoption of the State’s advocacy position underscores the lack of judicial independence in this process.

Once this Court reviews Mr. Gerrick’s post-hearing brief and reply brief¹ regarding the Facts Presented at Trial, the need to grant a new trial is apparent.

Testimony Presented at the PCR Hearing.

Except for a few minor stylistic changes, the order of dismissal, at 19-23, is a verbatim copy of the State’s post-hearing brief, at 18-22. Mr. Gerrick’s pointed out in his reply brief:

¹ Mr. Gerrick incorporates by reference his post-hearing brief and reply brief as if fully set forth herein verbatim.

The State suggests Charlene Gerrick “agreed that her trial testimony did not pertain to communications with her husband that would have been covered by the privilege she invoked.” State’s Brief at 18. Although technically true, this statement overlooks Ms. Gerrick’s testimony that law enforcement never would have discovered her trial testimony but for threats and violations of the spousal privilege.

The State acknowledges trial counsel did not interview Ms. Gerrick about the “root.” State’s Brief at 19-20.

The State minimizes Dr. Ross’s inability to testify to a reasonable degree of medical certainty about the time, location, and cause of death of Tyrone Donaldson. State’s Brief at 21-22.

The order of dismissal does not address any of these concerns. The wholesale adoption of the State’s advocacy position underscores the lack of judicial independence in this process.

Once this Court reviews Mr. Gerrick’s post-hearing brief and reply brief regarding the Evidence Presented at the PCR Hearing, the need to grant a new trial is apparent.

The PCR Allegations.

- A. Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a “root.” Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court’s opinion about the “root” evidence and constituted a conflict of interest.**

Regardless of favorable or unfavorable beliefs about the “root,” reasonable jurors would have concluded that Judge Early declined to “help” Mr. Gerrick keep the law away or obtain his freedom. Presiding over the trial conveyed to the jurors Judge Early’s belief that Mr. Gerrick’s trial should proceed. Trial judges are prohibited from communicating their personal beliefs about the facts of the case to the jurors. S.C. Const. Art. V, § 21. *And see, e.g., State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (instructing the jury on statute, providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, was an impermissible charge on the facts); *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (Ct. App. 1992) (requested charge on motive constituted impermissible charge on fact); *State v. Dawkins*, 268 S.C. 110, 232 S.E.2d 228

(1977) (where the jury returned to the courtroom after deliberating for a short time and inquired about the distance between the cars, the trial judge's response that he did not think there was any testimony of the distance 'in inches and feet' constituted an impermissible comment on the testimony given in the case requiring reversal). The focus of the order is on the Judicial Canon of Ethics (similar to the State's post-hearing brief), and this Court never addressed the state constitutional prohibition against trial judges expressing a view about the facts.

Additionally, the jurors could have viewed the "root" as an attempt to cast a spell on Judge Early or otherwise improperly influence him. Regardless of whether the jurors believed Judge Early discounted the root or was somehow influenced of the root, the influence of witchcraft or the "root" on anyone other than the accused is inadmissible. *State v. Mattison*, 276 S.C. 235, 239, 277 S.E.2d 598, 600 (1981) ("The trial judge excluded testimony as to the general effect of the fear of witchcraft or 'roots' on people, but permitted such testimony directed solely to its effect upon appellant. The testimony in question was properly excluded as irrelevant.") *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). The order of dismissal does not address adequately this consideration. That Judge Early did not specifically refer to his name being mentioned in the "root," compounds, not mitigates, the error. Judge Early's connection to the "root" was the "elephant in the room" throughout the trial.

The order of dismissal repeats the State's contention that Judge Early's "curative instruction" cured any error resulting from his presiding over Mr. Gerrick's jury trial despite the plea for his intervention in the "root." The cited instruction was not a "curative instruction." It did not address the evidence of the "root" or instruct the jurors not to form any inference about the trial judge's opinion from the evidence. More importantly, not every error can be cured by a

curative instruction. The prosecution emphasized the root in its closing argument, and the State continues to emphasize it in this PCR.

The order of dismissal repeats the State's contention that "there is no resulting prejudice" from this error, but neither the State, in its post-hearing brief, nor the order of dismissal, offered any analysis to support that assertion. This Court should deem the State's argument about lack of prejudice abandoned.

The State's case against Mr. Gerrick was not overwhelming. *See Smalls, supra*. Because credibility was the central issue for the jurors to determine, Judge Early presiding over Mr. Gerrick's trial, thereby conveying his beliefs about the "root," prejudiced Mr. Gerrick. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was "no physical evidence of sexual abuse"); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when "credibility was the most critical determination of this case"); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) ("These credibility questions and inconsistencies in the witnesses' testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry's guilt is overwhelming or that Berry's guilt is the only rational conclusion that could be reached from the evidence presented.>"). This Court should order a new trial.

B. Failing to investigate and present available evidence explaining the "root."

The prosecution relied on the "root" to show Mr. Gerrick's consciousness of guilt. Trial counsel did not interview Charlene Gerrick who was responsible for placing the "root" in her husband's automobile. Mr. Gerrick's testimony additionally explained that there was talk in the community about Mr. Gerrick being investigated for murder—something that would be upsetting

to anyone regardless of guilt or innocence—which further undermined the prosecution’s claim the evidence demonstrated Mr. Gerrick’s consciousness of guilt.

A new trial is warranted when trial counsel’s failure to investigate prejudices and accused. *See, e.g., Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014) (trial counsel’s failure to interview accused’s former girlfriend as a potential alibi witness warranted a new trial); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (trial “counsel was ineffective in failing to investigate medical evidence contradicting the State’s experts’ testimony”); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (Trial counsel’s failure to adequately investigate and present mitigating evidence during penalty phase was deficient performance); *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (defendant convicted of forgery and burglary was denied effective assistance of counsel due to defense counsel’s failure to investigate possible defenses); *Bagwell v. State*, 410 S.C. 259, 266, 763 S.E.2d 630, 634 (Ct. App. 2014) (“trial counsel’s failure to conduct DNA testing on the glass prior to trial constituted ineffective assistance of counsel”).

The State, all along, acknowledged that trial counsel did not interview Ms. Gerrick about the “root.” State’s Brief at 26-27. The State then argued that trial counsel was more credible when he testified Mr. Gerrick “told him that the root was his and he had written the note.” State’s Brief at 27. This testimony must be rejected—and the State seems to have backed off this contention—because the trial record unequivocally established that SLED handwriting examiners determined Mr. Gerrick did not write the note that is part of the “root.” On cross-examination, Investigator Harley acknowledged SLED handwriting experts determined Mr. Gerrick did not write the note, and law enforcement did not know how the note got into Mr. Gerrick’s vehicle. Tr. 387-89. It simply defies logic to attach Mr. Gerrick’s consciousness of guilty to a document when it is undisputed that someone other than Mr. Gerrick wrote it.

The admitted failure to investigate establishes deficient performance. Trial counsel did not offer a valid reason for not interviewing Ms. Gerrick about the “root.” *See Freiburger* and *Ingle, supra*. The order of dismissal, at 29, errs by asserting that trial counsel “articulated a valid strategy.” Yet, trial counsel could not have made a reasonable strategic decision when his strategy was controlled by ignorance of the facts. *See Wiek, supra*. The order of dismissal mistakenly relies on the trial judge denying the motion to suppress, but completely overlooks the relevance of the undiscovered and unrepresented material to that motion.

This Court’s order, at 30, contains a curious statement that is not supported—at all—by the record:

This Court further notes that in order to present the breadth of the PCR testimony about the “root” at trial, Charlene Gerrick would likely have had to waive her invocation of the spousal privilege to testify she to the facts she presented at the PCR hearing. Additionally, Applicant would have had to make the decision to testify at trial, opening him to cross-examination on a variety of subjects at issue in the case as well as to impeachment. Based on how the trial proceeded, it seems extremely unlikely that either witness would have chosen to testify in this manner under those circumstances.

This statement completely overlooks the fact that Ms. Gerrick provided this testimony during the PCR hearing while also asserting her spousal privilege. Also, Mr. Gerrick’s testimony at the PCR hearing was limited to facts necessary to establish deficient performance and prejudice. Mr. Gerrick never insinuated that he would have changed his mind and testified at trial.

Finally, the State argued in its brief, “[T]here can be no prejudice given the weight of the strong evidence against” Mr. Gerrick. State’s Brief at 28. The order of dismissal, at 30, repeats this conclusion. As discussed above, the order of dismissal, does not discuss our Supreme Court’s recent opinion in *Smalls* discussing the effect of the specific error alleged. The order ultimately overstates the strength of the State’s case. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive,

such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Smalls*. 422 S.C. at 191, 810 S.E.2d at 845. Such is not the case here, where the Mr. Gerrick always maintained his innocence and the State relied on “a large amount of circumstantial evidence.”

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

- C. Failing to object to the trial judge’s opening comments and final instruction on the law, instructing the jurors to find the “true facts,” including but not limited to the opening instruction, “[A]t the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict;” and the final instructions to the jurors, “It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;” “That is your sole responsibility, your sole duty to determine what the true facts are in this case;” and “You’re here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I’ve given it to you.”**

As seen, the trial judge repeatedly instructed the jurors to determine the “true facts.” Our Supreme Court long ago disfavored instructions like the one involved in this case. In *State v. Manning*, the trial court instructed:

Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and *that is a doubt for which you can give a real reason*. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. *A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason*. So it’s to that degree of proof that the State is required to establish the elements of a charge.

305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991) (emphasis supplied by the court). The Court, accordingly, prohibited trial judges from telling jurors “to seek some reasonable explanation of the

circumstances proven other than the guilt of the Defendant.” *Id.*, 305 S.C. at 416, 409 S.E.2d at 374. “Rather than conveying to the jury the principle that the State must affirmatively establish appellant’s guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant’s explanation of the evidence to determine the existence of reasonable doubt.” *Id.* 305 S.C. at 417, 409 S.E.2d at 374-75. Our Supreme Court reaffirmed this analysis in *State v. Raffaldt*, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995)² and *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004) (In *Manning* “we held that a circumstantial evidence charge which requires the jury to seek some reasonable explanation other than the defendant’s guilt ‘turns the State’s burden of proof on its head by requiring the jury to find a ‘reasonable explanation’ of the evidence inconsistent with appellant’s guilt before it can find him not guilty.’”).

In *State v. Needs*, the trial judge charged the jurors, “[Y]ou, the jury, must seek some other rational or logical explanation other than the guilt of the accused.” And, a “reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act.” 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998). Our Supreme Court “strongly urge[d] the trial courts to avoid using” this language when instructing jurors about circumstantial evidence and reasonable doubt. 333 S.C. at 155, 508 S.E.2d at 867. In *Aleksey*, this Court again reminded, “Jury 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 a defendant.’” 343 S.C. at 26-27, 538 S.E.2d at 251 (citing *Needs*). More recently, in *State v. Daniels*, 401 S.C.

² In *Raffaldt*, the trial judge instructed, “So in the consideration of circumstantial evidence, you must seek some reasonable explanation other than the guilt of the accused and if such reasonable explanation can be found, then you cannot convict upon circumstantial evidence alone.” 318 S.C. at 115, 456 S.E.2d at 393.

251, 256, 737 S.E.2d 473, 475 (2012), this Court instructed trial judges to remove similar instructions from charge books. “Such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State’s burden to prove the defendant’s guilt beyond a reasonable doubt.” *Id.* See also *State v. Beaty*, No. 2015-000718, 2018 WL 1938544 (S.C. Apr. 25, 2018) (trial judge’s preliminary remarks to the jury, that jury’s role was to “search for the truth,” determine “true facts,” and render a “just verdict,” were improper). The order of dismissal addressed only *Aleksey* and *Beaty*, completely overlooking these other cases. Mr. Gerrick pointed out in his reply brief, but this Court’s order of dismissal never addressed:

[T]he State tries to limit Mr. Gerrick’s claim to *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) and *State v. Beaty*, No. 2015-000718, 2018 WL 1938544 (S.C. Apr. 25, 2018). The State overlooks the numerous cases cited in Section IV(C) of Mr. Gerrick’s post-hearing brief, including but not limited to *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), which placed trial counsel on notice to object to these instructions.

The order of dismissal repeats this error.

Although decided after Mr. Gerrick’s trial, *Beaty* did not articulate a new rule of law. *Daniels*, *Cherry*, *Manning*, *Needs*, *Raffaldt*, and *Aleksey* placed trial counsel on notice to object to this jury instruction, but trial counsel was not aware of this line of cases. See *Weik*, *supra*. Additionally, in *Cage v. Louisiana*, 498 U.S. 39 (1990), a unanimous United States Supreme Court held that the jury instruction in that case was contrary to the “beyond a reasonable doubt” requirement articulated in *In Re Winship*, 397 U.S. 358 (1970) (holding that the accused is protected against conviction under the Fourteenth Amendment except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The words “substantial” and “grave” suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements were taken in conjunction with the

court's reference to a "moral" rather than evidentiary certainty, a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

"It is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean." *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (citations omitted). "In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation." *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.*, 376 S.C. at 506, 657 S.E.2d at 64 (quoting *Francis v. Franklin*, 471 U.S. 307, 322 (1965)). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

Trial counsel, therefore, was ineffective for not objecting the trial judge's opening remarks and final instruction on the law. *See Gibson and Lowry, supra*. The trial judge's final instruction, "That is your sole responsibility, your sole duty to determine what the true facts are in this case," rendered the entire instruction invalid. *See Beaty, Daniles, and Aleksey, supra*.

These instructions prejudiced Mr. Gerrick. Reasonable jurors could have concluded they had to determine the "truth," rather than applying the burden of proof. Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

The order of dismissal, at 32, acknowledges trial counsel was not aware of the relevant law, so he could not have made a strategic decision not to object, *see Weik, supra*. *See also Freiburger and Ingle, supra*. This Court, accordingly, must find trial counsel's performance deficient.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

D. Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.

"[T]he Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial." *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). *See also In Interest of Dwayne M.*, 287 S.C. 413, 414, 339 S.E.2d 130, 130 (1986) (An accused "has a constitutional right to be present at every stage of the criminal proceeding against him."); *State v. Taylor*, 261 S.C. 437, 442, 200 S.E.2d 387, 389 (1973) ("By virtue of their constitutional rights, persons accused of crimes are entitled to be present at every stage of the trial."). *And see United States v. Runyon*, 707 F.3d 475, 517 (4th Cir. 2013) ("district court erred in deciding to dismiss [Jury] Foreman with neither Runyon nor his lawyer present); *United States v. Rolle*, 204 F.3d 133 (4th Cir. 2000) (defendant's absence from individual voir dire of certain prospective jurors satisfied error and plain error prongs of plain error analysis); *United States v. Camacho*, 955 F.2d 950 (4th Cir. 1992) (accused had constitutional and statutory right to be present at his trial, including empaneling of jury). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused

personally the right to make his defense.” *Faretta v. California*, 422 U.S. 806, 819 (1975). In *United States v. Hanno*, the Fourth Circuit Court of Appeals held “dismember[ing a jury] without giving notice to and in the absence of the defendant” violates “the defendant’s due process right to be present under the constitution.” 21 F.3d 42, 46 (4th Cir. 1994). *See also United States v. Camacho*, 955 F.2d 950 (4th Cir. 1992) (trial judge erred in removing juror during in camera proceeding in absence of defendant and his counsel). The Fourth Circuit further held the trial “court erred in not recording the proceedings in which Hanno’s jurors were removed.” *Hanno at* 48. South Carolina courts have recognized the right of an accused to be present when the trial judge makes decisions involving jurors. *See, e.g., State v. Elmore*, 279 S.C. 417, 422, 308 S.E.2d 781, 785 (1983), *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (trial judge entering jury room with prosecutor and defense counsel “runs counter to the requirement that in a death case the defendant be present at all stages of trial”); *State v. James*, 116 S.C. 243, 107 S.E. 907, 908 (1921) (accused had right to be present when trial judge provided additional instructions to jurors).

The retention of Juror Number 23 was particularly prejudicial because she knew State’s witness Taylor White. As evidenced by the closing argument, the prosecution considered Ms. White a major witness. The prosecutor argued, falsely, that Ms. White witnessed Mr. Gerrick take a shower, which was circumstantial evidence of concealing his guilt. Juror Number 23, no doubt, was influenced by her knowledge of Ms. White.

The State conceded Mr. Gerrick was not present when the trial judge made decisions about Jurors 9 and 23. The State further conceded the error is structural. State’s Brief at 33. Yet, the Court’s order, at 36, proceeds to apply a prejudice analysis.

Regarding Juror Number 9, the State points to her alleged mental health infirmities, but it offers no evidence she was not qualified to serve as a juror. The trial transcript, likewise, is void of any evidence of her lack of qualifications to serve as a juror.

Regarding Juror 23, the State attempted to recast the claim as trial counsel's "decision to keep Juror #23 as an alternate." State's Brief at 33. The trial record actually demonstrates that, after the trial judge removed a sleeping juror from the case, Juror Number 23 was elevated to a regular juror. Tr. 281-82. The State then argues, "Trial Counsel explained that Juror #23 could help their case if they found the testimony from the witness she knew more credible." State's Brief at 33. Undersigned counsel does not recall this testimony. However, if trial counsel testified in this manner, then it was not only an unreasonable but an absurd strategy. *See also Freiburger and Ingle, supra*. Taylor White is the witness at issue. She was a witness for the State, not Mr. Gerrick. The State used Ms. White to establish circumstantial evidence that Mr. Gerrick washed clothes and took a shower to conceal the crime. A witness believing this testimony is more likely to convict Mr. Gerrick.³ The decision to retain Juror Number 23, therefore, constitutes deficient performance.

The Court's order, at 36-38, contends trial counsel's decisions about these jurors was a strategic choice. The Order does not address any of Mr. Gerrick's arguments about why these decisions—that he was not privy to—were unreasonable.

Finally, the order of dismissal, at 35, states, "Applicant's right to be present was not violated in this case because of the record made by the trial court regarding the initial in-chambers discussions." By the time the record was made, the trial judge had already made decisions about

³ As seen, the prosecutor misrepresented Ms. White's testimony during his closing argument.

these jurors, without providing Mr. Gerrick any opportunity to participate in the decision-making process.

E. Failing to object to or make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors' minds as to deny Mr. Gerrick due process.⁴

“Photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a capital case if they are irrelevant or not substantially necessary to show material facts or conditions.” *State v. Kornahrens*, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (citing *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986)). *See also State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010) (Use of horrendous photographs during the sentencing phase of a capital trial is “an area of growing concern” for our Supreme Court that has strongly encourage[d] all solicitors to refrain from pushing the envelope.”).

Here, the prosecution's stated purpose for introducing these photographs was to demonstrate the decedent's body was buried in a shallow grave, the ligatures were still around his wrists and ankles, and the body was in a moderate to severe state of decay. As our Supreme Court held:

There was no dispute as to these facts. All of them were fully established both by uncontradicted medical and lay testimony. These pictures were calculated to inflame and arouse the passions of the jury and their introduction was wholly unnecessary to establish the facts claimed. They should have been excluded.

State v. Waitus, 224 S.C. 12, 27, 77 S.E.2d 256, 263 (1953) (citing *State v. Edwards*, 194 S.C. 410, 10 S.E.2d 587, 588 (1940) (“[P]hotographs which are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are entirely irrelevant or not substantially

⁴ The order of dismissal, at 41, states, “Applicant did not incorporate the photographs in to the PCR record in this case.” This statement is an error of law because the entire trial record is part of the record in PCR cases.

necessary to show material facts or conditions.”). Trial counsel was deficient for not objecting to these photographs or offering to stipulate to their contents.

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

F. Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.

Charlene Cerrick’s testimony that she helped her husband move Tyrone Donaldson’s white Honda Civic from a secluded area on a dirt road in the woods to the China Express in Orangeburg was an important piece of circumstantial evidence for the prosecution. Ms. Gerrick testified at the PCR hearing that her statement was obtained in violation of her spousal privilege and as the result of law enforcement threatening to place the Gerricks’ special needs child in foster care. Trial counsel was not aware of this information because he did not interview Ms. Gerrick, meaning he could not make a strategic decision about a motion to suppress this statement. *See Weik, supra*. Threatening to place the Gerricks’ special needs child into foster care rendered Ms. Gerrick’s statement involuntary. *State v. Corns*, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) (threat to arrest wife and place children in foster care rendered accused’s statement involuntary).

The State argued in its brief, “Trial counsel correctly testified at the evidentiary hearing that he believed he had no basis on which to move to suppress any of [Ms. Gerrick’s] testimony as ‘fruit of the poisonous tree’ because he did not have standing to raise that issues; only Charlene herself had standing, as it was her right that was allegedly violated.” State’s Brief at 37. This assertion overlooks the fact that Charlene Gerrick did, in fact, assert her privilege. The order of dismissal does not acknowledge the significance of trial counsel’s ability to participate in the

determination of the effects of that invocation of the privilege. Once she asserted her privilege, trial counsel had not only the standing, but also the obligation, to argue the effect of Ms. Gerrick's assertion on the trial. Trial counsel's failure to advocate for his client after Ms. Gerrick asserted her privilege establishes deficient performance. Ms. Gerrick's testimony was a critical to the prosecution's case, and without it there is a reasonable probability of a different result.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

G. Failing to object to improper victim impact evidence that was not relevant and which were intended to arouse sympathy, passion, and prejudice in the jurors' minds.

The prosecutor introduced evidence about Mr. Donaldson being a family man, being "Mr. Mom" to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson's good character with Sammie Gerrick's bad character as a "classic liar." This testimony was prohibited by the South Carolina Victims' Bill of Right, which provides:

The circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing. Within a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement and the court must allow the defense an opportunity to respond to the statement. However, the victim impact statement must not be provided to the defense until the defendant has been found guilty by a judge or jury. *The victim impact statement and its contents are not admissible as evidence in any trial.*

S.C. Code Ann. § 16-3-1550(F) (emphasis added). *See also State v. Hill*, 331 S.C. 94, 105, 501 S.E.2d 122, 128 (1998) ("This section merely limits the victim impact evidence in non-capital cases."). *And see State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (Murder victim's sister's

testimony about victim's family, how victim acquired his nickname, "Bunny," and that victim had played drums in high school band, was not relevant to issue of defendant's guilt in murder prosecution).

The State acknowledges "victim impact evidence should be reserved for the court's consideration at sentencing." State's Brief at 38. The order of dismissal, at 45, repeats this statement. The order of dismissal, at 46-49, however, concludes this evidence "was not offered as victim impact evidence," but the order overlooks that fact that proving Tyrone Donaldson was a good father to his children *does not* establish any element of the crime alleged.

The order of dismissal excuses trial counsel's failure to object as trial strategy. Yet, the State conceded in its brief, at 39, that trial counsel did not recognize this testimony as victim impact evidence. The testimony was victim impact testimony, as it went far beyond what was necessary to introduce the decedent to the jurors. The order of dismissal does not explain how trial counsel's misunderstanding of the issue escapes a finding of deficient performance. This Court errs as a matter of law by concluding the testimony to be admissible.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

H. Failing to object to testimony that violated the confrontation clauses of the state and federal constitutions.

Mr. Gerrick withdrew this claim at the evidentiary hearing.

I. Failing to object to impermissible character testimony that violated Rule 404, SCRE.

As seen, both the prosecutor and defense counsel elicited testimony about Mr. Gerrick's bad character. This testimony implied Mr. Gerrick's guilt and was improper character evidence

pursuant to Rule 404, SCRE. Some of this evidence implied Mr. Gerrick had a prior criminal record or was incarcerated for other offenses. “[E]vidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper.” *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986)). *See also Deck v. Missouri*, 544 U.S. 622 (2005); *Estelle v. Williams*, 425 U.S. 501 (1976); *State v. Lawson*, No. 2015-002467, 2018 WL 2708761 (S.C. Ct. App. June 6, 2018) (admitting evidence of an accused’s prior criminal record required reversal).

Trial counsel was ineffective for not objecting to this improper character evidence. *See, e.g., Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989) (failure to object to improper character evidence was prejudicial ineffective assistance of counsel warranting a new trial). Trial counsel did not have a strategic reason for not objecting. *See Ingle and Freiburger, supra*. Reasonable jurors would view Mr. Gerrick as less credible because of his prior criminal record and unspecified long-term incarceration.

The State argued in its post-hearing brief:

Any testimony regarding [Mr. Gerrick] being incarcerated before the crime in question is admissible as *res gestae* evidence. The State’s theory of the case was that [Mr. Gerrick] killed the victim after the victim loaned him money to bail [Mr. Gerrick] out of jail. The testimony presented about [Mr. Gerrick’s] imprisonment at that time set up the facts and was relevant to show [Mr. Gerrick’s] motive in the crime. Because this evidence was admissible, any further evidence of prior bad acts or incarceration from other charges likely had no prejudicial effect on the outcome of the trial, as the jury was already away [sic] that [Mr. Gerrick] had served time in jail for other crimes.

State’s Brief at 42. The State, accordingly, conceded this evidence introduced at trial exceeded what was necessary to present *res gestae* evidence. The order of dismissal never addressed this concession. As seen in Mr. Gerrick’s post-hearing brief, some of this impermissible evidence was presented by Mr. Gerrick’s own trial counsel, meaning it cannot be explained as necessary for the

State's presentation of its case. The State's argument about "further evidence of prior bad acts or incarceration from other charges likely had no prejudicial effect on the outcome of the trial" additionally overlooks our Court of Appeals recent decision in *State v. Lawson*, No. 2015-002467, 2018 WL 2708761 (S.C. Ct. App. June 6, 2018) explaining how evidence implying a prior criminal record is impermissible and requires reversal.

The order of dismissal, at 51, states, "[C]ompared to the amount of corroborative evidence of Applicant's guilt as delineated in the undersigned's above statement concerning the facts presented at trial, any potential error in the admission of the 'prior bad acts evidence' cannot be said to prejudice Applicant under *Strickland*." As discussed above, the order of dismissal incorrectly applies our Supreme Court's recent opinion in *Smalls* discussing the role of the strength of the State's evidence in a *Strickland* prejudice analysis. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." *Smalls*. 422 S.C. at 191, 810 S.E.2d at 845. Such is not the case here, where the Mr. Gerrick always maintained his innocence and the State relied on "a large amount of circumstantial evidence."

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

(K), (M), & (N)

Failing to object to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

Failing to object to statements by the prosecutor during closing argument which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof.

Failing to object to inflammatory statements by the prosecutor which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and were so defamatory to Mr. Gerrick that it denied him due process.

The prosecutor made a powerful closing argument centered around Mr. Gerrick's alleged motive, opportunity, and guilty acts or guilty consciousness. *See, e.g.* tr. 697.

During the closing argument the prosecutor misrepresented Taylor White's testimony:

But, you remember, Taylor White states that later on that evening when she sees Sammie, he comes in, he goes back out, he comes back in with a barrel of clothes. He goes in the area where the washing machine is. He comes back without the clothes. He goes into the bedroom where the shower is and then he doesn't – and he changes clothes. He comes out in different clothes. Okay. Now, sure, a man can take a shower. By itself that means nothing. But when you put it together with everything else, what does it tell you.

Okay. It's just a, one more circumstance, one more fact that starts to draw that circle around Sammie Gerrick.

All right. Why did he need another shower? He already had one that morning or that afternoon, you know, right when he got out of jail. Why did he need to change for?

Tr. 722, lines 1-17.

The prosecutor argued the victim impact evidence introduced through witnesses earlier in the trial:

[B]efore we go through all Sammie's guilty acts, let's talk about Tyrone and what you heard about Tyrone. Tyrone was a family man. He took care of those kids, two young kids and his teenage sister. He cooked for them. He cleaned for them. He did their homework. The family and the friends said Tyrone wasn't doing any

drugs. Tyrone wasn't into any drugs. The officer said we looked into it Tyrone wasn't into any drugs.

Tr. 708, lines 1-8. And, "You haven't heard one person say a bad word about Tyrone except Sammie Gerrick." Tr. 708, lines 24-25.

The prosecutor argued for the jurors to seek justice for Tyrone Donaldson. Examples include:

- "Let's let Tyrone have the last word. And I told you before, Tyrone can testify here today. He was found, as I stated before with – his hands tied. His ankles had been tied. His body face down, suffocated, choked out." Tr. 742, lines 4-8.
- Is that Tyrone speaking to you right there? Is that Tyrone Speaking to you right there? The man who had the motive. The Man who had to opportunity. The man who engaged in all these guilty acts and he's got these scratches on him right after this crime happened." Tr. 743, lines 3-7.

The prosecutor repeatedly called Mr. Gerrick a liar. *See, e.g.*, Tr. 696, lines 17-18 ("we deal with the many twists and turns of Sammie Gerrick over there."); Tr. 699, line 25 – 700, line 2 ("It might be different than what was before but a classic person who tells falsehoods, a classic liar."); Tr. 704, line 1 ("Another lie by Sammie Gerrick over there."); Tr. 707, lines 21-22 ("The acts to conceal, to lie, to cover up, to divert attention, to lie."); Tr. 712, line 25 – 713, line 1 ("He has to move. He has to bob. He has to weave."); Tr. 721, line 9 ("Lies five, six, and seven."); Tr. 722, line 23 ("That's a lie."); Tr. 723, line 20 ("classic liar."); Tr. 724, line 12 ("You saw the evidence of a liar."); Tr. 725, lines 8-9 ("from faking texts to telling this lie to telling that lie."); Tr. 726, lines 1-2 ("He's tried telling lies."); Tr. 727, line 22 ("He comes back and tells that silly lie to Maurice."); Tr. 734, lines 21-22 ("Liar. Classic liar who admits to what you can prove and then creates a story based on that."); Tr. 735, lines 7-8 ("So he's got to come up with a new lie."); Tr. 736, line 18, ("that this is just all mind games and lies"), Tr. 737, line 3 ("cockamany last version"); Tr. 737, lines 20-22 ("Classic liar. Prove this, move the story. Prove that, move the

story. Prove that, move the story. And it's just a cockamany thing."); Tr. 738, line 10 ("concocts this story"); Tr. 739, line 13 ("cockamany story"); Tr. 740, line 10 ("Classic liar."); Tr. 742, lines 15-16 ("And we also know that Sammie Gerrick told lies about that, too."); Tr. 744, lines 12-14 ("Tyrone was fooled by Sammie Gerrick's lies and he died for it. Don't y'all be fooled by his lies, too.").

The prosecutor argued the "root" as evidence of guilt:

But anyway, they searched the truck. And what do they find? In this console they find what I'll call the little capsule. Right here. And they find a bottle of Law Keep Away. Law Keep Away found in the console of his truck where people tend to keep their personal items in their car where a lot of us spend our time.

And, you know, normally, again, by itself, it's not really that significant. And there's the capsule itself. But when you open it up and you know what else is going on in Sammie Gerrick's life and you get this. This is what's in there: Set me Sammie Gerrick free.

Let me back it [sic] out.

Set me Sammie Gerrick free from murder and revoke bonds. Jack Early set me free now. Jack Early set me free now. Jack Early set me free now. Sammie Gerrick, Sr. Sammie Gerrick, Sr. So shall it be. So shall it be. So shall it be.

Set me free from murder and revoke bonds. What was going on in Sammie Gerrick's life at that time? He had been questioned by the police multiple times. He knew he was the target of this investigation. He was engaging in all sorts of things to try to throw people off the track, whether it was the story about the ATM, or whether it was the track phone, or the lies, or the claim about the \$25,000 to Chief Holston. He knows he's in the fire. He's in the frying pan right now.

Now I don't know what he hoped to accomplish by this but I can say this. It was in his car next to a bottle of Law Keep Away, kept close and personal. And we also know that, as I told you before, a few days prior to that he had had his bond revoked. So I mean, it ties right to this case. He was hoping somehow this plea would keep him out of trouble. Set me Sammie Gerrick free from murder and revoke bonds. Well, guess what. He is facing a bond revocation and he was a target in a murder investigation. Who does that but a guilty man? Who does that?

And again by itself, the same thing with the Law Keep Away, Law Stay Away. Excuse me. By itself it's just a novelty item. By itself, it's just a novelty item. It's an incense powder. It says Law Stay Away. And it's got this picture, as you can

see, a guy pushing away a police officer who's dropping the billyclub. It's law Stay Away incense powder, and it's found right next to this plea and wrapped up in that capsule. Right there together in his console.

Tr. 732, line 2 – 733, line 22.

The prosecutor argued his theory about how Sammie Gerrick killed Tyrone Donaldson:

I submit to you that Sammie told Maurice we're going out – or, excuse me. Sammie told Tyrone we're going out to the woods to get that money. And they got the two shovels because they were going to dig it up. And Sammie went out there and made Tyrone unknowingly help dig his own grave.

And then he struck defensive wounds on the arm. I showed you before. And he overpowered him. He tied him up. He made him give up his PIN number so he could later claim he was entitled to use it. And then he choked him out and Tyrone with his hands tied was doing the best he could. And that's where he got the scratches right there on the inside of the elbow and right there on the chest area, because that's all Tyrone could do. But he couldn't win and he died.

There's only one man that all these circumstances fit. Only one man. And it's Sammie Gerrick.

He's got the motive. He's got the opportunity. He's got the guilty acts. He's got 16 lies, a classic liar who moves his story all the way down. He's got the track phone, the texts, the capsule, the Law Keep Away, the green netting, Bradley Smith saw him staring off into space when the crime happened. He had never did that before.

You've got, you got Early Glover faking evidence. You got Charlene taking the car and moving it in the middle of the night. You got using the ATM card, and you got Tyrone speaking to you with these scratches. All of this points to one man; Sammie Gerrick.

I got one last thing to say. Tyrone was fooled by Sammie Gerrick's lies and he died for it. Don't y'all be fooled by his lies, too.

On behalf of the State of South Carolina, on behalf of all of Tyrone's family and friends out here, I ask you to do your duty, do the right thing and find this man guilty of murdering Tyrone.

Tr. 743, line 8 – 744, line 18.

The State—in its post-hearing brief and the order it drafted for this Court—chose to address these three arguments in one section. State's Brief at 42-49. This Court should not allow the

combination of these arguments to lessen the significance of each error. The State combining these arguments, however, shows why a cumulative error analysis (discussed *infra*) is appropriate in this case.

The prosecutor introduced evidence about Mr. Donaldson being a family man, being “Mr. Mom” to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson’s good character with Sammie Gerrick’s bad character as a “classic liar.” These arguments were intended to arouse sympathy, passion, and prejudice in the jurors’ minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof. Trial counsel was ineffective for not objecting. *See, e.g., Tappeiner v. State*, 416 S.C. 239, 252, 785 S.E.2d 471, 478 (2016) (“[T]he solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors' emotions, rather than the evidence in the record.”); *Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (“trial counsel was deficient in failing to object to the challenged portion of the solicitor's closing argument because it constituted a “Golden Rule” argument which impermissibly appealed to the passion of the jurors by asking them to “speak up” for the child victim”); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial counsel formed deficiently by failing to object to solicitor's “golden rule argument” at penalty phase); *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (prosecutor's use of “you” some 45 times in closing argument, asking jury to put themselves in place of victim, constituted reversible error).

During his closing argument, the prosecutor argued facts that were not supported by the evidence. First, the prosecutor claimed Taylor White testified she witnessed Mr. Gerrick take a shower, arguing this testimony to be circumstantial evidence Mr. Gerrick was covering up the

crime. The prosecutor's claim misstated Ms. White's testimony, as she expressly denied witnessing Mr. Gerrick taking a shower. *See* Section II(A)(3), *supra*. Second, the prosecutor advanced a theory of the forensic evidence that was not supported by the state's own forensic pathologist, Dr. Janice Ross. *See* Section II(B), *supra*. Trial counsel was ineffective for not objecting to the prosecutor's misstating Ms. White's testimony. *See, e.g. Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) ("some of the solicitor's statements regarding Victim's credibility were not only damaging to Tappeiner, but misrepresented the evidence adduced at trial").

The State tries to justify trial counsel's failure to object as a reasonable strategic decision. *Id.* at 44. The State once again overlooks the fact that trial counsel was unaware of important legal principles. For example, PCR counsel expressly asked trial counsel if he was aware of a line of cases prohibiting prosecutors from calling an accused a "liar." He was not. *But see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002) and *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449 (1937). Trial counsel's ignorance of the law cannot be a valid strategic decision. *See Weik, supra*.

The State suggested the prosecutor was merely responding to Mr. Gerrick's closing argument. Trial counsel limited his argument to the evidence and did not argue that Mr. Gerrick did not make inconsistent statements. The prosecutor's argument, however, went far beyond a passing reference to an inconsistency. It struck at the core of Mr. Gerrick's character. The repeated attacks on Mr. Gerrick's character compounded the prejudice.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and*

Berry, supra, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

- L. Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.**

Our Supreme Court recently reminded, “[W]ith the repeal of Circuit Court Rule 58 by Rule 85(c), SCRCP, [on July 1, 1985] and with the adoption of Rule 39, SCRCrimP, there is no codified or otherwise duly adopted court rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence.” *State v. Beaty*, __ S.C. ___, 813 S.E.2d 502, 509 (S.C. 2018). Our Supreme Court then observed:

This Court cannot simply assume that from July 1, 1985 through the trial of the instant case, the criminal trial courts of this State have uniformly continued to follow repealed Circuit Court Rule 58 to the extent that it remains the “practice as it has heretofore existed” in criminal cases in which the defendant introduces evidence. We have no effective way to ascertain the prevailing practices of current and past trial judges. We can only conclude that absent a published court rule or a defined common law rule, individual trial judges have developed their own practices governing closing argument in cases in which a defendant introduces evidence.

Id. 813 S.E.2d at 509. And:

[T]rial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, our authority—and the authority of the trial court—is but to address due process considerations as they arise. In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial.

Id. 813 S.E.2d at 513. Accordingly, our Supreme Court recognizes trial judges are free to set their own rules, provided due process is protected. According to *Beaty*, this rule has always been the rule.

Beaty, although decided after Mr. Gerrick's trial, did not announce a new rule of law. Our Supreme Court merely observed that the lack of a formal rule required trial judges to exercise discretion to protect the due process rights of an accused. At the PCR hearing, trial counsel testified Mr. Gerrick's trial judge exercised a strict rule of not allowing a defendant who presented evidence to respond to the prosecutor's closing arguments on the facts. "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015). The prosecutor made a powerful closing argument that misstated important facts, advanced a theory of the forensic evidence not endorsed by Dr. Ross, emphasized the good character of Mr. Donaldson, and attacked Mr. Gerrick's character as a "classic liar." Trial counsel not only failed to object to any of these argument, but also did not ask for an opportunity to respond to the false statements and character assignation. Trial counsel did not offer a valid strategic reason for not requesting an opportunity to respond.

The order of dismissal states, "The rule, counsel correctly testified, is that where the defense puts up in evidence, the State gets the final closing." Under this claim, the trial judge still could have allowed the prosecution the final argument while still letting the defense respond to the State's argument.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

The prosecutor introduced evidence about Mr. Donaldson being a family man, being "Mr. Mom" to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson's good character

with Sammie Gerrick's bad character as a "classic liar." The prosecutor repeatedly called Mr. Gerrick a liar. "Our supreme court has previously held it is improper to call a party a liar in closing argument." *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002). *See also Major v. Alverson*, 183 S.C. 123, 190 S.E. 449 (1937). Trial counsel was not aware of this line of precedent, and his "ignorance" of the law "cannot be characterized as strategic." *See Weik, supra*. Additionally, trial counsel's decision not to object in order not to call attention to the insult must be rejected because the prosecutor's comments were not isolated, but rather an "in-your-face" attack of Mr. Gerrick's character that was emphasized over-and-over again.

The argued in its brief, "In the context of a PCR action, our courts have 'never required an attorney to be clairvoyant or anticipate changes in the law.'" *Beaty*, however, was not a change in the law, and Mr. Gerrick does not argue that it was. Our Supreme Court made it clear in *Beaty* that trial judges—and therefore trial counsel—always had an obligation to ensure the prosecution's closing argument did not violate due process. Trial counsel testified that this particular trial judge had a rule that did not allow the defense to respond to the State's best argument. Such a rule violates due process.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

- O. Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in the case, which denied Mr. Gerrick's right to a fair and impartial grand jury presentment.**

The following exchange occurred during a pre-trial hearing:

MR. WATERS: And lastly, Your Honor, we did push through or have the grand jury rule on a new indictment last week. As we were here for trial prep we -- Lieutenant Harley realized that one of the individuals on the grand jury had -- was a witness in the case. Not -- just kind of an auxiliary fact witness. And so fortunately the grand jury was in session. So we put the indictment through and she had recused herself obviously for that, but I've served that indictment on Mr. Williams. He's aware of that, but I just wanted to make --

THE COURT: There's no motion to quash the indictment, there's been no attack on the indictment; is that correct, Mr. Williams?

MR. WILLIAMS: Your Honor, just for the record. He has raised to me the fact that there is a time frame given for the murder. I've looked at that and I've talked to SLED. They've given me all of their evidence. So I'm able to properly defend him in the indictment. And I know what the charges are.

THE COURT: Thank you.

Tr. 136-37.

Trial counsel base his lack of objection on his understanding that an indictment is a merely notice document. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). An indictment is not merely a notice document as the State is required to present testimony to the grand jury establishing probable cause. The right of an accused to have a grand jury review the charges against him is a Constitutional right enumerated in the Fifth Amendment to the United States Constitution as well as in Article I, §11 of the South Carolina Constitution. "It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment." *State v. Rector*, 158 S.C. 212, 236, 155 S.E. 385, 394 (1930) (quoting *Crowley v. United States*, 194 U.S. 461, 473 (1904)).

It has long been recognized that when an indictment is presented, the accused "may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined." *State v. Faile*, 43 S.C. 52, 20 S.E. 798 (1895). *See also, State v. Torrence*, 305 S.C. 45, 406 S.E.2d

315 (1991). Our Supreme Court has recognized that questions about the fairness and impartiality of the grand jury are “so closely analogous” to questions regarding the qualification of jurors, that questions of the latter have bearing on considering questions related to the former. *Rector*, 158, S.C. at 240, 155 S.E. at 395 (citing *State v. Richardson*, 149 S.C. 121, 146 S.E. 676 (1928)).

A defendant must challenge the legality and sufficiency of the process of the grand jury *before* the jury renders a verdict in order to preserve the error for direct appellate review. See *Evans v. State*, 363 S.C. 495, 509 (2005) (citing *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)).

“Grand jury proceedings are presumed to be regular unless clear evidence indicates otherwise.” *State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (citing *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (1991)). Our Supreme Court has recognized the incredible burden this standard places on defendants. “It is usually difficult for a defendant to make such a claim...[because] speculation about ‘potential’ abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. Fortunately, given the nature of State Grand Jury proceedings, there is a complete record available for analysis.” *State v. Thrift*, 312 S.C. 282, 302-303, 440 S.E.2d 341, 352 (1993) (quoting *State v. Thompson*, 305 S.C. at 502, 409 S.E.2d at 424 (emphasis in the original)). Mr. Gerrick’s case, however, was not a State Grand Jury case, meaning there is not record of the proceedings.

In this case, a grand juror that was also a witness in Mr. Gerrick’s case participated in the presentment and probable cause determination. Once the grand juror discussed the case with the

other grand jurors, empaneling a new grand jury was the only way to cure the error. This error, therefore, was not cured by the re-indictment as the order of dismissal, at 61-62, suggests

The State in its brief and this Court in the order of dismissal make the same error as trial counsel—that an indictment is merely a notice document. *See State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). An indictment is not merely a notice document as the State is required to present testimony to the grand jury establishing probable cause. The right of an accused to have a grand jury review the charges against him is a Constitutional right enumerated in the Fifth Amendment to the United States Constitution as well as in Article I, §11 of the South Carolina Constitution. “It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment.” *State v. Rector*, 158 S.C. 212, 236, 155 S.E. 385, 394 (1930) (quoting *Crowley v. United States*, 194 U.S. 461, 473 (1904)).

Finally, the State’s reliance of cases holding the indictment to be sufficient because it tracked the language of the statute, once again, overlooks to role of the presentment of the indictment in our criminal justice system.

P. Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

At the PCR hearing, trial counsel testified he was aware of evidence establishing that someone other than Sammie Gerrick killed Tyrone Donaldson. Trial counsel as ineffective for not presenting this evidence to the jurors. *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Because the State’s case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Gerrick. This Court should order a new trial.

Q. Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal.

On appeal, appellate counsel briefed the following three issues:

1) Whether the court erred by admitting into evidence a “root” associated with witchcraft and a can of “Law Stay Away” that were seized from the center console of Appellant’s truck pursuant to a search warrant because this evidence was not relevant and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant?

2) Whether the court erred by denying Appellant’s motion for a mistrial after law enforcement characterized the “brown piece of paper bag” that was “taped up” to form some sort of “capsule” with weeds, twigs, and a penny inside and the words “Set me Sammie Gerrick free from murder and revoked bonds” written on the outside as a “witchcraft root” in front of the jury since this testimony was highly prejudicial and the court’s curative instruction failed to cure the prejudice suffered by Appellant?

3) Whether the court erred by refusing to grant a mistrial when the state showed a videotape of Appellant’s interview with law enforcement before his arrest with a polygraph machine clearly visible on the table since this was unduly prejudicial and denied Appellant a fair trial.

Trial counsel did not federalize these issues by arguing the error deprived Mr. Gerrick of his due process right to a fair trial. Trial counsel should have argued these errors denied Mr. Gerrick his fundamental due process right to a fair trial, applicable to the states through the Fourteenth Amendment. U.S. Const. Am. V and XIV. The failure to federalize these issues denies Mr. Gerrick the right to present these in a federal habeas corpus petition, should that need ever arise. *See* 28 U.S.C. § 2254.

R. The cumulative effect of trial counsel’s errors requires a new trial.

This Court must also apply a cumulative prejudice analysis. *Kyles*, 514 U.S. at 436 (the prejudice must be “considered collectively, not item-by-item”). The United States Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented

originally” in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. “[A]s a whole” implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional *errors*, the result of the proceeding would have been different.” 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of “individual error” or error-by-error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”⁵

The South Carolina Supreme Court has never before explicitly applied a cumulative prejudice analysis. *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). The court declined to do so in *Green* because Green failed to meet the threshold requirement of showing error. Specifically, the Court held that “[m]ultiple errors do not exist in this case to form any cumulative prejudicial effect.” 351 S.C. at 197, 569 S.E.2d at 325. While the application of the cumulative error doctrine is an unsettled issue in this state, South Carolina recognizes the doctrine in other contexts. The “cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citing *Tennant v. Marion Health Care*

⁵ Numerous courts, relying on *Strickland*, have held that a cumulative prejudice analysis is appropriate. See, e.g., *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008); *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008); *In re Gay*, 968 P.2d 476 (Cal. 1998); *McIntosh v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997); *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).

Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995)). The Court of Appeals applied the cumulative error doctrine in *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (“[T]he cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal.”).⁶

The State argued in its brief that the application of the cumulative error doctrine is unsettled in South Carolina. State’s Brief at 58. As discussed above, the cumulative error doctrine is a standard recognized by the Supreme Court of the United States in ineffective assistance of counsel claims and, therefore, applicable to Mr. Gerrick’s application for post-conviction relief.

Prejudice

As discussed throughout this motion, the State ignored *Smalls* in its post-hearing brief, and the order of dismissal incorrectly applied *Smalls*. The State’s case against Mr. Gerrick was not overwhelming, and the order of dismissal never applies *Smalls* to the specific error alleged in the PCR claims. The prejudice section of the order, at 71-77, never addresses Mr. Gerrick’s argument that he was prejudiced because, in this circumstantial evidence case, credibility was a central issue for the jurors to determine. See *Anderson, Jennings, and Berry, supra*

IV. CONCLUSION.

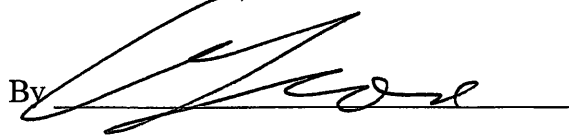
For the reasons set forth in Mr. Gerrick’s post-hearing brief, reply brief, and this motion, this Court should reconsider its order of dismissal, enter an order granting Mr. Gerrick post-conviction relief, and remand this case to the Court of General Sessions for a new trial.

IT IS SO MOVED.

⁶ The South Carolina Supreme Court denied the state’s petition for writ of *certiorari* on October 7, 2000. After granting Blurton’s cross petition for writ of *certiorari* on April 26, 2001, the Supreme Court ordered a new trial for Blurton on an additional ground. *State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002).

Respectfully Submitted,

By



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Attorney for the Sammie Gerrick

August 16, 2018
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Sammie Lee Gerrick,

Applicant,

vs.

State of South Carolina,

Respondent

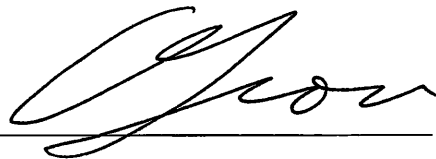
IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2016-CP-06-00111

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Julie A. Coleman, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

By



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

August 16, 2018
Greenwood, South Carolina

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0600111**

Sammie Lee Gerrick		South Carolina State of	

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: **Order Denying Defendant's Motion for Reconsideration.**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/ J R Scott Sprouse
Circuit Court Judge

2752
Judge Code

8/29/2018
Date

For Clerk of Court Office Use Only

This judgment was entered on **August 29, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **August 30, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Carter

Court Reporter

Constance B. Carter - Deputy Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Sammie Lee Gerrick,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

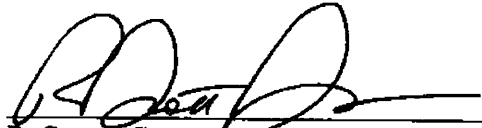
Case No.: 2016-CP-06-00111

ORDER DENYING DEFENDANT'S MOTION
FOR RECONSIDERATION

FILED FOR RECORD
2018 AUG 29 PM 1:08
RHONDA D McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Defendants's Motion, pursuant to Rule 59, SCRCP, ¹ is DENIED.

AND, IT IS SO ORDERED.



R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
August 29, 2018

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.