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July 29, 2019

RECEIVED
AUG 02 2019
S.C. SUPREME COURT

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

**RE: Devatee Clinton (#317521) v. State of South Carolina | 2018-CP-29-00110**

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Clinton.

Best regards,

Donae A. Minor, Esq.
Attorney at Law

cc: Devatee Clinton (#317521)
Samuel L. Key, Esq.
Lancaster County Clerk of Court
Office of Appellate Defense

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

RECEIVED
AUG 02 2019
S.C. SUPREME COURT

The Honorable Paul M. Burch, Circuit Court Judge

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Case No. 2018-CP-29-00110

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Devatee Clinton, #317521, ............................................................. Petitioner,

v.

State of South Carolina,.................................................................Respondent.

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NOTICE OF APPEAL

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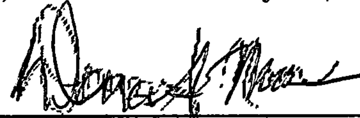
Applicant, Devatee Clinton, appeals the order of the Honorable Paul M. Burch, dated July 19, 2019, filed July 26, 2019, and received July 29, 2019.

June 29, 2019



DONAE A. MINOR, ESQUIRE
Minor Law Offices, LLC
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803-504-0971
SC Bar No. 102550
ATTORNEY FOR APPLICANT

Opposing Counsel:
Samuel L. Key
Post-Conviction Relief
6th and 13th Judicial Circuits
P.O. Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
AUG 02 2019
S.C. SUPREME COURT

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APPEAL FROM LANCASTER COUNTY
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Case No. 2018-CP-29-00110

---

Devatee Clinton, #317521, ............................................................ Petitioner,

v.

State of South Carolina,...............................................................Respondent.

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## PROOF OF SERVICE

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I, Brittany Clark, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, on July 29, 2019, addressed as follows:

Samuel L. Key
Post-Conviction Relief
6th and 13th Judicial Circuits
P.O. Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

July 29, 2019

Brittany Clark
BRITTANY E. CLARK
PARALEGAL TO ATTORNEY DONAE A. MINOR
1750 SC Highway 160 West,
Ste. 101-259
Fort Mill, SC 29708
803-504-0971

RECEIVED
AUG 02 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA )
COUNTY OF LANCASTER )

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Devatee Tymar Clinton, # 317521, Applicant,

v.

State of South Carolina, Respondent.

Case No: 2018-CP-29-0110

**ORDER OF DISMISSAL**

FILED
CLERK OF COURT
2019 JUL 26 PM 2:0
CLERK OF COURT
LANCASTER, SC

The matter before the Court is an action for post-conviction relief (PCR). Devatee Clinton (Applicant) commenced this PCR action on February 6, 2018. The State made its return on June 11, 2018. The Court held an evidentiary hearing January 23, 2019, at the Lancaster County Courthouse before the undersigned. Applicant was present and represented by Donae A. Minor, Esquire. Assistant Attorney General Samuel L. Key represented the State. Applicant testified on his own behalf at the PCR hearing. Applicant's trial counsel also testified. This Court had before it a copy of the records of the Lancaster County Clerk of Court regarding Applicant's convictions, the transcript from Applicant's trial, the PCR application, the State's Return, Applicant's records from the Department of Corrections, and Applicant's appellate records. After reviewing the record and evidence presented, for the reasons discussed below, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to relief and dismisses this action with prejudice.

## I. FACTS & PROCEDURAL HISTORY

In March 2012, the Lancaster County Grand Jury indicted Applicant and Al Martinez Green for the murder of Jenika Jones. (2012-GS-29-616, -636). Applicant was represented by William P. Frick of the Sixth Circuit Public Defender's Office. Solicitor Douglas Barfield

prosecuted the case. Applicant's charge stems from an incident that occurred January 18–19, 2012.

In January 2012, Jones lived in a trailer park with her three minor children—ages four, two, and one. (Tr. 216; 218–19; 221–26; 264–65). Applicant lived with his grandmother in the neighboring trailer. On January 19, 2012, law enforcement responded to a reported home invasion at Jones's trailer. They found Jones's body on the couch in a pool of blood with a single gunshot wound to the head. She was dead upon law enforcement's arrival. Her children were still in the house. Applicant, Green, and two other co-defendants were ultimately arrested for murdering Jones.

Applicant and Green were tried together from March 10–14, 2014, before the Honorable R. Knox McMahon and a jury. The State moved pretrial to bar Applicant or Green from eliciting out-of-court statements by Jones's four-year-old son to the first responders. (Tr. 157–58). Trial counsel argued that after law enforcement arrived and was "still trying to assess what occurred," Jones's four-year-old son "spontaneously state[ed] to . . . Investigator Crump first and then to another officer and . . . maybe a third officer on the scene that 'Shi's daddy shot my momma.'" Later, the child stated "Shortycake shot my momma." (Tr. 158–59).

To further clarify the issue, trial counsel explained Jones's son was nicknamed Deuce, and his father was Antonio Lamont Truesdale. The nickname in Deuce's declaration, "Shortycake," was not the nickname of either Applicant or Green. Rather, it was the nickname of a Rashad Johnson, who is the father of another of Jones's children, "Shi." (Tr. 159–60). The State explained it verified Jones had a child nicknamed Shi, Rashad Johnson was Shi's father, and Rashad Johnson's nickname is "Shortycake." The State also acknowledged Deuce had made a statement to Crump. (Tr. 160–61).

Trial counsel clarified his argument was the child's statement was admissible as an excited

utterance under Rule 803(2), SCRE, to which the trial court stated, "I realize [under Rule] 803 [the] availability of a witness is immaterial but you have to determine the competency of the individual that made the statement. In this regard I'm dealing with a four-year old." (Tr. 161). The State indicated the child's competency was the basis for its objection. (Tr. 161–62).

Trial counsel then argued Deuce was four-years old at the time of the murder, but almost immediately after the shooting, Deuce:

> [Went] to the next door neighbor's house and ask[ed] for help. They called 911. The police respond within 15 minutes. Because it was cold, Deuce and his siblings were put in an ambulance. [Deuce] makes the comment Shi's daddy hurt my momma. Jamia's (phonetics) daddy hurt my momma. Jamia and Shi are the same person and 'daddy' they are referring to is Rashad Johnson. He makes this statement . . . to Investigator Crump. He makes it in the ambulance in front of some of first responders who are on the [State's] witness list, and Mr. Plyler and Mr. Hope and then he says it spontaneous[ly] to Christy Rogers who is a CSI officer that responds there on the scene.

(Tr. 162–63). Thereafter, trial counsel presented three cases to the trial judge supporting his argument the admissibility of this declaration under Rule 803(2) did not depend upon the competency of the out-of-court declarant, and he asked the trial judge to consider these cases before ruling on the issue. Specifically, trial counsel relied upon *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007) (the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness); *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002); and *In Interest of Smith*, 277 S.C. 187, 284 S.E.2d 586 (1981) (three year old victim's statements describing defendant's actions to mother immediately after the incident, while she was still crying and showing signs of pain, were admissible under *res gestae* exception to hearsay rule in case charging juvenile defendant with criminal sexual conduct in the first degree). (Tr. 163).

The trial court noted factual distinctions between those three cases and the instant case, and clarified the issue with the statement was the foundation, stating trial counsel needed to establish a "foundation of the personal knowledge of the hearsay declarant and then meet the three requirements within the rules." *See* Rule 602, SCRE. The trial court also observed that "[p]resence in the home doesn't mean observation of the fatal act. That's all I am saying. . . . That goes back to the [R]ule 600 or something." (Tr. 163–67). The trial court further stated, "I am not saying it is or isn't admissible. I am saying a foundation has got to be laid for its admissibility and . . . you all are welcome to do it in whatever manner you all so choose." (Tr. 168).

The following morning, the trial court re-stated Applicant did not have to show Deuce's competency "for purposes of asking those questions, but they do have to lay the foundation under the excited utterance." The child's competency or incompetency, however, could be presented to the jury. (Tr. 178–79).

On cross-examination of Investigator Taylor, Applicant established Taylor saw the children at the crime scene on the night of the incident; all three children had blood on their clothing; and Taylor seized the children's bloody clothing. (Tr. 499–501). Trial counsel then asked Taylor:

> Q Did you ever have any conversation with any of these children?
> A Yes.
> Q Which one?
> A Oldest child.
> Q Okay. Where did you have this conversation?
> A In the EMS truck.
> Q Do you recall about when you had this conversation? How long you [had] been on the scene?
> A I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.
> Q Do you recall the demeanor of this child?
> A He seemed -- he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep

[their] mind[s] off maybe their thoughts or whatever.
Q Okay. Did you take a statement from any of these children?
A No, I did not take a statement.
Q Was anything told to you?

(Tr. 501–02). The State immediately objected based on trial eliciting an out-of-court statement. Trial counsel responded, "I didn't ask what." The trial court sustained the State's objection. (Tr. 502).

Taylor later testified he had been in the ambulance with the children "[p]robably about ten minutes." (Tr. 517–18). Taylor also opined based upon the blood on the children's clothing, it appeared the children would have been physically close to the victim, and he stated Deuce was able to see the blood on his siblings' clothing while he was in the ambulance. However, Deuce appeared to be "happy-go-lucky" during the time Taylor was with him. (Tr. 518–21).

The jury convicted Applicant and Green as indicted. Judge McMahon sentenced both Applicant and Green to terms of life imprisonment without the possibility of parole.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense and Chad N. Johnson, Esquire, perfected the appeal. Applicant raised two issues on appeal, arguing:

1. The trial court erred in excluding the statements of [Jones's] four-year-old son to first responders that implicated someone other than [Applicant] and [Green] in the charged crime; and

2. The trial court erred in failing to direct a verdict in favor of [Applicant] where the evidence and testimony merely raised a suspicion that he was involved in a crime, but failed to meet the elements of the charged crime.

The court of appeals affirmed Applicant's conviction. *State v. Clinton*, 2016-UP-206 (S.C. Ct. App. May 11, 2016). Applicant petitioned our Supreme Court for a writ of certiorari; however, the Court denied Applicant's petition for certiorari on August 4, 2016, and remitted the case back

to the circuit court on August 23, 2017. Applicant timely commenced this PCR action on February 6, 2018.

## II. ISSUES

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

1. Ineffective Assistance of Counsel by failing to properly preserve the evidence, allowed by the judge in ruling *in limine* and exculpatory to petitioner that another person actually committed the crime. Counsel made no objection or argument at all;
    a. Issue was raised and won in pretrial motion *in limine* during trial, counsel went to bring out the exculpatory testimony only to have the judge sustain the state objection and did not argue to apparent contradiction or properly preserve the issue whatever. They deficiency was highly prejudicial as testimony was exculpatory.

Applicant, through PCR counsel, amended his PCR application to allege the following:

1. Failure to properly preserve the record for Applicant's appeal regarding the issue of excluding testimony of exculpatory statements made by the victim's oldest minor child;
2. Failure to present Hearsay Exception, Present Sense Impression, Rule 803(1), SCRE, as an argument in response to the State's objection to the admissibility of exculpatory statements made to officers and first responders by the victim's oldest minor child;
3. Failure to investigate Applicant's case;
    a. Interviewing potential witnesses;
    b. Evaluating the veracity and authenticity of DNA evidence and other evidence sought against Applicant;
    c. Conducting an independent investigation of the crime scene; and
    d. Investigating the alleged suspect named by the victim's oldest minor child to the police and first responders as the person who shot his mother as part of Applicant's defense.

To the extent the allegations outlined in Applicant's original application constitute separate issues for relief, this Court finds those allegations are voluntarily waived and abandoned. As such, those allegations are hereby denied and dismissed with prejudice.

## III. DISCUSSION

The Court has reviewed the record and observed the testimony at the PCR hearing. The Court has observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The test for determining if counsel's performance was deficient is "whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel was not deficient and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. There is a strong presumption trial counsel's decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). To prove prejudice, the applicant must show "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.

Applicant asserts trial counsel was ineffective for: (1) failing to preserve issues regarding the trial court's exclusion of the Victim's four-year-old son for appellate review; (2) failing to argue the present sense impression hearsay exception in response to the State objecting to the victim's four-year-old son's statement coming into evidence; and (3) failing to investigate

Applicant's case. As discussed below, the Court finds trial counsel's representation was reasonable under prevailing professional norms, and Applicant has failed to show prejudice resulted from trial counsel's alleged deficiencies. Therefore, the Court denies relief and dismisses this PCR action with prejudice.

1. Failing to preserve issues regarding the trial court's exclusion of the Victim's four-year-old son's statement for appellate review.

Applicant alleges trial counsel was ineffective for failing to properly challenge and preserve issues regarding the trial court's exclusion of the Victim's four-year-old son's statement for appellate review. The Court disagrees.

*Strickland v. Washington*, requires that trial counsel must be given leeway to make reasonable strategic decisions. 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." *Strickland* at 688–89. "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, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. *Strickland* therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* Further, "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Hearsay is an out of court statement offered as a true statement. Rule 801(c), SCRE. Hearsay is generally inadmissible. Rule 802, SCRE. However, an excited utterance is an

exception to the general rule against hearsay. Rule 803(2), SCRE. An excited utterance is "[a] statement relating to a startling event . . . made while the declarant was under the stress of excitement caused by the event . . . ." *Id.* Whether the declarant of an excited utterance is available as a witness at trial is immaterial. Rule 803, SCRE.

Three elements must be met to establish a statement as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). "'Statements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule.'" *State v. Hill*, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998) (quoting 23 C.J.S. *Crim.Law* § 876 (1989)).

Trial counsel testified his strategy for eliciting the child's out of court statement was to get the statement into evidence through cross-examination of the first responders. Trial counsel stated he argued pretrial the child's statement was admissible as an excited utterance, and the trial court agreed, conditioning its pretrial ruling on whether Applicant could lay the proper foundation for the statement. Trial counsel felt as though he established the foundation for the child's out of court statement during his cross-examination of Taylor; however, trial counsel believed the trial court changed its mind when it sustained the State's objection to him asking Taylor if the children told him anything. Trial counsel explained he felt at that juncture, the only way to introduce the child's statement would have been to call the child to testify. Trial counsel then testified he did not proffer the child's testimony because the trial court instructed him to move on from the issue. Trial counsel testified that in hindsight he could have proffered the child's testimony, but at the time he

decided to move on with his cross-examination. However, trial counsel also testified that even in hindsight, he would not have chosen to proffer the child's testimony because the child had gone through a traumatic event, and he was unsure what the child would say when called to testify. Trial counsel admitted he did not consider pursuing the possibility of obtaining a child forensic interview. Trial counsel reiterated his strategy for getting the child's statement into evidence was through the excited utterance hearsay exception.

The Court finds trial counsel's strategy to elicit the child's out-of-court statement through cross-examination reasonable. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). The Court further finds trial counsel's decision not to proffer the child's testimony reasonable. While trial counsel arguably needed to proffer the child's testimony to preserve the issue for appellate review, the Court will not second-guess trial counsel's decision to move on with his questioning. *See Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003) ("[C]ounsel has wide latitude in deciding how best to represent a client . . . ."). Because trial counsel articulated reasonable trial strategy for attempting to elicit the child's out-of-court statement, the Court finds he was not deficient.

Therefore, the Court finds and concludes Applicant did not receive ineffective assistance of trial counsel for failing to preserve issues regarding the trial court's exclusion of the Victim's four-year-old son's statement for appellate review. The Court denies relief on this allegation and dismisses it with prejudice.

2. Failing to argue the present-sense impression hearsay exception in response to the State objecting to the victim's four-year-old son's statement coming into evidence.

Applicant alleges trial counsel was ineffective for failing to argue the child's statement was admissible as a present-sense impression which is an exception to the general rule against hearsay. The Court disagrees.

"[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531. "Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them." *Gentry*, 540 U.S. at 7.

As explained in the previous section, trial counsel testified his strategy for entering the child's out-of-court statement into evidence was to argue the statement was admissible under the excited-utterance exception to hearsay. Trial counsel testified when he was preparing the case for trial, he felt excited utterance was the most applicable hearsay exception and chose to pursue that argument at trial.

The Court finds reasonable trial counsel's strategy to argue the child's statement was admissible under the excited-utterance exception to the rule against hearsay. In fact, trial counsel was successful pretrial when the Court ruled it would allow questioning regarding the child's statement. However, during trial, the trial court changed its ruling in sustaining the State's objection. Because trial counsel articulated a reasonable trial strategy regarding the admissibility of the child's out of court statement as an excited utterance, trial counsel was not deficient for failing to argue the statement was admissible as a present-sense impression. Therefore, the Court denies relief on this issue and dismiss it with prejudice.

3. Failing to investigate Applicant's case.

Applicant asserts trial counsel was ineffective for failing to investigate Applicant's case. Specifically, Applicant claims trial counsel failed to: interview potential witnesses, evaluate the veracity and authenticity of DNA evidence and other evidence against Applicant, independently investigate the crime scene, and investigate the suspect named by Deuce as part of Applicant's defense strategy. The Court disagrees.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). However, "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). The applicant must present evidence to show what counsel could have discovered had he more fully investigated. *Jackson v. State*, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003).

As for whether trial counsel was ineffective for failing to interview potential witnesses, the Court finds Applicant has failed to prove any prejudice resulted from trial counsel's alleged deficiency of failing to interview potential witnesses because Applicant presented no witness in support of his allegation at the PCR hearing. *See Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417 ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Therefore, this allegation is denied and dismissed with prejudice.

Applicant alleges trial counsel was ineffective for failing to evaluate the veracity and authenticity of DNA evidence and other evidence sought against Applicant. Specifically, Applicant testified at the PCR hearing trial counsel was ineffective because the State said he was connected to the crime scene by DNA. The Court disagrees.

Trial counsel testified he reviewed the case file and all the witness interviews and statements with Applicant. Trial counsel recalled the State collecting Applicant's DNA through a DNA swab. However, trial counsel testified the State could not connect Applicant to the crime through DNA. Trial counsel recalled the State not have much direct evidence other than the statement of Wayne Blakeney, a co-defendant. Trial counsel recalled the crux of the State's case was Blakeney's testimony.

As for failing to investigate the DNA evidence, the Court finds credible trial counsel's testimony the State could not tie Applicant to the crime through DNA. Upon reviewing the record, trial counsel's strategy for attacking the DNA evidence is clear. Trial counsel thoroughly cross-examined the State's DNA expert and highlighted the high likelihood of the sample being someone's other than Applicant. (Tr. 609–15). Further, trial counsel highlighted the DNA results in his closing argument. Trial counsel pointed out the only DNA on the bullet shell casing was from Jones, Applicant was excluded from the DNA found on the storm door, and Applicant could not be included or excluded from the DNA found on the front door handle. (Tr. 927–28). Finally, trial counsel mitigated Applicant's possible DNA found on the jumpsuit by arguing the DNA did not help the State's case. (Tr. 928–29). The Court finds trial counsel had a strategy for attacking the DNA evidence in this case and employed that strategy at trial; therefore, trial counsel was not deficient for failing to investigate the DNA evidence in this case. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("[W]here counsel articulates a valid reason for employing certain strategy, such

conduct will not be deemed ineffective assistance of counsel.").

Applicant alleges trial counsel was ineffective for failing to conduct an independent investigation of the crime scene. Trial counsel testified at the PCR hearing drove around the trailer park but did not get out and look at the specific trailer where the incident occurred. Trial counsel explained he did not feel it was necessary to get out of the car to view the crime scene because Applicant was very familiar with the area and described it to him and because the scene was well documented in the photographs provided in the discovery. The Court finds trial counsel's investigation of the crime scene reasonable. Trial counsel credibly testified he drove around the trailer park where the incident occurred and felt he had a good idea of the crime scene from speaking with Applicant and from the pictures in discovery. Therefore, the Court finds trial counsel was not ineffective for failing to conduct an independent investigation of the crime scene.

Finally, the Court finds Applicant's allegation of ineffective assistance of counsel for failure to investigate the alleged suspect named by the victim's oldest minor child to the police and first responders as the person who shot his mother as part of Applicant's defense is without merit. Trial counsel testified law enforcement investigated who "Shi's daddy" was and talked to him. Trial counsel testified law enforcement's investigation of the person was provided in the discovery. It is clear from the trial transcript trial counsel tried using this information as part of his defense strategy. As mentioned above, trial counsel tried to get Deuce's statement into evidence through cross-examination. Trial counsel stated his defense strategy was Applicant was not there, and Applicant did not commit the crime. He stated the State did not have much physical evidence tying Applicant to the crime, and the case hinged on Applicant's co-defendant's testimony. Trial counsel attacked the co-defendant's credibility on cross-examination by

highlighting inconsistencies in the co-defendant's testimony and showing the co-defendant's possible bias due to his pending charges.

The Court finds trial counsel had a reasonable trial strategy in this case. Further, Applicant has not shown prejudice resulted from trial counsel's alleged failure to investigate a third-party guilt defense because Applicant did not present any evidence or witnesses trial counsel could have used at trial if he had investigated into the other person. *See Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417 ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Therefore, the Court finds this allegation is without merit.

## IV. CONCLUSION

Based on all the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. The Court finds trial counsel's representation was neither deficient nor prejudicial. Trial counsel articulated a reasonable trial strategy concerning his presentation of Deuce's out-of-court statement. While trial counsel arguably did not preserve his argument, he stated the only way he felt he could have gone further with the child's statement, from reading the trial court in the heat of trial, was to put Deuce on the stand to testify; however, the Court finds trial counsel's reasoning for not calling Deuce to testify reasonable because he was a young child and trial counsel did not know what he would say. Further, trial counsel reasonably investigated the case and formed a defense strategy based on his investigation. Therefore, the Court denies relief and dismisses the action with prejudice.

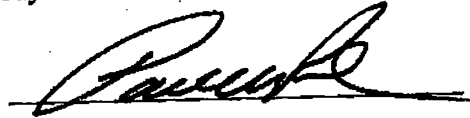
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate

review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. 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 Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**THEREFORE:**

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

**AND IT IS SO ORDERED.**



PAUL M. BURCH
Presiding Judge
Sixth Judicial Circuit

July 19th, 2019.

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Columbia SC 29211-1330

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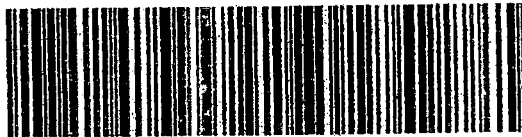

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