LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

April 24, 2019

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

RE: William Brockmeyer, SCDC # 347527, vs. State of South Carolina
Appeal of Case No. 2014-CP-32-689

Dear Mr. Shearouse,

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

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

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

Respectfully,

Kristy Goldberg

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

William Brockmeyer, SCDC # 347527
Kirkland Correctional Institution
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Columbia, South Carolina 29210

The Honorable Lisa Comer
Clerk of Court
205 East Main Street
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Chief Appellate Defender – Robert Dudek
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 26 2019

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2014-CP-32-00689

William Brockmeyer, SCDC # 347527, ... Appellant

v.

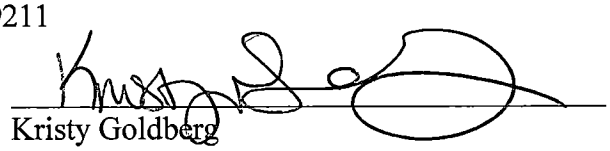
State of South Carolina, ... Respondent.

PROOF OF SERVICE

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

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on April 24, 2019 by depositing one copy in the U.S. Mail, postage prepaid:

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



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 26 2019

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2014-CP-32-00689

William Brockmeyer, SCDC # 347527, ... Appellant

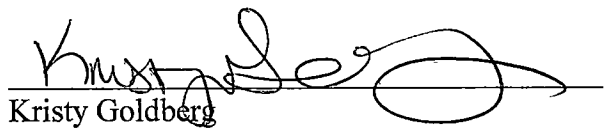
v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant William Brockmeyer hereby appeals from the Order of the Honorable R. Keith Kelly presiding Judge for the 11th Judicial Circuit, filed October 25, 2018 and the Order Denying Motion to Alter or Amend Judgment, filed April 22, 2019 and received by counsel for the Applicant on April 24, 2019 in the matter of William Brockmeyer v. State of South Carolina, Case No. 2014-CP-32-00689.

April 24, 2019



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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT 2014-CP-32-0689
William Brockmeyer, #347527, Applicant, v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed February 25, 2014. This Application was amended by Applicant on September 29, 2016. An evidentiary hearing in this action was heard by this Court at the Lexington County Courthouse on November 9, 2016. Applicant was present, and he was represented by Kristy G. Goldberg, Esquire. The State was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

At the hearing, Applicant testified on his own behalf. Assistant Public Defender David Mauldin testified also testified. Before this Court was also a copy of trial transcript, the Application and subsequent amendment, the Return, the records from the South Carolina Department of Corrections, the records of the Lexington County Clerk of Court regarding these convictions, and the records from the direct appeal.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the April 2007 term of the Lexington County Grand Jury for one count of murder (2011-GS-32-1255) and one count of possession of a firearm of knife during a violent crime (2011-GS-32-

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1257). Applicant was represented by David Mauldin and Robert Madsen, both Assistant Public Defenders for Lexington County.

On August 22-26, 2011, Applicant was tried by a jury before the Honorable Edward B. Cottingham, Circuit Court Judge. On August 26, 2011, the jury found Applicant guilty of one count of murder and one count of possession of a weapon during the commission of a violent crime. On October 21, 2009, Judge Cottingham sentenced Applicant to thirty-five (35) years imprisonment for the murder conviction and five (5) years imprisonment for the possession of a weapon during the commission of a violent crime conviction. The sentences were to be served consecutively. Overall, Applicant received an aggregated forty (40) year term of imprisonment.

Applicant timely filed and served a notice of appeal. On the appeal, Applicant was represented by Miles Coleman, Esq., and Robert M. Dudek, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

Applicant's appeal was perfected by the filing of a Final Brief of Appellant. In the Final Brief, Applicant presented four arguments. First, he contended the trial court erred by denying the defense's motion to enforce a subpoena where the information sought was clearly relevant, unavailable from other sources, and not otherwise protected. Second, Applicant argued the trial court erred and violated the Confrontation Clause of the Sixth Amendment to the United States Constitution by permitting the State to establish the chain of custody of its evidence through a computer log. Third, Applicant asserted the trial court erred by permitting the State to introduce a photograph of the defendant where the State used the photograph for the illicit purpose of implying that Mr. Brockmeyer was guilty. Fourth, Applicant claimed the trial court erred by permitting the State to introduce hearsay evidence taken from the decedent's telephone.

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The State filed a Final Brief of Respondent. Applicant subsequently filed a Final Reply Brief of Appellant.

By Order filed February 28, 2013, Applicant's appeal was certified for review by the South Carolina Supreme Court. Oral argument was heard by the South Carolina Supreme Court on May 15, 2013.

In a published opinion filed November 27, 2013, the South Carolina Supreme Court affirmed Applicant's convictions. State v. Brockmeyer, 406 S.C. 324, 331, 751 S.E.2d 645, 649 (2013). The Remittitur was issued on December 13, 2013.

II. ALLEGATIONS

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

10(a) Ineffective Assistance of Counsel
11(a) Counsel failed to properly preserve Appellant issues for appeal
11(b) Counsel failed to show how Appellant Constitutional Rights were violated which denied Appellant due process of law

In the amendment to the Application that was filed as an attachment to the original Application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Counsel was ineffective by failing to properly preserve motion to enforce subpoena for appellate review.

2. Court appointed counsel was ineffective by failing to properly preserve a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution, this denied Appellant due process of law and this was highly prejudicial and rendered the evidence inadmissible

3. Counsel was ineffective for failing to object when the jury foreman stated that jury found defendant of weapon/possession weapon during a violent crime on 8/25/11 the day before jury found defendant guilty of murder on 8/26/11.

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In the Amended Application filed on September 29, 2016, Applicant alleged he is being held in custody unlawfully for the following reasons:

11(a) Ineffective assistance of trial counsel for failing to object to inadmissible hearsay testimony. Page 147 and 148.

11(b) Ineffective assistance of trial counsel for failing to preserve the record clearly and have physical demonstrations done in Court described for the transcript.

11(c) Ineffective assistance of trial counsel for failing to effectively present arguments regarding the angle of the gunshot wound and failure to allow the Applicant to demonstrate what happened.

11(d) Ineffective assistance of counsel for failure to present evidence regarding reputation and use of a nickname prior to the incident.

11(e) Ineffective assistance of counsel for failure to object when the trial judge provided instructions to the jury prior to the closing arguments of counsel.

11(f) Ineffective assistance of counsel for failing to object when the Court did not emphasize to the jury that a conviction on a violent crime was a prerequisite for a conviction on possession of a deadly weapon during commission of a violent crime.

11(g) Ineffective assistance of counsel for failing to object and/or request a mistrial and/or move for a new trial based on the fact that the jury reached a verdict on possession of a deadly weapon during commission of a violent crime prior to reaching a verdict on whether or not he committed a violent crime, and the Court instructed the jury to re-date the verdict on the indictment.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds trial counsel's testimony credible and finds Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 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. "[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)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient

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performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to all of his allegations of ineffective assistance of counsel.

1. Trial counsel was not ineffective for not preserving the defense motion to enforce subpoena for appellate review.

In his first claim in his initial application for post-conviction relief, Applicant asserts trial counsel was ineffective because counsel did not preserve the motion to enforce a subpoena at trial. Applicant had served a subpoena on local TV station WLTX seeking information about a commenter on their website. The subpoena specifically sought the production of

> ANY AND ALL REGISTRATION INFORMATION FOR THE USERNAME "**AndTheTruth**" THAT REPLIED ON JULY 12, 2010 @ 1:36 AM EDT TO THE NEWS ARTICLE REGARDING **WILLIAM MARK BROCKMEYER** BEING CHARGED WITH THE SHOOTING DEATH OF **NICHOLAS ALTON RAE**.

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Court Exhibit 1, p. 6. (ROA p. 800).[1] Counsel for the news station objected to the subpoena by letter, contending the information sought was constitutionally protected as anonymous internet comment and not subject to disclosure. *January 7, 2011 Letter - Bender to Mauldin, Court Exhibit 1*, p. 9. (ROA p. 803).

A hearing on the subpoena was convened by Judge Cottingham on August 3, 2011. After hearing argument, Judge Cottingham opined that the witness was constitutionally protected. He concluded that given the nature of the case and number of witnesses, if the party exists, it can be determined appropriate discovery without violating the constitutional privileges of the station and the named individual. (Tr. 15-6). Prior to Applicant's trial and during Applicant's trial, no other mention was made of the subpoena.

Applicant raised the denial of the subpoena as an issue on appeal. Specifically, he argued the trial court erred by applying the wrong legal standard and denying the defendant's motion to enforce a subpoena where the information was clearly relevant, unavailable from other sources,

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[1] The defense believed that a comment may have been written by a potential witness in the case. The comment stated as follows:

> AndTheTruth
> 1:36 AM on July 12, 2010
>
> **Were you there, did you see what happened, did you see the tears on his young confused face when he realized he had just accidently killed his friend....**
> - God makes provision for an accidental or carelessly caused death. Judge not, and ye shall not be judged: condemn not, and ye shall not be condemned; forgive, and ye shall be forgiven Corinthians 15:54-55:
> So when this corruptible shall have put on incorruption, and this mortal shall have put on immortality, then shall be brought to pass the saying that is written, Death is swallowed up in victory.
> O death, where is thy sting? O grave, where is thy victory?
> - My Heart & Prayers go out to both families & all of my friends who had to see this happen, may God be with you all...

Court Exhibit 1, p. 4. (ROA p. 798).

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and not otherwise protected. The South Carolina Supreme Court denied relief upon the claim, finding it was not preserved for appellate review:

> Although Brockmeyer presents a compelling argument for the disclosure of the commenter under the circumstances presented, we decline to reach this issue on issue preservation grounds. We have no way of properly evaluating Brockmeyer's continuing need for the information he sought to subpoena following the trial judge's instructions for the solicitor to take additional steps to assist the defense in identifying everyone at Jager's on the night of the shooting. This is so because Brockmeyer failed to renew his motion at the outset of trial. Thus, Brockmeyer has failed to provide this Court with a sufficient record on appeal to evaluate this assertion of error. See Harkins v. Greenville Cnty., 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding it impossible to evaluate the merits of certain issues because the Appellant failed to include the relevant material in the record on appeal); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (noting an appellant bears the burden of providing a sufficient record to review his assertions of error).

State v. Brockmeyer, 406 S.C. 324, 338–39, 751 S.E.2d 645, 652–53 (2013). The Supreme Court further found any error by the trial court in not granting the subpoena was harmless because the evidence sought was cumulative to evidence presented at trial.

> However, even assuming the trial court erred in not requiring disclosure of the anonymous commenter's identity, the error would not be reversible. Brockmeyer is unable to show he was prejudiced by the trial judge's denial of his motion to enforce the subpoena. More to the point, evidence of an accidental shooting and Brockmeyer's distraught state was presented. Brockmeyer testified that the shooting was an accident and that he was "in shock" afterwards. More importantly, Mariko Clack, who was among the group of friends with Brockmeyer and the victim on the night of the shooting, testified that Brockmeyer was weeping and was "really shaky and frantic" after the shooting. Thus, any error was harmless because even assuming the anonymous commenter testified to that effect, it would have been cumulative. See State v. Commander, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). In sum, the issue is not properly preserved, but in any event, any error in the trial court's refusal to enforce the subpoena would not constitute reversible error.

Brockmeyer, 406 S.C. at 339, 751 S.E.2d at 653.

There was no testimony regarding this claim at the evidentiary hearing.

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This Court finds Applicant has failed to establish he is entitled to relief upon this claim of ineffective assistance of counsel. First, Applicant has not shown trial counsel was deficient in not further contending the subpoena was needed before trial. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland v. Washington, 466 U.S. 668, 689 (1984). Applicant presented no evidence at the PCR evidentiary hearing that the information requested in the subpoena was still needed at trial. Nor did Applicant establish trial counsel did not make a strategic decision to not continue seeking enforcement of the subpoena. Thus, this Court finds Applicant fails to meet his burden of showing trial counsel was deficient.

Applicant also fails to establish he was prejudiced by any error of counsel in the handling of the subpoena. First, Applicant presented no evidence at the evidentiary hearing in this action to establish what would have been obtained had the subpoena been enforced. His argument regarding prejudice is purely speculative and insufficient to establish prejudice. See Putnam v. State, 417 S.C. 252, 266, 789 S.E.2d 594, 601 (Ct. App. 2016). Second, to the extent Petitioner's argument relies upon his belief that his prejudice stems from the argument not being preserved for appellate review, this Court finds his argument is without merit. In making this finding, this Court finds very persuasive the Supreme Court's reasoning for its finding that any error by the trial court was harmless. As noted by the Supreme Court, the information contained in the online comment that was the basis for the subpoena was cumulative to evidence presented at Applicant's trial. Applicant had testified the shooting was an accident, and he was in shock afterwards. (Tr. 653, 656-58). Further, Mariko Clack had testified that when she saw Applicant after the shooting, she "saw him like weeping", in response to an inquiry as to whether he was

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crying that night. (Tr. 100, l 2). In light of the Supreme Court's determination that any error by the trial court in not enforcing the subpoena would have been harmless, this Court finds Applicant cannot show he was prejudiced by counsel's failure to preserve this issue for appeal. This claim for relief is therefore denied and dismissed with prejudice.

2. Trial counsel was not ineffective for not preserving an objection asserting a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

In his second claim of the original application, Applicant asserted trial counsel was ineffective in failing to raise an objection to the admission of several items during his trial because the admission of those items violated the Confrontation Clause of the Sixth Amendment. It appears this claim stems from an argument presented by Applicant in his direct appeal. In the appeal, Applicant challenged the admission five items (a shirt worn by Applicant, a shell casing, a pistol magazine, a pistol, and a recovered projectile). (See Final Brief of Appellant, footnote 15). At trial, trial counsel objected to the admission of these items, asserting each time the State had failed to present a sufficient chain of custody or foundation. (Tr. 353, 359-60, 366-67, 421-23). On appeal, Applicant attempted to argue that the admission of these items violated the Confrontation Clause of the Sixth Amendment.

The South Carolina Supreme Court found the arguments were not preserved for appellate review. State v. Brockmeyer, 406 S.C. 324, 350, 751 S.E.2d 645, 659 (2013). The Supreme Court further found there was no Confrontation Clause violation.

> We find the facts of this case demonstrate that the evidence logs were kept as business records for the purpose of identifying and storing evidentiary items. We find the trial judge properly determined the chain-of-custody reports fall within the hearsay exception in Rule 803(6), SCRE, and that the evidence custodians' testimony about the chains of custody was admissible. Critical to admissibility of the chain-of-custody records here is their non-testimonial nature. Regarding the Confrontation Clause analysis, these chains of custody were not created "for the sole purpose of providing evidence against the defendant."

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> Melendez–Diaz, 557 U.S. at 323, 129 S.Ct. 2527. Indeed, the evidence logs do not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items; thus, the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their "primary purpose" is not to constitute evidence in a criminal trial. Because we find these statements are not testimonial, they are exempt from Confrontation Clause scrutiny. See Bullcoming, 131 S.Ct. at 2720 (Sotomayor, J., concurring) ("[B]usiness and public records 'are generally admissible absent confrontation.' ").

Brockmeyer, 406 S.C. at 352, 751 S.E.2d at 660.

No testimony regarding this claim was presented at the PCR evidentiary hearing.

At the outset, this Court would note that the underlying facts regarding how this claim arose at trial are recited in detail in the South Carolina Supreme Court's opinion.

This Court finds Applicant has failed to meet his burden of showing trial counsel was ineffective in not presenting an objection based upon the Confrontation Clause when he objected to the admission of these items at trial.

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland, 466 U.S. at 697. This Court finds Applicant has not shown that he was prejudiced. As found by the South Carolina Supreme Court in the direct appeal, no Confrontation Clause issue was present in this case. The evidence logs and chain-of-custody documents were not testimonial in nature, and are exempt from Confrontation Clause scrutiny. Brockmeyer, 406 S.C. at 352, 751 S.E.2d at 660. Thus, any objection based upon the Confrontation Clause would have been without merit. Applicant cannot show there is a reasonable probability the result at trial

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would have been different had counsel presented timely Confrontation Clause objections. Thus, this claim for relief is denied and dismissed with prejudice.

3. Counsel was not ineffective for not objecting when the jury foreman stated that jury found Applicant guilty of the possession of a weapon during the commission of a violent crime the day before the jury verdict was entered. .

In his third claim in the original Application, Applicant asserts trial counsel was ineffective for not objecting when the jury indicated it found Applicant guilty of possession of a weapon during the commission of a violent crime before it found Applicant was guilty of murder. Applicant raises a similar claim in his seventh claim (11(g)) of his amended Application. In that claim, he also asserts trial counsel should have moved for a mistrial when this information was disclosed.

This claim stems from the following exchange before the verdicts were read:

> THE COURT: Mr. Foreman. I've been advised that the jury has reached a unanimous verdict; is that true?
>
> THE FOREMAN: Yes, Your Honor.
>
> THE COURT: If this verdict be the unanimous verdict of all 12, please signify by raising your right hands.
>
> The jury has so signified.
>
> Hope, please accept the verdict form and hand it to me.
>
> THE CLERK: Yes, sir.
>
> THE COURT: What is today's date?
>
> THE CLERK: The 26th.
>
> THE COURT: Please take this back, so they can date it. The date — inadvertently put the 25th, and it's the 26th.
>
> **THE FOREMAN: Your Honor, at around 7:00 o'clock last night we did.--**
>
> THE COURT: Well, date it today, if you. will.

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THE FOREMAN: Yes, sir. '

THE COURT: That's the rendition of the verdict.

THE CLERK: If you'll just change it, sir. And put your initials beside it.

(Jury foreman corrects date with clerk.)

THE CLERK: Thank you, sir.

(8/26/11 Tr. p. 9, l 25 – Tr. 10, l 20).

At the evidentiary hearing, Applicant stated that in light of the exchange, he did not believe the jury was properly instructed or did not follow the instructions that reflected a conviction for a violent crime was a prerequisite for a conviction on the weapons charge. (PCR Tr. 14-5). He further claimed it was potential evidence the jury did not follow instructions throughout the entire trial. Id.

In explaining why he did not raise an objection after hearing this colloquy between the foreman and the trial judge, trial counsel Mauldin stated:

> Well, they did find him guilty of a violent crime and then the -- so the verdicts weren't inconsistent. If they had found him guilty of that and were continuing to do deliberations on the other charge if they had found him guilty of involuntary manslaughter or not guilty, I would have objected to the conviction of that as being definitely inconsistent and not par with the consideration of the elements of the greater offense.

(PCR Tr. 45, l 23 – Tr. 46, l 5). During cross-examination, counsel noted the jury never indicated they were not able to reach a resolution regarding the murder charge. (PCR Tr. 53). Counsel reiterated he would have objected if the jury had reached an inconsistent verdict in finding Applicant guilty of the possession of a weapon charge, but not on the murder charge. (PCR Tr. 53-4).

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This Court finds Applicant has failed to meet his burden of establishing trial counsel was ineffective in not raising an objection under these circumstances. First, Applicant has not shown trial counsel was deficient. As noted by trial counsel, at the time the verdict was published, the jury had found Applicant guilty of both murder and possession of a weapon during the commission of a violent crime. He had the prerequisite conviction for the possession of a weapon during the commission of a violent crime conviction. Further, the jury confirmed its verdict when it was polled. (8/26/11 Tr. pp. 12-3). There was no inconsistent verdict to be challenged, and Applicant has not identified a valid objection that counsel should have otherwise been made. Second, Applicant has failed to establish he was prejudiced. Again, the jury had found Applicant guilty of both murder and possession of a weapon during the commission of a violent crime. He had the prerequisite conviction for the possession of a weapon during the commission of a violent crime conviction. Further, the jury confirmed its verdict when it was polled. (8/26/11 Tr. pp. 12-3). Thus, any objection based upon an alleged inconsistent verdict would have been without merit. Furthermore, to the extent Applicant attempts to assert he was prejudiced because the jury may have prematurely considered the weapons charge, his argument is dismissed because he has presented no probative evidence to support the allegation. See generally Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (finding no prejudice when PCR applicant failed to present testimony or affidavits to establish underlying facts to support claim when counsel failed to preserve objection). This claim for relief is therefore denied and dismissed with prejudice.

4. Trial counsel was not ineffective for not objecting to hearsay testimony.

In his first claim of his amended Application, Applicant asserts trial counsel was ineffective for not objecting to hearsay testimony presented during the testimony of Mariko

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Clack, one of the patrons at the bar where the shooting occurred. At trial, the following exchange occurred during Ms. Clack's direct examination:

Q: At some point does Will Brockmeyer leave with the police?

A: Yes.

Q: What, if anything, is he saying to you as he is leaving?

A: "Come get me."

Q: At some point later did you get a phone call from Will Brockmeyer?

A: Yes, I did.

Q: How much longer after he left was it when he called you?

A: Maybe an hour, maybe more, a couple of hours.

Q: What, if anything, did he tell you on the phone about what happened with Nick?

A: He called me and told me to come get him, and I told him that he wasn't leaving **and that people had seen him shoot Nick**.

Q: **People said what?**

A: **That they had seen him shoot Nick. There was witnesses that had seen him shoot Nick.**

Q: What did he say?

A: He said he didn't do it.

(Tr. 147, l 8 – Tr. 148, l 4) (emphasis added).

At the PCR evidentiary hearing, counsel testified that the statement that there were witnesses that had seen Applicant shoot the victim were hearsay. (PCR Tr. 29). Counsel could not recall if there was a specific reason no objection was made, and he surmised that it might have gone by quickly because the witness testified about Applicant denying shooting the victim immediately afterwards. (PCR Tr. 30). Counsel further noted only one witness testified to

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actually seeing the shooting. (PCR Tr. 30). Further, Ms. Clack did not see the shooting, and she did not identify the people who claimed to have seen the shooting. (PCR Tr. 30). Counsel then noted it was probably a missed objection. (PCR Tr. 30). During cross examination, counsel again noted, "that might have gone by quick because then most of it afterward was about him denying doing anything wrong." (PCR Tr. 46, ll 21-22). Counsel wanted the testimony regarding Applicant's denial of involvement in the shooting to come out. (PCR Tr. 46).

This Court finds Applicant has failed to meet his burden of showing trial counsel was ineffective in not objecting to this testimony. Here, Applicant fails to establish there is a reasonable probability the result of the proceeding would have been different had counsel objected to this testimony.[2] In this Court's opinion, this testimony had very limited impact on Applicant's trial. The testimony itself was limited in nature. The State did not attempt to use Clack's mention of other witnesses as evidence of Applicant's guilt at any point throughout the rest of the trial. One witness testified she actually saw the shooting. (Tr. 99-103). Another witness described the victim as slumping over in his chair when Applicant approached. (Tr. 245). This witness, Mr. Kabar, noted Applicant knelt down, had his hands on or about the victim, and talked with the victim for approximately fifteen seconds. The witness testified they heard a loud pop, and then Applicant stood up and walked off around the building. (Tr. 245-46). Second, Applicant's defense was that the shooting was accidental. He testified that he touched either the victim's hand or the gun, and the gun went off. (Tr. 759). There was no question at

[2] This Court would also question whether trial counsel was deficient as a strong argument could be made that the testimony at issue was hearsay under Rule 801(c), SCRE. The transcript reflects the testimony was not offered to prove the truth of the matter asserted (i.e. multiple people saw Applicant shoot the victim). To the contrary, this Court finds this testimony was offered to establish Applicant's response to initial allegations regarding his involvement in the shooting, which was to deny he had anything to do with the shooting. See generally Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

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trial that Applicant was involved in shooting the victim. Clack's testimony did not contradict Applicant's assertions that the shooting was accidental. Furthermore, this Court finds there was overwhelming evidence of Applicant's guilt outside this one statement made by Ms. Clack. In light of these considerations, this Court finds Applicant fails to establish he was prejudiced. As a result, he has not shown trial counsel was ineffective. This claim for relief is denied and dismissed with prejudice.

5. Trial counsel was not ineffective for not preserving physical demonstrations in the record clearly and have physical demonstrations done in Court described for the transcript.

In Applicant's second claim in his amended application, he asserts trial counsel was ineffective in not creating a better record regarding the physical demonstrations that were done at trial by Gina Brakefield, the only State's witness to actually see the shooting, and the pathologist.[3]

At trial, Gina Brakefield testified about what she saw just prior to the shooting, and her observation of the shooting. During her testimony, she also demonstrated what she saw. The exchange went as follows:

Q: When you come out on the front porch, what do you see?

A: I saw Nick in the chair slumped over and Will crouching in front of him.

Q: When you say slouched over, what do you mean?

A: Hands by his side, head in his lap.

Q: Who, if anybody else, do you see around Nick at that time?

A: Amera Kabar and Keith Kabar were still sitting there.

[3] Applicant also asserts another demonstration should have been presented by counsel. Since this argument falls within the claim presented in Applicant's next allegation, it is addressed in section 6 below.

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Q: Who else, if anybody, did you see?

A: That's it.

Q: Where is Will Brockmeyer at that time?

A: He is crouching in front of him.

Q: When you say crouching, what do you mean?

A: Squatting down.

Q: In front of who?

A: In front of Nick.

Q: What, if anything, do you see next?

A: I saw him like whispering in his ear with his hands up in a trigger- like position.

Q: When you say he was whispering in his ear, who was whispering in whose ear?

A: Will was whispering in Nick's ear.

Q: What was Nick doing at that time?

A: He was asleep.

Q: Were you able to hear what Will Brockmeyer was saying?

A: No, sir.

Q: You said his hand came up in a trigger- like position. What do you mean?

A: I'm not sure how to describe it other than show you.

MR. GRAHAM: Your Honor, could I have the witness step down from the stand and use a chair and have her reenact this for the jury, please?

THE COURT: I will permit it.

MR. GRAHAM: Thank you, Your Honor.
(Witness leaves the witness stand.)

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THE COURT: I find it would help the jurors in hearing the testimony.

MR. GRAHAM: Thank you, Your Honor.

THE COURT: Counsel for the defense, you may come forward, please.

BY MR. GRAHAM:

Q: Gina, if you will stand over here and face the court reporter and keep your voice up so she can hear you.

A: Yes, sir.

Q: If this is the chair that Nick was in -- this is Detective Grant, who is a detective on the case - would you put his body in the position that you saw Nick in.

A: Yes, sir (indicating).

Q: You have him slumped forward with his head forward and his arms hanging down to his side?

A: Yes, sir.

Q: Mr. Hubbard will be Mr. Brockmeyer in this situation. Would you have Mr. Hubbard in the position that you saw Will Brockmeyer.

A: (Indicating.)

Q: Crouching down?

A: Uh-huh. (Indicating affirmative response.) Head forward .

Q: You have his right hand up by his neck, and that's when you say he was whispering in his ear. Where are you standing at when this happens?

A: About here (indicating).

Q: That's about five to six feet away?

A: Yes, sir.

Q: You are looking from the right-hand side over Mr. Brockmeyer's shoulder?

A: Yes, sir.

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THE COURT: Have the witness resume the stand if you have completed your demonstration.

MR. GRAHAM: I think we are at this time, Your Honor. I think that is good.

BY MR. GRAHAM:

Q: Have a seat back there, please, Gina.

A: (Witness resumes the witness stand.)

Q: Now that we have established the position and you have the hand up in a trigger finger in the neck area of the left side of Nick, what do you see or hear next?

A: I heard a loud pop. I saw a flash of yellow and a brass casing fly out.

Q: Did you know it was a casing?

A: No.

Q: So what did you see?

A: It was just like a flash of yellow and then something gold.

Q: What did the flash of yellow look like?

A: Like a fire, like a spark, or a flame.

(Tr. 99, l 17 – Tr. 103, l 9).

The cross-examination of Ms. Brakefield that related to the testimony given during the demonstration was as follows:

Q: You say you weren't there but 30 seconds, and you come out again to the porch area; is that right?

A: Yes, sir.

Q: From that front door, I guess area, to where Nick was sitting, would you say it was about this distance (indicating)?

A: From you to her?

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Q: From me to you.

A: From where I was standing?

Q: No, from the door.

A: The entrance?

Q: Yes.

A: No, it was closer.

Q: It was closer than that. Was it about this close (indicating)?

A: Maybe another foot closer.

Q: So about this close. So you were standing pretty much at the door when you saw it?

A: I might have been a foot away from the door. I was getting ready to tap Will on the shoulder. That's what I was walking up to do.

Q: Because you were going outside, and you didn't think anything was going on?

A: No.

Q: You were just there laughing about being whores and that kind of thing. You are going out because you wanted to see what was going on with Nick, I guess, as far as him being sick?

A: Yes, to see if they were going to come back into the bar or if they were ready to go home.

Q: So he is crouched -- you say he's crouched down, and you are going to tap him on the shoulder, but you are about five, six feet away at that time; is that right?

A: Yes.

Q: And then you -- was his hand up when you first saw him?

A: Yes. Almost right when I saw him like crouched down, he had his hand up.

Q: You said he was whispering?

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A: Yes, it looked as if he was saying something to him.

Q: Okay. But you didn't think anything was untoward or anything at that time?

A: No.

Q: You say you hear the bang and see the flash of light, and you see something gold fly off. You pretty much, I guess, guess that was the bullet afterwards when you were talking to the police; right?

A: Once I realized that he was bleeding out, I knew it was a gun.

(Tr. 119, l 11 –Tr. 121, l 12).

The forensic pathologist, Dr. Bradley Marcus, testified the victim died as a result of a single contact range, penetrating gunshot wound to the left neck. (Tr. 676). Using State's Exhibits 55 and 62, Dr. Marcus showed how the gun was lined up against the victim's neck when the shot was fired. (Tr. 678-80). During his direct examination, the following exchange occurred between the solicitor and Dr. Marcus:

Q: Doctor, if I can get you to step over here to the middle. I want to ask you -- this is not a real gun, Doctor, but it's similar in size and shape to that one.

A: Can you put up the one where I can see his face, please?

Q: State's Exhibit 55. Hypothetically if Nick Rae was sitting in a chair and slumped forward and passed out, would you orient that gun as it was on Nick Rae when it was fired?

A: Sure. Approximately just like this (indicating) in my opinion.

Q: Thank you, Doctor. If you would take the stand again.

(Witness resumes the witness stand.)

(Tr. 681, ll 5-19). To start the cross-examination, the defense immediately addressed the demonstration that was done by Dr. Marcus:

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BY MR. MADSEN:

Q: Doctor, you said that basically I think you had taken the gun and pointed it with someone having it in the right-hand and holding it back like this (indicating); is that correct? That's how you held it over there?

A: Let me see.

Q: With the right-hand - -

A: I think it was like this.

Q: It was not like that.

A: Then it was my error in that part.

Q: Because it would have to be held like this (indicating); wouldn't it? Because this gun, what is down here (indicating), that circle and that thing around, that's coming from this down here (indicating)?

A: That's correct. That's correct. Yeah, that was an error on my part.

Q: So it's not consistent with someone holding it in a right-hand and putting it like that (indicating). It would be consistent if I had it like this (indicating) in my left hand because this has to be facing downward instead of like this (indicating); correct? You held it like that. It couldn't be like that because that wouldn't be the way that it would be done; correct?

A: Well, right. That's not the way it was -- that's not the way. Let me see this. This (indicating) is the way it was held. I held in error.

Q: Right. You held it the opposite way.

A: The gun has to be held like this (indicating), absolutely.

Q: And if I have got it, it doesn't make a lot of sense that someone -- that they would end up doing that? That is kind of unnatural; isn't it? If I had it in my left hand and I had this gun like this (indicating), that is kind of how it would end up going?

A: It's possible, yes.

Q: Not inconsistent with what you saw?

A: It's possible, yes.

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(Tr. 683, l 15 – Tr. 685, l 4). The pathologist also indicated the victim had a watch on his left wrist. (Tr. 686).

At the PCR evidentiary hearing, Applicant testified about the demonstration that was done by Ms. Brakefield. Applicant stated,

> She got down from the stand and they had two people -- you know, she put them in position as far as what she said she seen, and obviously in this case it was a contact range gunshot wound so the gun touched the person's skin and she put the gun up to the skin in a certain way saying that she seen me like that but it was not actually how it lined up, but we weren't aware of it at the time. We didn't become aware of it until later, until the pathologist testified.

(PCR Tr. 7, l 24 – Tr. 8, l 6). Applicant indicated Brakefield used a prop gun during the demonstration. (PCR Tr. 8). Applicant further testified that Brakefield said she was standing three or four feet away and was looking over Applicant's shoulder. (PCR Tr. 8). He asserted the transcript does not reflect the demonstration she did at trial. (PCR Tr. 8). He also stated the pathologist did not do a demonstration. (PCR Tr. 8). Applicant complained "it was actually completely reversed all the way around where it would be consistent with being in his own hand." (PCR Tr. 9, ll 22-4). Applicant contended the demonstration done by Brakefield was not possible:

> She demonstrated it with a gun being in my right hand with my palm facing down -- . . . -- which the actual muzzle imprint lines up with the wound as far as either it being in someone -- like Nick's hand, who was sitting down, it could have been in his left hand with palm facing down or if it was, in fact, in my hand, my hand would have been supinated with my palm facing upward.

(PCR Tr. 12, ll 7-8, 10-15).

During cross-examination, Applicant testified the victim was sitting outside, and he was severely intoxicated. (PCR Tr. 21). He also had a gun in his hand in his lap. (PCR Tr. 21). Applicant indicated the victim lifted the gun up, and that was when Applicant grappled with him

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for the gun. (PCR Tr. 21-22). Applicant said he made contact with the victim's hand to pull the gun away. (PCR Tr. 22). When asked if the gun was touching the victim when it fired, Applicant noted the gun was at the victim's neck. Applicant further stated, "[i]t happened so fast. I mean, I don't -- I don't recall all the exact details, but, yeah." (PCR Tr. 22, ll 15-6).

Counsel Mauldin testified that there was no indication of what angle the gun was held in the transcript of Ms. Brakefield's testimony. (PCR Tr. 30-1). Further, Mauldin remembered the solicitor provided the pathologist with a prop gun to demonstrate how the gun would have been positioned on the victim when the gun fired. (PCR Tr. 31). Mauldin acknowledged the transcript did not reflect how the gun was held, and there was no indication of what the jury saw or considered. (PCR Tr. 31-2). After reviewing the questions presented in cross-examination, Mauldin agreed there was no way of knowing how the gun was held. (PCR Tr. 32-33). Mauldin further testified that during cross-examination, the pathologist admitted he had made an error in his demonstration during his direct-examination:

> Oh, I believe the way the gun was -- or at least the muzzle imprint on the neck was oriented, the person holding the gun, if they were right-handed, that it would have been palm up and I think he did it more palm down, gangster style.

(PCR Tr. 33, ll 9-13). Mauldin also stated,

> Well, Mr. Madsen crossed the doctor and we had actually discussed it somewhat at the table. It was something that probably would have easily been fixed if we had gone over it extensively during cross, during redirect, the orientation of the gun, that he had just made a mistake, it was like this, like this, and we thought it would kind of be better to leave it at the doctor admitting he made a mistake and not push too hard and then just talk about it a little bit in closing, that it was confusing even to the doctor and how would the jury know, and it seemed like something that -- again, that -- you know, and this was -- Mr. Madsen was cross-examining, but I know we were discussing it that it was a mistake and it looked like something we'd be able to fix rather easily and move on from there and so we kind of did what we did with it not to cause more damage.

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(PCR Tr. 33, l 21 – Tr. 34, l 11). Mauldin further testified that they talked about how he had the gun palm down, and that would not have been the way the gun was oriented. (PCR Tr. 35).

> [H]e had the gun, I think, palm down and that was not the way it would have been had it been oriented, and I think further on Page 684, although it's hard to say, they talk about left hand and something having to be facing downward and then there's a lot of indicating, but that's basically what it was. And the way the imprint was on the side of his neck, I believe there's -- there's a barrel and then the bottom part under the barrel there was metal on the gun and it would have been held with palm up next to the neck and the man had his right hand with the palm down.

(PCR Tr. 35, ll 1-11). Mauldin also testified they were more worried about the actual presentation to the jury than preserving the demonstration for appeal. (PCR Tr. 35). Mauldin did not believe there would be an appeal issue about the demonstration. Id.

During cross-examination, Mauldin agreed that Applicant's defense was not denying his involvement in the shooting. (PCR Tr. 48). Applicant said it was an accident. (PCR Tr. 48). Further, counsel examined State's Exhibits 55 and 62 from the trial.[4] It was undisputed the gunshot went into the left side of the victim's neck. (PCR Tr. 50). Mauldin noted the top of the gun had to be oriented toward the back of the victim's neck and the bottom of the gun was more towards the front of the victim's neck. (PCR Tr. 50-1). Mauldin testified that if the gun was in the victim's left hand, his palm would be facing down, but if it was in his right hand, the palm would be facing up. (PCR Tr. 51-2). Mauldin could not recall which direction Ms. Brakefield held the gun, but it was clear the pathologist held the gun in the wrong position. (PCR Tr. 52). Mauldin agreed that he and Counsel Madsen discussed how to handle the matter, and they made a strategic decision to handle it in the cross-examination in the manner that was done. (PCR Tr. 52).

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[4] State's Exhibit 55 was the left side of the victim's head from the mouth downward. State's Exhibit 62 was an overlay of an image of the gun barrel.

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This Court finds Applicant has failed to meet his burden of establishing trial counsel was ineffective in their handling of the demonstrations at trial. First, this Court finds trial counsel were not deficient in the handling of the Ms. Brakefield's demonstration. As noted by trial counsel, their concern with the demonstrations was with the presentation to the jury, not an appeal. Furthermore, trial counsel's strategy for combatting the demonstration was borne out during cross-examination of Ms. Brakefield. Counsel attempted to first establish Brakefield viewed Applicant negatively because of his use of a fake name. (Tr. 111-13). Counsel also had Brakefield admit there were several inconsistencies between her testimony at trial and the statements and emails she provided to law enforcement. (Tr. 116-17, 121, 122). During cross-examination, Brakefield also admitted she was five to six feet away before the shooting occurred, and it did not look as if Applicant was doing anything untoward the victim just before the shooting occurred. (Tr. 120-21). Counsel also had Brakefield clarify that her statement to law enforcement that indicated Applicant shoved the victim to the ground after the shooting was not accurate. (Tr. 122). Where, as here, trial counsel conducts a thorough and meaningful cross-examination of a witness, counsel's failure to employ a trial strategy that, in hindsight, might have been more effective does not constitute unreasonable performance for purposes of an ineffective assistance of counsel claim. Cardwell v. Netherland, 971 F.Supp. 997, 1019 (E.D.Va.1997).

Second, this Court finds trial counsel were not deficient in the handling of the pathologist's demonstration of the positioning of the gun when the shot was fired. The trial transcript reflects that during cross-examination, trial counsel had the pathologist admit that his demonstration during his direct testimony was incorrect. Further, the transcript reflects trial counsel also did a demonstration while Dr. Marcus was on the stand, and Dr. Marcus agreed the

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corrected positioning demonstrated would have been the consistent with the evidence Dr. Marcus observed. Counsel Mauldin testified that he and Counsel Madsen did discuss how to handle the demonstration done by Dr. Marcus at counsel table, and the cross-examination done by Counsel Madsen was a reflection of their strategy in handling their concerns that had been raised by Dr. Marcus's demonstration during his direct testimony. This Court finds Counsel's Mauldin's testimony regarding trial counsel's strategic decision to be credible, and affords it great weight. Based upon this testimony and the trial transcript reflecting that counsel's actions, this Court finds Applicant has failed to show trial counsel was deficient in this regard.

This Court further finds Applicant has not shown that he was prejudiced. First, this Court would note that Applicant has not presented any testimony or established before this Court how the demonstration done by either Ms. Brakefield or Dr. Marcus at trial should have been preserved for the record. Neither Ms. Brakefield nor Dr. Marcus testified at the PCR evidentiary hearing, and none of the testimony presented clarifies their demonstrations in any more detail than was presented at trial. Thus, to the extent Applicant's claim is based upon a belief that counsel was ineffective for not clearly establishing a record of the demonstration, Applicant fails to establish he was prejudiced. His assertion that he was prejudiced is merely speculative. Furthermore, Applicant also fails to establish how better record of the demonstration would have possibly led to a different result at trial. Applicant appears to believe that a better record would have provided an avenue for a different argument on appeal. This Court rejects this argument for two reasons. In addition to not presenting what a record of the demonstrations during either witnesses' testimony would have looked like in a transcript, Applicant has also not presented an argument that could have been raised on appeal had the demonstrations been better preserved in the record. This Court would note that no objections were made at trial regarding either the

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demonstration done by Ms. Brakefield or by Dr. Marcus. Altogether, Applicant has not shown there was a reasonable probability that the result at trial would have been different had counsel handled the demonstrations in a manner that would have better reflected the demonstrations in the trial transcript. This claim for relief is therefore denied and dismissed.

6. Trial counsel were not ineffective for not allowing Applicant to demonstrate the shooting, and for not presenting a different argument regarding the shooting in closing argument.

In his third allegation in the amended application, Applicant complains trial counsel should have allowed him to demonstrate what occurred at the shooting, and counsel should have presented a different closing argument challenging the State's demonstrations of the shooting. This Court finds these contentions are without merit.

At the PCR evidentiary hearing, Applicant presented a demonstration of how the shooting occurred from his point of view:

> Okay. Like if you're holding a gun, the handle would be here, the muzzle would be here. Gina testified that she seen me -- if I could use you. Well, he was sitting down. She said she seen me leaning, holding the gun like this, which if he would have lifted his hand up there was no way it could be in his hand, but it actually lines up the other way. So if you could grab it, put it in your left hand. If you were holding it up to your neck, it would be exactly consistent like that. That's how it actually lines up. The muzzle imprint with the imprint of the wound, but she said that she seen me completely the opposite way, like this, which -- can have I have it one more time? If she was correct in this, there's no way it could have fit in no hand and that's what the State relied on saying that my testimony couldn't have been right because of that fact.

(PCR Tr. 11, ll 9-24). Applicant claimed he did not believe his lawyers presented the issue effectively, and another demonstration should have been done, noting "if my counsel was confused about, you know, the -- the physical proof, then obviously the jury would have been, too, and wouldn't have been able to make a proper decision based upon the evidence presented because it wasn't presented enough to them for them to make an educated decision." (PCR Tr.

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13, ll 10-5). Applicant also expressed he believed counsel admitted as much in closing argument when counsel noted another demonstration was not done. (PCR Tr. 13-4).

During cross-examination, Applicant admitted he was intoxicated at the time, and the victim had the gun sitting in his lap shortly before the shooting. (PCR Tr. 21). Applicant stated the victim lifted up the gun, and Applicant went to grab it, not thinking it was loaded. (PCR Tr. 21). Applicant asserted he was reaching for the gun trying to grab it went it fired. (PCR Tr. 21-22). Applicant further testified the gun was right at the victim's neck when it fired. "It happened so fast. I mean, I don't -- I don't recall all the exact details, but, yeah." (PCR Tr. 22, ll 15-6).

Trial counsel was not directly asked about whether the defense considered having Applicant present a demonstration regarding how the shooting occurred. However, Counsel Mauldin did note that in regards to the pathologist's testimony, he and Counsel Madsen discussed and jointly decided against asking for a second demonstration of how the shooting occurred. (See PCR Tr. 34-5).

This Court finds Applicant has failed to meet his burden of showing trial counsel was deficient in not having Applicant demonstrate how the shooting occurred, and also not presenting a closing argument based upon such a demonstration. Counsel's testimony reflects they made a strategic decision not to present a second demonstration of how the shooting occurred. Counsel's strategy, as indicated in the trial transcript and closing argument, was to utilize the fact the State failed to present an accurate depiction of the shooting to argue there was reasonable doubt. This Court finds this strategy was a reasonable and valid strategy. Thus, Applicant cannot show counsel was deficient. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance).

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This Court also finds Applicant fails to show that he was prejudiced. In light of Applicant's testimony that he was intoxicated when the shooting occurred, and he did not recall all of the exact details at the evidentiary hearing, this Court does not find the demonstration presented by Applicant to be credible. Further, this Court finds there was not a reasonable probability the result at trial would have been different had counsel asked Applicant to present this demonstration at trial. Applicant's credibility issues at trial (stemming from his use of a fake name the days prior to the shooting and his differing accounts of how the shooting occurred when talking with law enforcement, among other issues), a demonstration by Applicant would not have assisted his defense at trial. Similarly, this Court finds Applicant has failed to show he was prejudiced by counsel's closing argument and counsel's decision not to present another demonstration for closing argument. This claim for relief is therefore denied and dismissed with prejudice.

7. Applicant's claim that trial counsel was ineffective assistance for failing to present evidence regarding reputation and use of a nickname prior to the incident was withdrawn.

At the evidentiary hearing, Applicant withdrew this claim from consideration. (PCR Tr. 4). Thus, this Court finds Applicant has withdrawn his fourth allegation in the amended application for post-conviction relief. Thus, this claim is dismissed with prejudice.

8. Trial counsel was not ineffective in not objecting when the trial judge provided instructions to the jury prior to the closing arguments of counsel.

In his fifth claim of the amended application, Applicant asserts trial counsel was ineffective for not objecting when the trial court giving the jury charge before the parties presented their closing arguments. This Court finds this claim is without merit.

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This claim stems from the trial court's decision to give its instructions prior to closing argument. Prior to giving the jury charge, the trial court stated as follows,

> THE COURT: Mr. Foreman, as you are well aware, we have now concluded all of the testimony in the case and thus remaining is the final arguments of counsel and my charge to you upon the law, after which I will give you the case this afternoon for your deliberations.
>
> Ordinarily we have the charge on the law after distinguished counsel have made their closing arguments, but over the years many jurors have told me, "Judge, I wish you would have given us the law first. I believe I could have followed the lawyers' positions better and applied the facts as I found them to the law, and it would have helped me to know the law first so I could follow the lawyer's position."
>
> That just simply makes sense to me. So it is for the last 15 years, by and with the consent of the State and the defendant, I have done that. With their consent I propose to do it at this time.
>
> I will give the charge on the law, have you take a short break. We will return and we will have first counsel for the defense's argument. We will take a very short break at that time.
>
> Then we will have arguments from the State. At that time I will give any concluding remarks that may be appropriate or necessary, and you will have the case for your deliberation.

(Tr. 827, l 7 – 828, l 7).

At the PCR evidentiary hearing, Mr. Mauldin testified he did not recall if there was a discussion with the judge where the judge asked the attorneys if they consented to having the jury instructions be given before closing argument. (PCR Tr. 36). When asked why he did not object, Mauldin explained,

> I couldn't think of a ground other than that's just not the way it's done, judge. I couldn't think of any kind of constitutional grounds or anything to make an objection. It was unusual and we thought it was unusual, but we just couldn't think -- you know, it's out of order, but just saying well, that's not the way we do it, it didn't have any kind of constitutional limitation or statutory ground that I could think of.

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(PCR Tr. 36, ll 16-23). Mauldin reiterated this explanation during cross-examination. (PCR Tr. 53).

This Court finds Applicant fails to show trial counsel was deficient in not objecting to the order of the jury instructions and closing argument. "Generally, the conduct of a criminal trial is left largely to the sound discretion of the trial court." State v. Oglesby, 384 S.C. 289, 292, 681 S.E.2d 620, 622 (2009). It was well within the trial court's sound discretion to order the proceedings in the manner it selected. Applicant has failed to identify any objection that trial counsel could have raised to the trial court's decision to give its jury instructions before closing argument. Thus, he has failed to meet his burden of establishing trial counsel was deficient. Furthermore, this Court finds Applicant also fails to show he was prejudiced by any error of counsel in their handling of this issue. He has not presented any evidence to support a finding there was a reasonable probability the result at trial would have been different had counsel objected to the order of the jury instructions and closing arguments. Since Applicant fails to establish he is entitled to relief upon this claim, this Court denies this claim and dismisses it with prejudice.

9. Trial counsel was not ineffective in not objecting to the trial court's instructions that a conviction on a violent crime was a prerequisite for a conviction on possession of a deadly weapon during commission of a violent crime.

In the sixth claim of the amended application, Applicant asserts trial counsel was ineffective for not objecting to the trial court's jury instruction regarding his charge for possession of a weapon during the commission of a violent crime. Applicant asserts trial counsel should have requested an instruction that emphasized that a conviction for a violent crime was a prerequisite for a conviction on the possession of a weapon during the commission of a violent crime.

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Applicant takes issue with a portion of the trial court's instruction. Specifically, Applicant appears to complain about this portion of the instructions:

> Now, the indictments in this case allege two different offenses against the defendant as I have indicated. The charges were, one, murder and, two, possession of a deadly weapon during the commission of a violent crime.
>
> Each indictment charges a separate and distinct offense. You must decide each indictment separately based on the evidence as to that issue. As an example, your verdict may be the same as to each indictment, but it may be different as to each indictment, depending on your view of the facts as you apply those facts to the law of the case.

(Tr. 830, ll 1-12).

The trial court later gave the following instruction regarding possession of a weapon during the commission of a violent crime:

> The defendant is charged with possession of a weapon during the commission or attempt to commit a violent crime. The State must prove beyond a reasonable doubt that the defendant was in possession of a firearm, such as a pistol, or visibly displayed what appeared to be a firearm during the commission of a violent crime.
>
> Of course, firearms mean obviously machine gun, rifle, pistol, or weapons of that nature. In order to find the defendant guilty of possession of a weapon during the commission of a violent crime, you must first find the defendant guilty of either committing a violent crime or attempting to commit a violent crime. I charge you that the offense of murder is a violent crime.

(Tr. 843, l 16 – 844, l 3).

At the PCR evidentiary hearing, trial counsel Mauldin testified at trial that his understanding the jury to find the defendant guilty of a violent crime before the defendant could be found guilty of possession of a weapon during the commission of a violent crime. (PCR Tr. 37-8). Mauldin agreed that the trial court's specific instruction regarding possession of a weapon during the commission of a violent crime was an accurate and correct statement of the law.

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(PCR Tr. 38-9). Mauldin also acknowledged the trial court did not instruct the jury to consider and complete the murder verdict form before considering the weapons charge. (Tr. 39).

This Court finds Applicant fails to meet his burden of showing trial counsel was ineffective. First, Applicant fails to show trial counsel was deficient. "In general, the trial court is required to charge only the current and correct law of South Carolina. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). A jury charge is correct if it contains the correct definition of the law when read as a whole. Id." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472–73 (2004). This Court agrees with trial counsel's assessment that the trial court's instruction regarding the law of possession of a weapon during the commission of a violent crime was an accurate statement of the law. When taken as a whole, the trial court properly instructed the jury that it had to find Applicant guilty of either a violent crime or attempting a violent crime before it could find him guilty of possession of a weapon during the commission of a violent crime. Since the trial court's instruction was a proper statement of the law, trial counsel was not deficient in not challenging the instructions.

Applicant also fails to establish that he was prejudiced. Again, the instructions given by the trial court were proper. Further, Applicant was convicted of murder, the predicate violent crime for the possession of a weapon during the commission of a violent crime conviction. He fails to show there is reasonable probability the result at trial would have been different had counsel objected. This claim for relief is denied and dismissed with prejudice.

CONCLUSION

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

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

Accordingly, the Court denies relief on each of Applicant's claims. This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on his behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

R. Keith Kelly

The Honorable R. Keith Kelly
Presiding Judge

Gaffney, South Carolina
16 October 2018

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3200689

William Brockmeyer #347527		**State of South Carolina**	
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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ 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.

Circuit Court Judge	**Judge Code**	10/25/2018 **Date**

For Clerk of Court Office Use Only

This judgment was entered on **October 25th 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **October 25th 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

Kristy Grafton Goldberg 1720 Main Street, Suite 303 Columbia, SC 29201

Kelly Oppenheimer Rembert C. Dennis Building PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

Lisa M. Comer - 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.

FILED

2014 APR 22 PM 3:04

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
William Brockmeyer, #347527, Applicant, v. State of South Carolina, Respondent.	Case No. 2014-CP-32-00689 **ORDER DENYING APPLICANT'S "MOTION TO ALTER/AMEND JUDGMENT"**

This matter comes before this Court by way of Applicant's "Motion to Alter/Amend Judgment," asking this Court to alter or amend its order of dismissal denying Applicant's application for post-conviction relief.

I.

William Brockmeyer (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its May 2011 term, the Lexington County Grand Jury indicted Applicant murder (2011-GS-32-01255) and possession of a weapon during the commission of a violent crime (2011-GS-32-01257). Eleventh Circuit Public Defender Robert M. Madsen and Assistant Public Defender David Mauldin represented Applicant on these charges. Eleventh Circuit Solicitor S.R. Hubbard, III, and Deputy Solicitor Shawn Graham prosecuted the case. On August 22-26, 2011, Applicant proceeded to a jury trial before the Honorable Edward B. Cottingham. The jury convicted Applicant as indicted. Judge Cottingham sentenced Applicant to a term of imprisonment of thirty-five years for murder and a consecutive term of imprisonment of five years for the weapons charge.

Applicant filed a timely notice of appeal, and Miles E. Coleman, Esquire, and A. Mattison Bogan,

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Esquire, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. Did the Trial Court err by applying the wrong legal standard and denying the [Applicant's] motion to enforce a subpoena where the information sought was clearly relevant, unavailable from other sources, and not otherwise protected?
2. Did the Trial Court err and violate the Confrontation Clause of the Sixth Amendment to the United State Constitution by permitting the State to establish the chain of custody of its evidence through the use [of] a computer log read aloud by a witness rather than by live testimony from the parties handling the evidence?
3. Did the Trial Court err by permitting the State to introduce a photograph of the [Applicant] where the State repeatedly used the photograph for the illicit purpose of implying that the [Applicant] was guilty? [and]
4. Did the Trial Court err by permitting the State to introduce hearsay testimony taken from the decedent's cell phone?

By order filed February 28, 2013, Applicant's appeal was certified for review by the South Carolina Supreme Court. Following briefing and oral argument, the Supreme Court affirmed Applicant's conviction and sentence by published opinion on November 27, 2013. *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013). The Remittitur was issued on December 13, 2013.

II.

On February 25, 2014, Applicant filed an application for post-conviction relief. In this application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.
   a. Counsel failed to properly preserve appellant issues for appeal;
      i. Counsel was ineffective for failing to properly preserve motion to enforce subpoena for appellate review.
   b. Counsel failed to show how [Applicant's] constitutional rights were violated which denied [Applicant] due process of law; [and]
      i. Court appointed counsel was ineffective by failing to properly preserve a violation of the confrontation Clause of the Sixth Amendment to the United States Constitution, this denied [Applicant] due process of law and this was highly prejudicial and render the evidence inadmissible.
   c. Counsel was ineffective for failing to object when the jury foreman

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stated that jury found [Applicant] guilty of weapon/possession of a weapon during a violent crime on 8/25/11 the day before jury found [Applicant] guilty of murder on 8/26/11.

Respondent made its return on September 30, 2014, requesting an evidentiary hearing. Subsequently, through his counsel, Applicant filed an amended application for post-conviction relief on September 29, 2016. In this amendment Applicant raised the following grounds for relief:

1. Ineffective assistance of trial counsel [and]
    a. Ineffective assistance of trial counsel for failing to object to inadmissible hearsay testimony. Page 147 and 148;
    b. Ineffective assistance of trial counsel for failing to preserve the record clearly and have physical demonstrations done in Court described for the transcript;
    c. Ineffective assistance of trial counsel for failing to effectively present arguments regarding the angle of the gunshot wound and failure to allow the Applicant to demonstrate what happened;
    d. Ineffective assistance of counsel for failure to present evidence regarding reputation and use of a nickname prior to the incident;
    e. Ineffective assistance of counsel for failure to object when the trial judge provided instructions to the jury prior to the closing arguments of counsel;
    f. Ineffective assistance of counsel for failing to object when the Court did not emphasize to the jury that a conviction on a violent crime was a prerequisite for a conviction on possession of a deadly weapon during commission of a violent crime; [and]
    g. Ineffective assistance of counsel for failing to object and/or request a mistrial and/or move for a new trial based on the fact that the jury reached a verdict on possession of a deadly weapon during commission of a violent crime prior to reaching a verdict on whether or not he committed a violent crime, and the Court instructed the jury to re-date the verdict on the indictment.

A hearing into the matter was convened at the Lexington County Courthouse on November 9, 2016, before the Honorable R. Keith Kelly. Applicant was present at the hearing and represented by Kristy G. Goldberg, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela of the South Carolina Attorney General's Office represented Respondent. After hearing all the testimony presented at

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the evidentiary hearing, as well as arguments from both parties, this Court issued an order of dismissal on October 16, 2018, denying and dismissing the application with prejudice. Said order was filed with the Lexington County Clerk of Court on October 25, 2018.

Subsequently, on October 30, 2018, Applicant, through his counsel, submitted a "Motion to Alter/Amend Judgment." Respondent submitted its return on or about November 27, 2018.

III.

This Court finds its order of dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. *See also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds there is no basis for altering or amending its prior ruling.[1] Therefore, this Court hereby denies Applicant's motion in its entirety, and affirms the previous order of dismissal.

This Court notes if Applicant desires to secure appellate review of this order and the order of dismissal, a notice of appeal must be filed and served within thirty days of the service of this order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

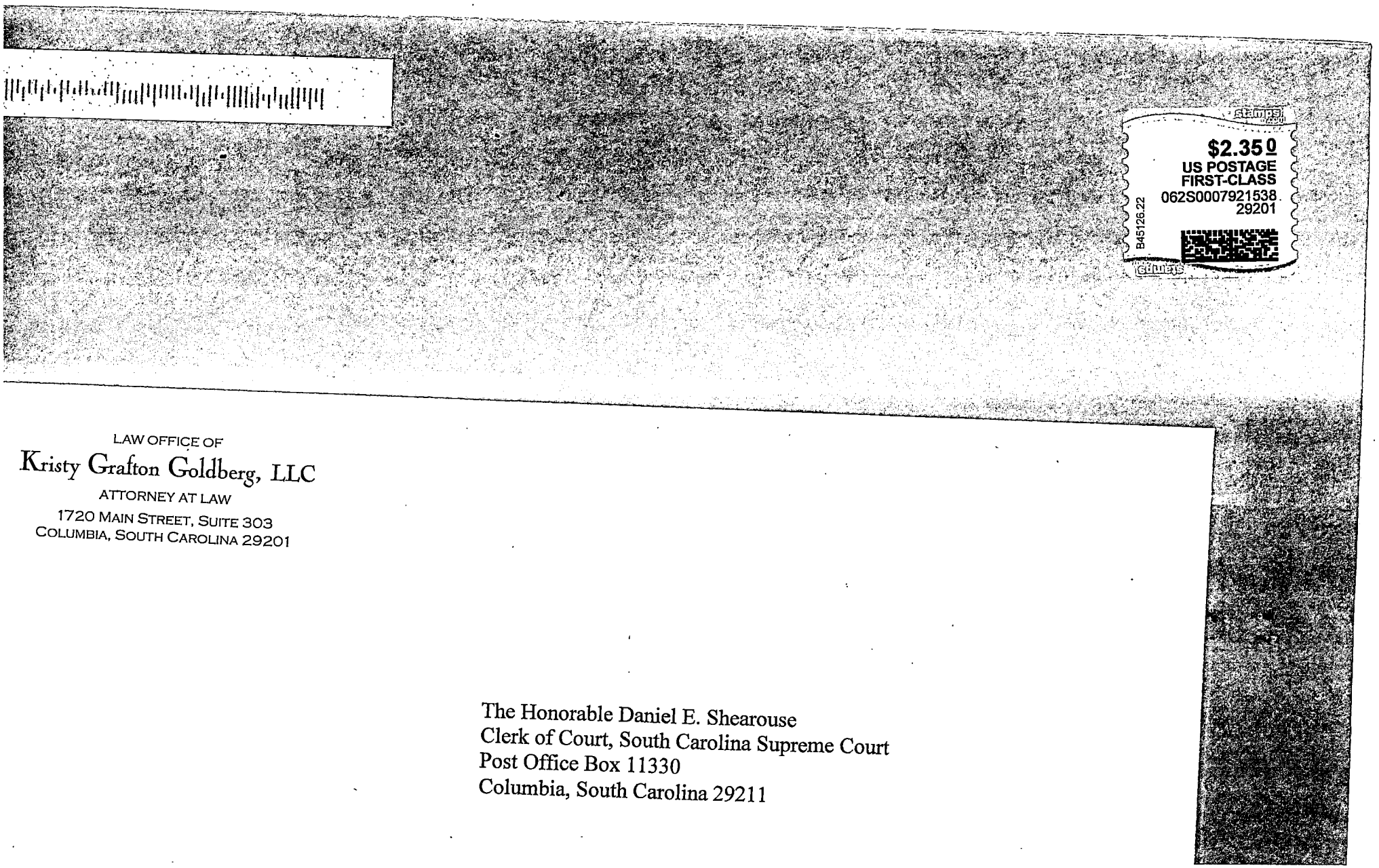
AND, IT IS SO ORDERED this 17 day of April, 2019.

R. Keith Kelly

R. KEITH KELLY
Presiding Judge
Eleventh Judicial Circuit

Spartanburg, South Carolina

[1] The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. *See* Rule 59(f), SCRCP.



LAW OFFICE OF
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The Honorable Daniel E. Shearouse
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Post Office Box 11330
Columbia, South Carolina 29211