

LAW OFFICE

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June 17, 2019

Hon. Daniel E. Shearouse
Clerk of Court
S.C. Supreme Court
1231 Gervais Street
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

JUN 20 2019

S.C. SUPREME COURT

Re: Fred Lewis (#171471) v. State of South Carolina
Laurens C/A No. 2014-CP-30-206

Dear Clerk Shearouse:

Please file the enclosed Notice of Appeal and Proof of Service and return clocked copies of both documents to me in the enclosed envelope provided for your convenience. Also enclosed is Circuit Judge Brian M. Gibbons' Order of Dismissal dated May 26, 2019.

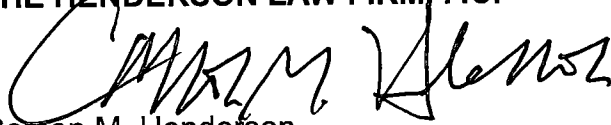
My email address is carson@carsonhendersonlawfirm.com.

Thank you for your assistance and cooperation in this matter.



Cordially yours,

THE HENDERSON LAW FIRM, P.C.


Carson M. Henderson

CMH/lhc

Enclosures as indicated

Cc: Janell Gregory, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

S.C. Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
Columbia, S.C. 29201

Fred Madden (#171471)
Perry Correctional Institution
430 Oaklawn Road
Pelzer, S.C. 29669

#2

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

RECEIVED

JUN 20 2019

S.C. SUPREME COURT

Brian M. Gibbons, Presiding Circuit Judge -- Laurens County

C/A No. 2014-CP-30-206

FRED MADDEN (#171471),

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Fred Madden appeals the Order of Dismissal issued by the Honorable Brian M. Gibbons on May 26, 2019. This matter was heard in Greenwood County on February 27, 2019. The Appellant's trial counsel received the Order of Dismissal from the Laurens County Clerk of Court on Monday, June 10, 2019.

THE HENDERSON LAW FIRM, P.C.

Trial Attorney for the Appellant

By:


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June 17, 2019

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S.C. Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM LAURENS COUNTY
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Brian M. Gibbons, Presiding Circuit Judge – Laurens County

C/A No. 2014-CP-30-206

FRED MADDEN (#171471),

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent, State of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on June 17, 2019, addressed to its attorney of record, Janell Gregory, Esquire, S.C. Attorney General's Office, P.O. Box 11549, Columbia, S.C. 29211, with a copy also being mailed to S.C. Commission on Indigent Defense, Appellate Division, 1330 Lady Street, Suite 401, Columbia, S.C. 29201.

★1

THE HENDERSON LAW FIRM, P.C.

Trial Attorney for the Appellant

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Greenwood, South Carolina

June 17, 2019

#2

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

2014-CP-30-206

Fred Madden, #171471,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

LAURENS COUNTY
CLERK OF COURT
2019 JUN -7 PM 1:15
LYNN W. LANCASTER

This matter comes before the Court by way of an application for post-conviction relief filed on March 11, 2014, by Fred Madden (Applicant) and later amended through counsel on February 24, 2019. The State (Respondent) filed a Return on June 27, 2014, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on February 27, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Carson Henderson, 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. Claude H. Howe, III, Esquire (Counsel) and Donna Katherine Kendall (Kendall)¹ 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.

PROCEDURAL HISTORY

The records before this Court establish Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Laurens County Clerk of Court's order of commitment. During its February 2010 term, the Laurens County Grand Jury indicted Applicant for murder

¹ During the PCR hearing, Kendall testified Counsel was lead trial counsel and she was second chair. Kendall testified Counsel was the ultimate decision maker during Applicant's trial. Kendall did not provide substantive testimony regarding any of Applicant's allegations.

(2010-GS-30-0288) and possession of a weapon during the commission of a violent crime (2010-GS-30-0289). Counsel and Kendall represented Applicant. Assistant Solicitors Jack W. Hammack, Jr., and Yates Brown of the Eighth Circuit Solicitor's Office prosecuted the case.

On August 29 – September 1, 2011, Applicant proceed to a jury trial before the Honorable Frank R. Addy. Applicant was found guilty as indicted by the jury. Judge Addy sentenced Applicant to life imprisonment and five concurrent years for possession of a weapon during the commission of a violent crime.

Applicant timely filed a notice of appeal and Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense perfected the appeal. In his brief to the South Carolina Court of Appeals, Applicant raised the following issue:

- I. The court erred by refusing to instruct the jury on State v. Edwards, 298 S.C. 275, 379 S.E.2d 888 (1989), circumstantial evidence charge as requested since it was undisputed this was a purely circumstantial evidence case and the State v. Edwards traditional instruction rather than the generic State v. Gripton, 327 S.C. 79, 489 S.E.2d 462 (1997) instruction should have been charged to explain how to analyze circumstantial evidence.

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. State v. Madden, Op. No. 2014-UP-032 (S.C. Ct. App. filed January 22, 2014). The Remittitur was issued February 7, 2014.

SUMMARY OF FACTS

On December 10, 2009, Ernestine "Tine" Brown (Victim) was at her home alone on Highway 308 in Laurens County. Victim received a call from her sister, Kathy Dowdy (Dowdy) that morning. As the sisters were chatting, Victim heard a knock at her door. Victim told her sister Applicant was at her door. Dowdy felt the need to text their other sister, Delores Yelverton, to have her send their brother, Albert "Bruce" Brown (Bruce) to check on Victim. Shortly after

Dowdy sent the text, the phone call with Victim dropped and she could not get Victim back on the phone. (Trial Tr. 189, 205.)

Bruce testified he received the message and headed out to Victim's home. Bruce testified on the way to the home, he passed Applicant on his moped. Bruce saw Applicant look back toward him. When Bruce saw Applicant on the moped, Applicant was approximately three to four miles from Victim's home. Bruce continued to his sister's home. He knocked on the door and called on the phone. He received no answer. He went in the home and called his sister's name, but, again, received no answer. He then went to the bedroom door, which was partially closed and found his sister lying behind the door. Bruce called 911. He checked but could not find a pulse. Bruce testified this occurred "around 11:00 or a little before." (Trial Tr. 224-226.)

Emergency personnel confirmed they were called to the scene at approximately 11:00 a.m., with the actual dispatch time being 10:59 a.m. Though they attempted to revive Victim, she was eventually pronounced dead at the scene. (Trial Tr. 248-252.)

Forensic pathologist Dr. Janice Ross testified the cause of death was "two gunshot wounds of the head and chest." The chest shot went through Victim's left arm into the chest, through the left lung, severed the spinal cord and lodged in the spinal canal. The head shot entered the top of the head and traveled down into the brain. According to Dr. Ross, "[e]ach one, by themselves, would be fatal." Death would have occurred within "a few minutes, maybe up to five or six." (Trial Tr. 261-262.)

In his statement to investigating officers, Applicant admitted being in the home, but asserted Victim was already shot when he arrived. He also asserted that there was gunpowder still in the air, so he went to Mack Irby's house, where he had been staying since the eviction from Victim's home, and took a shower. He was aware that Bruce had seen him on the moped near the



home. He was also aware he would be a suspect. So, in addition to taking a bath, he also burned his clothes. (Trial Tr. 120-123.)

Mack Irby testified and confirmed that Applicant had been at Irby's home that morning but left for approximately 30 to 45 minutes. Upon his return, Applicant went to his room. Applicant later came back out, asked whether Mr. Irby was hungry, and Mr. Irby began preparing breakfast. (Trial Tr. 232-233.)

Investigation of the home revealed no signs of forced entry, but two other bullets were recovered in the linen closet and the bathroom wall. A cell phone was recovered from the master bedroom near the victim's body, which showed 911 on the screen. (Trial Tr. 356 – 360.)

Though a gun was not recovered, the bullets recovered from autopsy and the bullets recovered from the home were compared. SLED firearms identification expert Kenneth Whitler testified that, though he could not confirm the bullets were fired by the same gun, "the class characteristics, mainly the rifling characteristics on these bullets were similar and while [he] couldn't say they were fired by the same firearm, they could have been fired by the same firearm or by separate firearms with similar rifling characteristics." (Trial Tr. 385.) The bullets were "most consistent" with .38 caliber and .357 caliber. (Trial Tr. 386.) Specifically, a .38 caliber *Rossi* firearm could have fired the four bullets. (Trial Tr. 387.) James Brent Cooper, Applicant's friend and former co-worker, testified that he sold a .38 caliber *Rossi* firearm to Applicant in 2007. (Trial Tr. 392-393.)

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ALLEGATIONS RAISED

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Counsel of my lawyers”
2. “My lawyers failed to do their job to the fullest(sic)”
3. “14th Amendment violated the Defendant’s Sixth Amendment”
4. “Due Process rights was(sic) violated”
5. “Mere Presence is my case”
6. “I was at the crime scene, no knowledge what happen(sic)”

On February 24, 2019, Applicant, through counsel, amended his application to allege the following:

1. Counsels were ineffective for failing to object to the testimony of Kathy Dowdy when she testified, “He and my sister were in a relationship until she evicted him.”
2. Counsels were ineffective for failing to ask the court to strike the testimony of Kathy Dowdy after the court sustained the objection.
3. Counsels were ineffective because they asked witness Dowdy about Applicant being evicted from Victim’s residence.
4. Counsels were ineffective because they asked a question of Kathy Dowdy which elicited a response about the Victim “putting him out.”
5. Counsels were ineffective because they failed to object when Kathy Dowdy testified as follows: “(Q) Ms. Dowdy, is there any reason why you would make this up? (A) No.”
6. Counsels were ineffective for failing to object when Albert Brown testified, “My initial thought was Fred had murdered her.”
7. Counsels were ineffective because they failed to ask the Court to strike the following statement from witness Mack Irby: “When Fred got out of the shower.”
8. Counsels were ineffective for failing to follow up on the subpoena to Laurens County Sheriff Rick Chastain for the production of “all training records” for the deputies who investigated this and “all training manuals, police procedure manuals for questioning suspects.”
9. Counsel was ineffective for failing to thoroughly investigate Victim’s daughter Keila Brown’s potential involvement in Victim’s death.
10. Counsels were ineffective for failing to introduce into evidence the telephone calls between Applicant and Victim on December 9-10, 2009.
11. Counsels were ineffective because they discouraged Applicant from testifying because the defense was “winning” at trial.

On February 27, 2019, an evidentiary hearing was convened. Applicant proceeded with the hearing on the allegations set forth in his amended application.

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.

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, Applicant's appellate records, 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

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency on the part of Counsel and any prejudice therefrom.

Counsel was constitutionally ineffective as it pertains to the testimony of Kathy Dowdy.²

Applicant alleges Counsel was ineffective for failing to object when Dowdy testified that Applicant and her sister, Victim, were in a relationship until she evicted Applicant. Applicant alleges Counsel was ineffective for asking Dowdy about Applicant being evicted from Victim's residence and for asking a question that elicited a response from Dowdy about Victim "putting [Applicant] out."

Applicant testified he was evicted from Victim's residence. Applicant testified sheriff deputies did come to make him move from Victim's residence. Applicant testified it was part of the plan he had with Victim.

Counsel testified Applicant gave two statements to law enforcement; one on December 10, 2009 and one on December 15, 2009. Counsel testified they had a pretrial Jackson v. Denno, 378 U.S. 368 (1964), hearing and he successfully suppressed Applicant's December 10th statement. Counsel testified Applicant told him that he was having issues with Victim's daughter, Keila

² This section addresses allegation 1, 3, and 4 of Applicant's amended application.



Brown (Keila). Counsel testified Applicant told law enforcement during the December 15th statement that he had been evicted from Victim's residence because of issues in the house between him and Keila. Counsel testified he did not object when Dowdy testified, "He and my sister were in a relationship until she evicted him." Counsel testified he wish he would have objected since it is an issue at the PCR hearing, however, he does not believe objecting would have made a difference in Applicant's trial. Counsel testified he did not move to strike Dowdy's testimony he successfully objected to and in hindsight he wished he would have because it is an issue at the PCR hearing.

During the trial, Captain Stephane Williams (Williams) testified. During Williams' testimony, he told the jury about Applicant's December 15th statement to law enforcement. In that statement, Applicant said, "he was evicted from the residence, that he had a relationship with Ernestine and, at some point, there were some problems with the relationship and he was evicted from the residence." (Trial Tr. 310.)

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to object to Dowdy's testimony regarding Applicant's relationship with Victim and his eviction from Victim's residence. Applicant's own statement presented at trial stated he was evicted from Applicant's residence. (Trial Tr. 310.) Applicant's testimony at the post-conviction relief hearing also established he was evicted from Victim's residence. Further this Court finds, Applicant has failed to show any resulting prejudice from the alleged deficiency. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.



Counsel was constitutionally ineffective for failing to ask the court to strike the testimony of Kathy Dowdy after the court sustained the objection. Applicant further alleges Counsel was ineffective because he failed to object when Kathy Dowdy testified as follows: "(Q) Ms. Dowdy, is there any reason why you would make this up? (A) No."³

Applicant alleges Counsel was constitutionally ineffective for failing to strike Dowdy's testimony that Counsel successfully objected to during the State's direct examination. The State was questioning Dowdy, who testified she was on the phone with Victim at the time Applicant came to her residence the morning of the homicide, about what she was able to hear on the phone. The State asked, "Once [Victim] stated it was Fred, did you hear anything else," and Dowdy responded, "Yes. I initially told her, 'Don't answer the door.' And then she answered the door and I heard her and she said it was Fred. I said, 'Well, what does he want?' and she said, 'I don't know.'" (Trial Tr. 203-204.) At that point, Counsel objected and it was sustained by the trial court. (Trial Tr. 204.) Although Counsel's objection was sustained, he did not request Dowdy's testimony to be stricken from the record, which Applicant has alleged was deficient performance. Applicant further alleges Counsel should have objected during the State's re-direct of Dowdy when she was asked, "Ms. Dowdy, is there any reason why you would make this up?" and Dowdy responded, "No." (Trial Tr. 219.)

Counsel testified he wishes he would have moved to strike Dowdy's statement and objected to the State's question on re-direct because those are issues Applicant was able to raise in his post-conviction relief application. Counsel testified he believed he was successful bringing out important testimony during his cross-examination of Dowdy.

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient as Counsel objected to Dowdy's statement and, although he did not move to strike that statement, he prevented the State

³ This section addresses allegation 2 and 5 from Applicant's amended application.



from eliciting further testimony. Additionally, Counsel thoroughly cross-examined Dowdy and, as Counsel testified, was able to elicit beneficial testimony during that cross-examination. Further, this Court finds Applicant has failed to show any resulting prejudice from Counsel's alleged deficiency. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.

Counsel was constitutionally ineffective for failing to object when Albert [Bruce] Brown testified, "My initial thought was Fred had murdered her."

Applicant alleges Counsel was constitutionally ineffective for failing to object to Bruce's statement, "My initial thought was Fred had murdered her." (Trial Tr. 226.) Counsel testified he did not see a reason to object and did not believe the judge would have sustained an objection to that statement.

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to object to Bruce's testimony. As Counsel testified, his actions were proper under the circumstances. Applicant has also failed to show any resulting prejudice from Counsel's failure to object as any potential objections would not have changed the outcome of Applicant's trial based on the strength of the evidence against him, which included Dowdy's testimony and Applicant's own statement to law enforcement on December 15th. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.

Counsel was constitutionally ineffective for failing to ask the Court to strike the following statement from witness Mack Irby: "When Fred got out of the shower."


Applicant alleges Counsel was ineffective for failing to ask the trial court to strike the statement, "When Fred got out of the shower," from the record during Mack Irby's (Irby) testimony.



After reviewing the record, the statement Applicant is highlighting was made by the State during its direct examination of Applicant. The State read a small portion of the statement Irby provided to law enforcement before Counsel objected. Counsel's objection led to a bench conference. (Trial Tr. 233.) The trial court excused the jury and the State conducted an in-camera examination of Irby regarding his statement to police. (Trial Tr. 235-236.) After the in-camera examination, the State abandoned that line of questioning before the jury and Counsel was provided the opportunity to cross-examine Irby. (Trial Tr. 237.) During Counsel's cross-examination, Counsel was able to elicit testimony that Irby cannot account for everything Applicant did, other than fix breakfast, once he returned home the morning of the incident. (Trial Tr. 238.) Counsel testified he did object to the statement the State read to Irby during direct-examination, however, he did not request it be stricken from the record because the State did not go forward with questioning Irby on his statement to law enforcement.

In Applicant's December 15th statement, Applicant admitted to taking a bath upon returning to Irby's residence. (Trial Tr. 122.) Applicant told officers, "When I seen [Victim] on the floor, that's what made me a suspect and I was scared. . . I figured if it were gunpowder in the air in [Victim's] house, it would probably be on my clothes, too, although I didn't kill her. . . I took a bath and I took the clothes and I burned them." (Trial Tr. 122.)

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient as Applicant admitted to law enforcement that he took a bath at Irby's residence. Further this Court finds, Applicant has failed to show any resulting prejudice from the alleged deficiency as striking the testimony of Irby would not have changed the outcome of Applicant's trial. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.



Counsel was constitutionally ineffective for failing to follow up on the subpoena to Laurens County Sheriff Rick Chastain for the production of "all training records" for the deputies who investigated this and "all training manuals, police procedure manuals for questioning suspects[.]"

Applicant alleges Counsel was constitutionally ineffective for failing to obtain the training records, training and police procedure manuals from the Laurens County Sheriff's Office for trial.

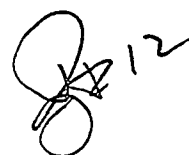
Counsel testified he drafted the subpoena because he has had officers testify to technical matters outside of their training during previous trials and he wanted to be prepared in case that occurred. Counsel testified he did not serve the subpoena because officers did not inappropriately testify to technical matters, so he did not have a need for those materials.

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient as the materials he would have obtained during the subpoena would not have been helpful to Counsel during the trial. Further this Court finds, Applicant has failed to show any resulting prejudice from the alleged deficiency as obtaining those documents would not have changed the outcome of Applicant's trial. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.

Counsel was constitutionally ineffective for failing to thoroughly investigate Victim's daughter Keila Brown's potential involvement in Victim's death.

Applicant alleges Counsel was constitutionally ineffective for failing to thoroughly investigate the potential involvement of Keila in the Victim's death. Applicant testified Counsel failed to fully investigate Keila and should have done more. Applicant testified he gave Counsel evidence about Keila to assist him in his case. Applicant testified he and Keila had issues and Keila had assaulted Victim.

Counsel testified Applicant had provided him with information on Keila and knew Applicant believed Keila killed Victim. Counsel testified he hired an investigator who investigated



Applicant's case, which included any potential involvement Keila may have had in the homicide. Counsel testified the only one providing information about Keila's potential involvement was Applicant. Counsel testified he did not receive any information from law enforcement regarding Keila being a suspect or a potential suspect. Counsel testified that, according to Applicant, Keila was trying to take over Victim's house. Counsel testified, because of Applicant's information about Keila, they obtained 911 phone records that showed Applicant had called 911 in the past because of issues with Keila. Counsel testified he received a lot of information from his investigator about Keila, however, he were not able to interview her, despite his efforts. Counsel testified he got the school records on Victim's children to see if they were in school on the day of the homicide. Counsel testified he could not agree or disagree that Keila was picked up near Victim's residence on the morning of the homicide or whether Keila was wanted at that time. Counsel testified the investigator attempted to locate an eye witness who reported seeing Keila close to Victim's house on the day of the homicide, however, the eye witness could not be located. Counsel testified there was information Keila called her mother from the Budget Lodge close to Victim's residence on the morning of the homicide. Counsel testified it did not matter if Keila was the beneficiary of Victim's estate because the State did not contend Applicant had a financial motive to commit the homicide. Counsel testified he has worked other cases involving third-party guilt and they did not have enough information to go forward with that theory at trial. Counsel testified he did not want to muddy the waters that way for the jury.

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 in failing to investigate Keila as Counsel testified he did have an investigator obtain information on Keila to see if Applicant's allegation regarding Keila being involved in Victim's homicide was a viable theory to proceed on at trial. Counsel obtained phone records,

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police records, school records, and attempted to locate potentially favorable witnesses regarding Keila's whereabouts around the time of the homicide. Despite Counsel's efforts, he felt he did not have enough to cast doubt on the State's case.

This Court further finds Applicant has failed to show any resulting prejudice from the alleged deficiency. The State was able to show the jury: Applicant's December 15th statement where he admitted to finding Victim deceased in her home, leaving the scene without calling 911, returning to Irby's residence where he admittedly took a bath and burned his clothes; testimony from Victim's siblings that showed Applicant was at Victim's house just prior to the homicide and was observed in close proximity to the Victim's residence after the homicide; and testimony from a man who sold Applicant a gun that matched the type of gun that could have been the murder weapon. Even if Counsel presented evidence regarding alleged difficulties Applicant and/or Victim had with Keila, Applicant has failed to show how that would have changed the outcome of his trial. Counsel credibly testified that he could not substantiate Applicant's claims that Keila had been at her mother's residence, or within close proximity to the residence the morning of the homicide. Counsel further testified he had previous experience with third-party guilt cases and he did not feel they had enough to proceed on that theory at trial. Additionally, Counsel testified he did not want to muddy the waters for the jury. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.

Counsel was constitutionally ineffective for failing to introduce into evidence the telephone calls between Applicant and Victim on December 9-10, 2009.

Applicant alleges Counsel should have introduced phone records during trial that showed Applicant and Victim had a lot of communication prior to the homicide.



Counsel testified he did have phone records showing calls between Victim and Applicant, however, Counsel testified the issue was whether that communication was friendly or not. Counsel testified he did not have a way of using those records because without knowing if the communication was friendly.

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient as he had obtained the phone records, however could not find a way to utilize them during trial to benefit Applicant. Further this Court finds, Applicant has failed to show any resulting prejudice from the alleged deficiency as Applicant has failed to show how the introduction of the phone records would have changed the outcome of his trial. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.

Counsel was constitutionally ineffective for discouraged Applicant from testifying because the defense was "winning" at trial.

Applicant alleges Counsel was constitutionally ineffective for discouraging him from testifying because they were "winning." Applicant testified Counsel told him he did not have to testify at trial. Applicant testified Counsel told him the trial was going good and that they were ahead. Applicant testified he took Counsel's statement to mean they were winning.

Counsel testified he did not tell Applicant they were winning. Counsel testified he also did not feel like they were winning. Counsel testified it was up to Applicant whether he testified or not and if Applicant had wanted to testify he would have testified.

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 or any resulting prejudice from the alleged deficiency. Based on the



forgoing, Applicant has failed to meet his burden set forth in Strickland and this allegation must be denied and dismissed with prejudice.

CONCLUSION

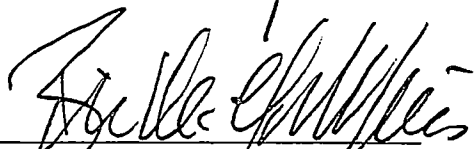
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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:

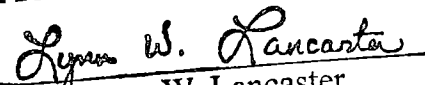
1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this _____ day of 5/26, 2019.

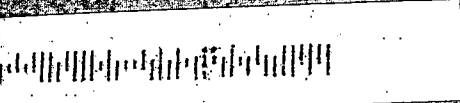


BRIAN M. GIBBONS
Presiding Judge
Eighth Judicial Circuit

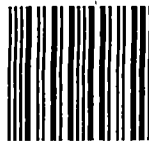
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Lynn W. Lancaster
Laurens County CCCP & GS



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m, P.C.

Hon. Daniel E. Shearouse
Clerk of Court
S.C. Supreme Court
1231 Gervais Street
P.O. Box 11330
Columbia, S.C. 29211