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JUN 20 2019

S.C. SUPREME COURT

\*OF COUNSEL

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FAIRFAX, VA 22030

June 17, 2019

The Honorable Daniel E. Shearhouse  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

Re: **Robert Harbuck v. State of South Carolina**  
**PROPOSED ORDER OF DISMISSAL**  
Appellate Case No.: 2019-000948

Dear Mr. Shearhouse:

I have enclosed a copy of the Proposed Order of Dismissal that Assistant Attorney General Janell Gregory re-sent to Judge Gibbons to sign and file with the Laurens County Clerk of Court. The Clerk of Court did not have the original signed Order of Dismissal, which is why another Order is being requested by Ms. Gregory for Judge Gibbons signature.

Thank you for your assistance in this matter. If you have any questions or concerns, please notify my office.

Sincerely,

  
Dayne C. Phillips, Esq.

Enclosure (noted)

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ALAN WILSON  
ATTORNEY GENERAL

June 13, 2019

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JUN 20 2019

S.C. SUPREME COURT

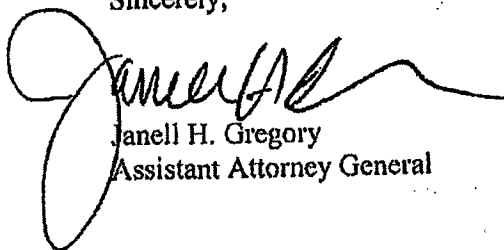
The Honorable Brian M. Gibbons  
Presiding Judge, Eighth Judicial Circuit  
Post Office Drawer 580  
Chester, South Carolina 29706

**Re: Robert Clinton Harbuck, #369560 v. State of South Carolina**  
**2017-CP-30-648**

Dear Judge Gibbons:

Enclosed please find an original proposed Order of Dismissal in the above-captioned case. If this Order meets your approval, please sign and return to me in the enclosed envelope, and I will then forward it to the Laurens County Clerk of Court to be filed and served.

Sincerely,



Janell H. Gregory  
Assistant Attorney General

JHG/cc  
Enclosure(s)

cc: Dayne C. Phillips, Esquire

STATE OF SOUTH CAROLINA )

COUNTY OF LAURENS )

ROBERT CLINTON HARBUCK, #369560 )

Plaintiff, )

vs. )

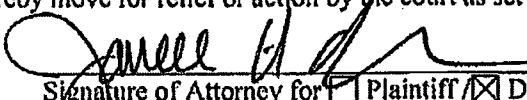
STATE OF SOUTH CAROLINA )

Defendant. )

IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-30-648

**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

<b>Plaintiff's Attorney:</b> Dayne C. Phillips, Bar No. _____ Address: 1614 Taylor Street, Suite D Columbia, South Carolina 29201 Phone: _____ Fax _____ E-mail: _____ Other: _____	<b>Defendant's Attorney:</b> Janell H. Gregory, Bar No. _____ Address: Post Office Box 11549 Columbia, South Carolina 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES/ <input checked="" type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> 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 <input type="checkbox"/> Plaintiff/ <input checked="" type="checkbox"/> Defendant	
June 13, 2019 Date submitted	
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCF) <input type="checkbox"/> 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: _____ <input type="checkbox"/> Other: _____	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA )  
COUNTY OF LAURENS )  
) )  
) )  
Robert Clinton Harbuck, #369560, )  
) )  
Applicant, )  
v. )  
State of South Carolina, )  
) )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE EIGHTH JUDICIAL CIRCUIT

2017-CP-30-648

**Order of Dismissal**

This matter comes before the Court by way of an application for post-conviction relief filed on August 7, 2017, by Robert Harbuck (Applicant) and amended on June 14, 2018. The State (Respondent) filed a Return on December 18, 2017, requesting an evidentiary hearing. Respondent filed an Amended Return responding to Applicant's amended allegations on September 25, 2018. An evidentiary hearing into the matter was convened on March 1, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Dayne Phillips, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf and presented testimony from two expert witnesses: Dr. Donna Schwartz Maddox, forensic psychiatrist and Dr. Nicholas Batalis, forensic pathologist. Thomas Quinn (Counsel), also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

**I. PROCEDURAL HISTORY**

Robert Harbuck (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Laurens County Clerk of Court. During the October 2015 term, the Laurens County Grand Jury indicted Applicant for assault on an officer

while resisting arrest (2015-GS-30-1622); four counts of attempted murder (2015-GS-30-1618, -1619, -1620, -1621); and failure to stop for a blue light (2015-GS-30-1710). Thomas Quinn, Esquire, represented him. Assistant Solicitors Dale Scott and Jim Todd of the Eighth Circuit Solicitor's Office prosecuted the case. On August 24-26, 2016, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, circuit court judge.

The jury convicted Applicant of resisting arrest as a lesser-included offense of assault on an officer while resisting arrest (2015-GS-30-1622), three counts of third-degree assault and battery as a lesser-included offense of attempted murder (2015-GS-30-1618, -1619, -1620), assault and battery of a high and aggravated nature as a lesser-included offense of attempted murder (2015-GS-30-1621), and failure to stop for blue lights (2015-GS-30-1710). Applicant was sentenced to one year imprisonment for resisting arrest, thirty days imprisonment for each third-degree battery conviction, nine years imprisonment for assault and battery of a high and aggravated nature, and three years imprisonment for failure to stop for blue lights. All sentences were to run concurrently. Applicant did not file a notice of appeal.

## **II. SUMMARY OF FACTS**

On September 6, 2015, Applicant was driving down I-26 in his gold Chevrolet Silverado "like a NASCAR driver, cutting through traffic, using the emergency lane as a speed lane." (Trial Tr. 35.) A group of co-workers (witnesses) who were traveling on I-26 the same morning, observed Applicant's driving and made a frantic call to 911. (Trial Tr. 35.) Trooper Lindler caught up to Applicant and attempted to pull Applicant over. (Trial Tr. 50.) The witnesses got in front of Applicant and exited the interstate. (Trial Tr. 49.) At that point, Applicant was behind them and began to follow them. (Trial Tr. 50.) The witnesses noticed Applicant and pulled over on the interstate ramp to let him pass as they believed he was fleeing from Trooper Lindler. (Trial Tr.

50.) Instead of passing the witnesses, Applicant pulled up behind them and rammed their vehicle. (Trial Tr. 50.) Trooper Lindler pulled in behind Applicant and, after ramming the witnesses' car, put his truck in reverse and sped towards Trooper Lindler's police cruiser. (Trial Tr. 50-51.) Applicant then drives his truck and pulls it in front of the witnesses' vehicle. (Trial Tr. 51.) Trooper Lindler then positioned his police cruiser between the witnesses' vehicle and Applicant's vehicle. (Trial Tr. 51.) Trooper Lindler ordered Applicant out of the vehicle at gunpoint and Applicant complied. (Trial Tr. 87.) Applicant complied with Trooper Lindler's commands until Applicant was put in handcuffs and he began fighting. (Trial Tr. 88.) Another Trooper showed up at that time, and shortly thereafter, officers from the Clinton Police Department arrived on the scene. (Trial Tr. 88.) Applicant remained combative and officers had to wait for a caged vehicle to transport Applicant from the scene. (Trial Tr. 88.) Once the caged vehicle arrived, multiple officers had to be used to put Applicant in the vehicle as he continued to fight. (Trial Tr. 90.) Officers "drive stunned" Applicant two times during the arrest in order to get him to comply with their commands. (Trial Tr. 140.) Applicant would stop fighting temporarily, but would eventually become combative again. (Trial Tr. 140-142.)

While being transported, Applicant attempted to shimmy out of his handcuffs back of the caged unit and officers had to pull over and radio for assistance. (Trial Tr. 36, 143.) Officers spoke to Applicant, attempted to calm him down, and Applicant appeared to be cooperative. (Trial Tr. 144.) Once officers opened the car door, Applicant became combative again. (Trial Tr. 144.) Applicant was eventually transported to the hospital for an exam. (Trial Tr. 146-147.) Applicant would not consent to an exam and told the doctors, "You're not touching me." (Trial Tr. 147.) Due to Applicant's non-compliance, no blood was drawn at the hospital. (Trial Tr. 148.) Applicant was then taken to jail without further incident. (Trial Tr. 148)

At trial, Applicant testified on his own behalf. During cross-examination, Applicant testified he was not intoxicated at the time of the incident and had only ingested a Red Bull and cigarettes prior to the incident. (Trial Tr. 205.) Applicant testified regarding his military service, which included details of his two tours overseas, a truck accident he was involved in, and coming under indirect fire. (Trial Tr. 179-189.) Applicant also testified he had been treated for mental health issues while in the military. (Trial Tr. 201.)

In mitigation, Counsel submitted a statement from Steven Johnson from the Department of Veterans Affairs and a letter from Major Clinton Schofield. (Trial Tr. 328.) Counsel also explained to the court Applicant had been diagnosed with PTSD and was currently in treatment. (Trial Tr. 328.) Counsel also highlighted Applicant's military service and distinctions. (Trial Tr. 329.)

During sentencing, Judge Hocker stated he was taking into account, to some extent, the fact that Applicant is currently being treated for PTSD. (Trial Tr. 331.) Judge Hocker also noted the significance of the impact involved with Corporal Lindler's patrol vehicle. Judge Hocker stated, "... the impact involved caused the in car video camera to come off the mount. And I've always understood that those things are mounted pretty good just to prevent people that they arrest [from] jerking the thing off. And the impact was such that it knocked that camera off the mount. That's pretty strong. That's pretty strong." (Trial Tr. 332.) Judge Hocker went on to say, "... if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case." (Trial Tr. 332.) Applicant received concurrent sentences of nine years for ABHAN, thirty days for each of the assault and battery (3<sup>rd</sup> degree) charges, three years for the failure to stop, and one year for

the resisting arrest. (Trial Tr. 333.)

### **III. ALLEGATIONS RAISED**

During the evidentiary hearing, Applicant proceeded on the following allegations:

#### **I. Ineffective Assistance of Counsel:**

- a. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- b. Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-410 and 430.
- c. Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f). SCRCrimP; see also S.C. Code § 17-24-10.
- d. Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.
- e. Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronin, 466 U.S. 648 (1984).
- f. Trial Counsel failed to object to inadmissible evidence during Applicant's trial.
- g. Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.
- h. Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction

and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

- i. Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.
- j. Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.
- k. Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.
- l. Trial Counsel failed to hire an expert witness to conduct an independent review of Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or whether the act that caused those injuries was likely to produce "Great Bodily Injury" to satisfy that element of Assault and Battery of a High and Aggravated Nature when it was reasonable and necessary in requesting a lesser-included offense.
- m. Trial Counsel failed to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this evidence.
- n. Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

An evidentiary hearing was held on March 1, 2019. Prior to the hearing, Applicant expressly waived the allegation pertaining to the Blair hearing and Counsel's failure to request jury instructions on the affirmative defense of insanity or guilty but mentally ill. As such, those allegations should be denied and dismissed. During the hearing, Applicant abandoned the allegation pertaining to Counsel's failure to object to inadmissible evidence during Applicant's

trial as Applicant failed to provide any testimony regarding this claim. As such, that allegation should be denied and dismissed. At the conclusion of the hearing, counsel for each side was allowed time to provide a brief in support of their case. This brief follows.

#### IV. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that 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 the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

## **V. FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

### **Ineffective Assistance of Counsel**

*Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).*

Applicant presented an expert witness in forensic psychiatry, Dr. Donna Schwartz Maddox, who testified Applicant was competent to stand trial and criminally responsible for his actions on the date of the incident. Dr. Maddox's report also indicates Applicant was voluntarily intoxicated at the time of the incident, which contradicts his trial testimony. Her report was entered as Applicant's Exhibit #6. Dr. Maddox also testified she would not have been helpful for Applicant at trial as there is no question regarding Applicant's criminal responsibility or capacity in this case.

Counsel testified there was no question Applicant was competent to stand trial. Counsel testified he did not consider using insanity as a defense in this case.

Counsel was not deficient in failing to have Applicant evaluated for competency as Applicant's own expert indicates Applicant was competent to stand trial and criminally responsible

for his actions. Counsel did not pursue an insanity defense because Applicant did not qualify for such a defense. Applicant has not provided this Court with any information showing he was not competent to stand trial or would have been successful pursuing an insanity defense.

*Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-410 and 430.*

This allegation was expressly waived by Applicant on the record during the evidentiary hearing. As such, this allegation is denied and dismissed with prejudice.

*Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f), SCRCrimP; see also S.C. Code §17-24-10.*

Although Applicant maintained that he was not intoxicated at the time of the incident, Dr. Maddox testified Applicant admitted to her that he was under the influence of methamphetamine and had been up for three days at the time of the incident. In Dr. Maddox's opinion, she found Applicant was criminally responsible for his actions.

This Court finds Dr. Maddox's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to pursue the affirmative defense of insanity as Applicant was not entitled to such defense.

Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.*

At the hearing, Dr. Maddox testified Applicant suffers from PTSD as a result of his service in the U.S. Army. Dr. Maddox testified Applicant told her about his two tours in Afghanistan and his exposure to trauma overseas. Dr. Maddox testified Applicant told her about seeing a suicide bomber blow himself up, and an incident where his camp was blown in half. Dr. Maddox testified Applicant had pre-existing trauma and gender identity issues. Dr. Maddox testified it is common for someone with those issues to join the military to try to overcome the gender identity issues. Dr. Maddox testified Applicant was an alcoholic and had issues with his wife when he was married. Dr. Maddox testified Applicant was using three grams of methamphetamine a day at the time of the accident. Dr. Maddox testified Applicant believed he was being followed on the day of the incident and Applicant had not slept in three days. Dr. Maddox testified she did not believe there is a capacity issue or criminal responsibility issue, but she would have presented this during mitigation at Applicant's sentencing.

Counsel testified he could not have used Dr. Maddox's report at trial because Applicant admitted to Dr. Maddox that he was intoxicated and had been up for three days prior to the incident, which was a drastically different story than what Applicant testified to at his trial. At trial, Applicant testified he had only ingested a Red Bull and cigarettes on the date of the incident and denied any drug use despite the law enforcement witnesses testifying that he appeared to be "on something." (Trial Tr. 205.) Applicant also testified that he had been treated for mental health issues in the military. (Trial Tr. 201.) Counsel testified Dr. Maddox's report would have completely changed their trial strategy and would not have been helpful at trial. Dr. Maddox's testimony seemed to concede this point as she testified she did not think there was a criminal responsibility or capacity issue that she could have assisted with at trial.

This Court finds Dr. Maddox's testimony and Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient or any resulting prejudice from the alleged deficiency as Counsel testified Dr. Maddox would not have been helpful at trial because he told her a completely different story than what he testified to at trial. Additionally, Dr. Maddox's own testimony also indicates she would not have been helpful for Applicant at trial.

Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronin, 466 U.S. 648 (1984).*

Applicant argues Counsel should have presented an expert during trial to show Applicant suffers from PTSD. Applicant also argues Counsel should have presented an expert at trial to show the impact of the collision with Corporal Lindler's vehicle did not cause and could not have caused great bodily injury to Corporal Lindler and, therefore, Applicant could not be found guilty of ABHAN.

Counsel testified his trial strategy was to show Applicant could not have formulated the intent necessary to be convicted of the charges. Based on what Applicant told Counsel, this was a reasonable trial strategy since Counsel was unaware of Applicant's intoxication at the time of the incident. Counsel had Applicant testify regarding his military experience and symptoms he experienced on the date of the incident. During his closing argument, Counsel provided argument regarding Applicant's inability to formulate intent as Applicant, "was not in his right mind." (Trial Tr. 250.)

This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient as Counsel articulated a valid trial strategy to show Applicant could not formulate intent, which would have been destroyed had Counsel presented the case through Dr. Maddox. Under Counsel's strategy, Applicant was convicted on all lesser included offenses – except for the failure to stop for blue lights charge – and received only nine years out of a possible twenty-four year sentence.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. Strickland, 466 U.S. 668, (1984). 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. Id. 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 finds Applicant has failed to show that the outcome of his trial would have been different had Counsel's trial strategy acknowledge Applicant's voluntary intoxication because he lied about it during his trial. Applicant was able to keep confirmation of his intoxication from

being considered by the jury or the trial judge and, based on the comments by the trial judge during sentencing, Applicant was clearly not prejudiced by Counsel's trial strategy. Based on the standard set forth in Strickland, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Trial Counsel failed to object to inadmissible evidence during Applicant's trial.*

Applicant failed to present any testimony regarding this claim at the evidentiary hearing, consequently abandoning this allegation. Therefore, this allegation is denied and dismissed with prejudice.

*Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.*

During its closing argument, the solicitor argued, "[W]hen you use a deadly weapon, a four ton truck that is capable of traveling at great rates of speed and you intentionally ram somebody's car with it, the inference there is malice. The inference that you mean great harm." (Trial Tr. 279.) Counsel objected and a sidebar conference was held. The State went on to argue malice can be inferred from the use of a deadly weapon. The Court excused the jury at the end of the State's closing and Counsel was able to put on the record his objection to the State's comment regarding malice. Counsel cited the holding in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), to the trial court in support of his argument that the jury should not be able to infer malice because Counsel had presented evidence that would "reduce, mitigate or excuse, or justify an assault and battery with an intent to kill." (Trial Tr. 290.) In Belcher, the South Carolina Supreme Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged

that malice may be inferred from the use of a deadly weapon.” *Id.* at 612, 685 S.E.2d at 810. The Court’s ruling only pertains to the trial court’s instruction on implied malice to the jury, it does not limit the State’s ability to argue implied malice during their closing argument.

The trial court found, “[U]nder Belcher the mitigation offered would be sufficient enough to not charge inference of malice by use of a deadly weapon.” (Trial Tr. 294.) The trial court removed the inference language from the jury charge over the State’s objection. (Trial Tr. 294.) Counsel requested the trial court provide a curative instruction to the jury regarding the State’s closing argument on inferring malice. (Trial Tr. 295.) The trial court provided the jury with a charge that requires them to follow the law as the court charges, even if it contradicts what the lawyers have argued. (Trial Tr. 295.)

Applicant has alleged Counsel was deficient for failing to object to the trial court’s curative instruction to the jury and move for a mistrial. “A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial.” State v. Wilson, 3889 S.C. 579, 698 S.E.2d 862 (2010). “The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (2009) (citing State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (2005)).

Here, the trial court acknowledged the issue as to whether Belcher applied in this case was an “extremely close issue.” (Trial Tr. 294.) The trial court provided the remedy it believed to be appropriate in this case, which was similar to the remedy the trial court provided when Counsel moved for a mistrial during Corporal Lindler’s testimony regarding his injuries. (Trial Tr. 91-94.)

The trial court made it clear the issue of whether malice can be inferred in this case was an “extremely close issue” and, even if Counsel had moved for a mistrial, it would not have been

appropriate to grant such a motion because Belcher does not prevent the State from arguing implied malice in their closing argument. The trial court, even though it believed the issue to be close, followed the Court's ruling in Belcher and appropriately instructed the jury. This Court finds Applicant has failed to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. As such, this allegation is denied and dismissed with prejudice.

*Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.*

Counsel objected twice during the State's closing argument. Counsel objected when the State started talking about affirmative defenses in South Carolina. (Trial Tr. 275.) In his objection, Counsel argued the State's comments were not a true statement of law and it was not relevant to the case. (Trial Tr. 275.) The trial court overruled the objection and urged the solicitor to move on with his argument. (Trial Tr. 275.) Counsel again objected when the State argued implied malice to the jury. (Trial Tr. 279.) Counsel stated the solicitor's argument was "a complete misstatement" and then noted there were Supreme Court cases. (Trial Tr. 279-280.) The trial court held a sidebar conference and allowed the State to proceed with their argument. (Trial Tr. 280.)

Applicant has alleged he should have objected more based on the content of the State's closing argument. During the PCR hearing, Counsel testified he did not continue to object to the State's closing because it was not hurting their case. He elaborated the jury was not paying a bit of attention to the Solicitor and he did not feel any additional objections were necessary.

Applicant alleges the State made inappropriate comments regarding Applicant's drug use during his closing argument and Counsel was deficient for failing to object. "A solicitor has a

right to state his version of the testimony and to comment on the weight to be given such testimony." Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (citing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998)). The State had two law enforcement officers testify during their case-in-chief that they believed Applicant was impaired during the incident. Corporal Lindler testified Applicant exhibited, "normal behavior for an impaired driver." (Trial Tr. 76.) Corporal Lindler also testified intended to conduct a field sobriety test on Applicant after pulling him over, but Applicant was too violent. (Trial Tr. 89.) Officer Scott Peay with Clinton Public Safety testified in his opinion Applicant was "definitely impaired." (Trial Tr. 146.) This Court finds the State's comments regarding Applicant's alleged drug use were reasonable inferences that could be drawn from the testimony of the officers at trial. As such, Counsel was not deficient in failing to object because the solicitor's comments were not objectionable.

This Court finds Applicant has failed to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. As such, this allegation is denied and dismissed with prejudice.

*Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.*

Applicant alleges Counsel did not preserve his motion for a mistrial after Corporal Lindler testified regarding medical injuries he suffered. During the trial, Counsel moved for a mistrial following testimony by Corporal Lindler that he suffered herniated discs as a result of the collision caused by Applicant. (Trial Tr. 93.) The trial court denied Counsel's motion, but, following an in-camera examination of Corporal Lindler, issued a curative instruction to the jury to disregard Corporal Lindler's testimony regarding his injury. (Trial Tr. 98.) Counsel objected stating the instruction was not sufficient and again moved for a mistrial. (Trial Tr. 98.) The trial court did

not address Counsel again regarding the mistrial. Applicant alleges Counsel's failure to have the trial court address his follow-up motion prevented him from preserving the issue for appeal.

The South Carolina Supreme Court held in State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), that a defendant adequately preserved for appeal his claim that admission of testimony concerning proposed polygraph test required a mistrial where defendant immediately objected, moved for a mistrial after the jury was removed, and renewed his motion for a mistrial following the court's curative instructions.

Here, directly after Corporal Lindler's testimony, Counsel requested a sidebar conference after which the judge excused the jury. (Trial Tr. 91.) Counsel provided a thorough argument regarding his motion for a mistrial and the trial court allowed Counsel to engage in an in-camera examination of Corporal Lindler regarding his injury and "depending on what he testifies to, it may justify the Court issuing some curative instruction to disregard his testimony." (Trial Tr. 94.) At the conclusion of the in-camera examination, the trial court explained it would instruct the jury to disregard the testimony of Corporal Lindler as it related to the existence of his herniated discs. (Trial Tr. 98.) Once again, Counsel objected to the instruction as it was not sufficient and requested a mistrial. (Trial Tr. 98.)

This Court finds Applicant has failed to establish how Counsel was deficient as Counsel made the proper objections at the appropriate times and this issue is clearly preserved for appeal. Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Therefore, Applicant has failed to meet his burden to show how Counsel is deficient or how he was prejudiced by Counsel's representation. Therefore, this allegation must be denied and dismissed with prejudice.

*Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.*

This allegation was expressly waived by Applicant on the record during the evidentiary hearing. Therefore, this allegation is denied and dismissed with prejudice.

*Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.*

Applicant alleges Counsel should have filed a Motion for Reconsideration in order to provide the trial court with mitigation evidence that was not presented during sentencing regarding Applicant's PTSD. Counsel testified he did present mitigation during the sentencing phase of Applicant's trial. Counsel testified he presented a statement from Steven Johnson with the Department of Veteran Affairs and a letter from Major Schofield on Applicant's behalf. Counsel also testified the trial court was aware of Applicant's PTSD diagnosis and the record shows the trial judge took that into account during the sentencing. (Trial Tr. 331.) The record also shows the trial court was bothered by the force of the collision Applicant caused when he rammed Corporal Lindler's vehicle. (Trial Tr. 332.)

During the PCR hearing, Applicant presented testimony from Dr. Maddox to show Counsel should have provided additional mitigation to the trial court during sentencing, however, Counsel testified Dr. Maddox's report would not have been useful in Applicant's case. Counsel testified he could not have used Dr. Maddox for mitigation because Applicant testified during the trial he was not intoxicated during the incident. Dr. Maddox's report clearly states the PTSD was secondary to the voluntary intoxication. Counsel would not have been able to present an expert witness to provide mitigation regarding Applicant's PTSD without conceding the voluntary intoxication, which, as Counsel testified, would have completely changed their trial strategy.

This Court finds credible Counsel's testimony with respect to this allegation. This Court finds Applicant has failed to show how the trial court would have imposed a more favorable sentence on Applicant had Counsel filed a Motion for Reconsideration and presented an expert on PTSD. During the sentencing, Applicant received the benefit of the trial court taking his PTSD into account while being able to maintain he was not under the influence at the time of the incident. Counsel would not have been able to present an expert during mitigation on Applicant's PTSD alone because, as Dr. Maddox's report clearly states, the PTSD was secondary to Applicant's voluntary intoxication. Therefore, Applicant has failed to meet his burden on this issue as he has failed to show how Counsel was deficient or how he was prejudiced by Counsel's failure to file a Motion for Reconsideration. Therefore, this allegation must be denied and dismissed with prejudice.

*Trial Counsel failed to have an expert review Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or call an expert to rebut the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Lindler's injuries did not meet the definition of "Great Bodily Injury."*

Applicant argues Counsel was deficient for failing to have an expert review Corporal Lindler's medical records or testify that his injuries did not meet the definition of "great bodily injury." Applicant maintains he could not have convicted of ABHAN if Counsel had presented an expert on "great bodily injury."

Assault and battery of a high and aggravated nature is defined as:

A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and:

- (a) great bodily injury to another person results; or
- (b) the act is accomplished by means likely to produce death or great bodily injury.

S.C. Code Ann. §16-3-600 (B)(1) (1976) (emphasis added).

During the hearing, Dr. Nicholas Batalis was admitted as an expert in forensic pathology. Dr. Batalis provided testimony regarding the medical report on Corporal Lindler's herniated discs and whether the collision between Applicant's truck and Corporal Lindler's vehicle was likely to produce "great bodily injury." The State objected to Dr. Batalis' testimony regarding the collision as he does not have the training and experience necessary to provide an expert opinion regarding vehicle collisions.

Counsel testified he does not believe the trial court would have allowed Dr. Batalis' testimony. Counsel testified Dr. Batalis would not have been helpful at trial because the report was speculative and would have infringed on the province of the jury. Counsel testified the trial judge submitted all lesser included offenses with definitions, so there was no need for an expert on great bodily injury because the jury had already been provided all of the necessary information. Counsel also testified he would not have used Dr. Batalis at trial because Dr. Batalis cannot say anything regarding moderate bodily injury and Counsel believed the facts of this case supported the jury's verdict. Counsel testified the jury was properly instructed on assault and battery of a high and aggravated nature.

During sentencing, the trial court stated,

What I felt like was significant as it relates to Corporal Lindler, the impact involved caused the in car video camera to come off the mount. And I've always understood that those things are mounted pretty good just to prevent people that they arrest [from] jerking the thing off. And the impact was such that I knocked that camera off the mount. That's pretty strong. That's pretty strong.

(Trial Tr. 332.) The trial court evaluated the force of the impact to be severe based on the video of the collision. Dr. Batalis testified on cross-examination he did not know how fast the Applicant's vehicle was going at the time of the collision and he did not know how much force it would take to knock the camera off the mount in Corporal Lindler's vehicle.

This Court finds credible Counsel's testimony with respect to this allegation. This Court also finds Dr. Batalis' opinion on whether the collision could have caused great bodily injury is outside the scope of his expertise as he testified he did not have any training or experience in estimating the speed of a vehicle, accident reconstruction, or how much force would be necessary to cause great bodily injury. This Court finds Applicant has failed to meet his burden to show Counsel was deficient for failing to call an expert on great bodily injury because, as Counsel testified, Dr. Batalis' report was speculative and would not have been admissible at trial. Therefore, this allegation must be denied and dismissed with prejudice.

*Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.*

Applicant argues Counsel should have presented an expert to testify at the sentencing phase of the trial regarding Applicant's PTSD and other mental health issues. Applicant presented testimony from Dr. Maddox who testified about Applicant's military deployments, gender identity issue, and substance abuse issues. Dr. Maddox testified she found Applicant to be criminally responsible for the incident and found his PTSD to be secondary to his voluntary intoxication.

Counsel testified he would not have used Dr. Maddox's report at trial because it would have destroyed their trial strategy of negating intent. Additionally, Dr. Maddox's report contradicts Applicant's trial testimony that he was not under the influence at the time of the incident. Applicant insinuated during cross-examination at the PCR hearing that Counsel should have obtained an expert solely on the issue of PTSD as if the substance abuse aspect of Dr. Maddox's report could somehow be isolated from her overall opinion. As Dr. Maddox's report shows, Applicant's PTSD is *secondary* to his substance abuse and any qualified expert who examines Applicant regarding his mental health would not be able to separate PTSD from Applicant's drug abuse.

Counsel testified the judge was aware of Applicant's PTSD and Counsel testified he also provided a information from the Department of Veteran Affairs and letter from a U.S. Army Major Schofield on Applicant's behalf. During sentencing, the trial judge stated, "I am taking into account to some extent the fact that you are currently being treated for PTSD." (Trial Tr. 331.) Later, the trial judge stated,

You know, if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, which is 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case.

(Trial Tr. 332.)

This Court finds Applicant was afforded mitigation from the information Counsel presented. This Court also finds credible Counsel's testimony that he would not have been able to use Dr. Maddox's report for mitigation as it would have destroyed their trial strategy in negating Applicant's intent. Applicant has failed to show this court how Counsel was deficient for failing to present expert mitigation because, as Dr. Maddox's report shows, expert mitigation would have shown Applicant was voluntarily intoxicated during the incident. Applicant, who admitted during the post-conviction relief hearing that he lied under oath at his trial, would not have benefited from an expert because, just like Dr. Maddox's report indicates, Applicant is criminal liable and the PTSD was secondary to Applicant's voluntary intoxication. The trial judge was clearly disturbed by Applicant's actions towards Corporal Lindler, and, had mitigation been provided showing Applicant was voluntarily intoxicated during the incident, the trial court likely would have increased Applicant's sentence. Applicant was able to receive the benefit of mitigation for his PTSD while denying his intoxication during sentencing.

This Court finds Applicant has failed to meet his burden to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. Therefore, this allegation must be denied and dismissed with prejudice.

#### **VI. CONCLUSION**

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

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief 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, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### **IT IS THEREFORE ORDERED THAT:**

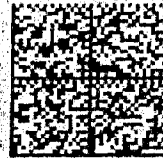
1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

**AND IT IS SO ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
BRIAN M. GIBBONS  
Presiding Judge  
Eighth Judicial Circuit

\_\_\_\_\_, South Carolina

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