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August 26, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, S.C. 29211

RE: Quincy A. McCants, #318280, Appellant -vs- State of South Carolina, Respondent
2009-CP-32-4236

Dear Mr. Shearouse:

I was appointed to represent Mr. McCants in a post-conviction relief action. Judge Goldsmith has denied him relief and dismissed the action. Mr. McCants has instructed me to file an appeal.

Enclosed, for filing, please find the following relating to this matter:

1) A copy of Judge Goldsmith's written Order of Dismissal;
2) A Notice of Appeal;
3) A Proof of Service; and
4) A Certificate of Filing (as to the filing of the Notice of Appeal and Proof of Service with the Lexington County Clerk of Court).

I am turning this matter over to the Office of Appellate Defense for any further proceedings.

Sincerely yours,

Don A. Thompson

RECEIVED
AUG 29 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, IV, Circuit Court Judge

Case No. 2009-CP-32-4236

Quincy A. McCants, #318280,

Applicant,

vs.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Quincy A. McCants appeals the order of the Honorable Brooks P. Goldsmith, IV, dated July 23, 2019. Appellant received written notice of entry of this order on August 2, 2019.

August 26, 2019

Don A. Thompson
(S.C. Bar No. 5545)
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Attorney for Appellant

Other Counsel of Record:
Taylor Z. Smith
Assistant Attorney General
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Columbia, South Carolina 29211
Attorney for Respondent
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 29 2019

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, IV, Circuit Court Judge

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vs.

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Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina (respondent) by depositing a copy of it in the United States Mail, postage prepaid, on August 26, 2019, addressed to the State's attorney of record, Taylor Z. Smith, Assistant Attorney General, S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.

August 26, 2019

Don A. Thompson
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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, IV, Circuit Court Judge

Case No. 2009-CP-32-4236

Quincy A. McCants, #318280,

Applicant,

vs.

State of South Carolina,

Respondent.

CERTIFICATE OF FILING
WITH LEXINGTON COUNTY CLERK OF COURT

I certify that I have filed the Notice of Appeal and Proof of Service in this matter with the Lexington County Clerk of Court by depositing a copy of it in the United States Mail, postage prepaid, on August 26, 2019, addressed to The Honorable Lisa M. Comer, Lexington County Clerk of Court, 205 East Main Street, Suite 128, Lexington, S.C. 29072.

August 26, 2019

Don A. Thompson
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(864) 270-2831
Attorney for Appellant

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Quincy A. McCants, #318280, Applicant, v. State of South Carolina, Respondent.	Case No. 2009-CP-32-4236 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an Application for Post-Conviction filed on September 18, 2009, by Quincy A. McCants (Applicant). The State (Respondent) filed its Return on February 25, 2010. An evidentiary hearing in the matter was held before the Honorable Brooks P. Goldsmith, IV, on June 26, 2019, at the Lexington County Courthouse. Applicant was present and was represented by Don A. Thompson, Esquire. Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and Jonathan M. Harvey, Esquire, and Stanley L. Myers, Esquire, testified on behalf of Respondent. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its December of 2005 term, the Lexington County Grand Jury indicted Applicant for armed robbery. Jonathan M. Harvey, Esquire, and Stanley L. Myers, Esquire, represented Applicant during that case. Samuel

R. Hubbard, III, prosecuted the case on behalf of the Lexington County Solicitor's Office. On October 16-17, 2006, Applicant appeared before a jury for trial, with the Honorable R. Knox, McMahon, presiding. After the jury trial, Applicant was found guilty as indicted, and Judge McMahon sentenced him to imprisonment for twenty-two years. A timely Notice of Appeal was filed and then perfected by Deputy Chief Appellate Defender Wanda H. Carter. Ms. Carter filed an Anders brief in the case. The South Carolina Court of Appeals affirmed the conviction and sentence in an unpublished opinion that was filed on May 6, 2009. The Remittitur was issued on May 22, 2009.

Applicant then filed his Application for Post-Conviction Relief on September 18, 2009, which is the Application that initiated this present action. Respondent filed its Return on February 25, 2010. Applicant was represented by Tricia A. Blanchette, Esquire. Applicant filed an Amended Application on November 5, 2012. An evidentiary hearing was held in the matter on April 13, 2013, before the Honorable Edgar W. Dickson. Judge Dickson denied the application and dismissed with prejudice in an Order of Dismissal that was issued on November 24, 2014. Applicant filed a Motion for Rehearing Pursuant to Rule 59(a), SCRCP and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP, on February 27, 2015, which was denied by Judge Dickson in an Order Denying Applicant's Motion to Alter or Amend a Judgement, which was issued on September 7, 2015. Ms. Blanchette then filed a timely Notice of Appeal.

The appeal of the denial of Applicant's PCR action was perfected by Appellate Defender Taylor Davis Gilliam. The South Carolina Supreme Court issued an Order on December 1, 2016, in which it ordered the parties to attempt to reconstruct the record from the PCR evidentiary hearing before Judge Dickson due to the fact that the court reporter could not produce a transcript of the hearing. A reconstruction was attempted, and Judge Dickson issued an Order of

December 14, 2018, in which he found that the attempt to reconstruct the record had been unsuccessful. By an Order issued on February 1, 2019, the Supreme Court granted the parties' joint motion to vacate Judge Dickson's Order of Dismissal and remand for a new hearing. Pursuant to that Order, the matter came before this Court for an evidentiary hearing on June 26, 2019.

CURRENT PROCEEDING

On September 18, 2009, Applicant filed an Application for Post-Conviction Relief, in which he made the following allegations:

1. Ineffective assistance of counsel;
    a. Failure to properly prepare for trial and conduct an independent investigation of the case;
    b. Failure to raise contemporaneous trial objections; and
    c. Failure to properly address the forensic evidence and SLED report regarding the forensic evidence.

On November 5, 2012, Applicant filed an Amendment to Application for Post-Conviction Relief, in which he made the following allegations;

1. Ineffective assistance of trial counsel for failure to properly prepare and investigate, specifically, but not limited to the following claims:
    a. Failure to review and explain the complete discovery materials to Applicant prior to trial;
    b. Failure to conduct an independent investigation into the evidence and witnesses that formed the State's case against Applicant;
    c. Failure to properly prepare and discuss the defense strategy with Applicant prior to trial; and
    d. Failure to advise Applicant about the use of a private fingerprint expert and that the chip bag was not in evidence for said expert to review;
2. Ineffective assistance of trial counsel for failure to properly advise Applicant on the plea offer and failure to ensure that Applicant knowingly and voluntarily went forward with trial. Specifically, failure to ensure that Applicant was correctly advised as to whether

the sentence on the plea offer would be classified as violent or non-violent;

3. Ineffective assistance of counsel for failure to properly handled the Jackson v. Denno hearing, specifically, but not limited to:
    a. Failure to discuss testifying with Applicant and failure to utilize Applicant as a witness; and
    b. Failure to advise Applicant regarding how his alleged statements would be made at trial;
4. Ineffective assistance of trial counsel for failure to properly handle the motion to suppress the fingerprint evidence. Specifically, but not limited to the following:
    a. Failure to call the referenced expert as a witness;
    b. Failure to make a request to review the evidence in a timely manner, as was argued by the State;
    c. Failure to make a chain of custody argument, as was later attempted during the trial; and
    d. Failure to utilize evidence of prints being analyzed by SLED;
5. Ineffective assistance of counsel for failure to properly handle the fingerprint evidence at trial. Specifically, but not limited to the following:
    a. Failure to mention the missing bag during chain argument; and
    b. Failure to utilize evidence of prints being analyzed by SLED;
6. Ineffective assistance of counsel for failure to properly handle the issues involving the identification of Applicant by Chandra Wright both pre-trial and during trial. Specifically, but not limited to the following:
    a. Failure to advise Applicant regarding Ms. Wright's testimony and identification;
    b. Failure to raise a notice argument; and
    c. Requesting that the show-up be excluded from jury instead of using it as a basis for defense argument (not questioning Detective Sims regarding it);
7. Ineffective assistance of counsel for introducing Chandra Wright's statement, which bolstered her testimony;
8. Ineffective assistance of counsel for agreeing to allow the State to explain how Applicant was arrested due to vehicle information

when inconsistent information regarding the vehicle(s) existed. Failure to question the State's witnesses or raise an argument to the jury regarding the inconsistent vehicle information;

9. Ineffective assistance of counsel for requesting that the sequestration order be lifted to call witnesses and then failing to utilize those witnesses;
10. Ineffective assistance of counsel for failure to provide the court with a specific request to charge;
11. Ineffective assistance of counsel for failure to object to the State's closing argument, about what Applicant did not say, during closing argument;
12. Ineffective assistance of counsel for failure to make an argument to the jury regarding the video, which was replayed for the jury; and
13. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal. Specifically, but not limited to the following:
    a. Failure to address pre-trial motion and objections regarding identification; and
    b. Failure to address pre-trial motion and objections regarding the admissibility of statements.

At the start of the evidentiary hearing, Respondent requested that Applicant specify for the record the grounds upon which Applicant would move forward at the hearing. Applicant specified that he would be moving forward only upon the specifically mentioned allegations found in items one through twelve on the Amendment to Application for Post-Conviction Relief filed by Applicant on November 5, 2012, and affirmatively waived the ineffective assistance of appellate counsel allegations found in item thirteen. Later in the hearing, Applicant also affirmatively waived the allegations found in item ten from the Amendment to Application for Post-Conviction Relief. Because the allegations specifically listed in items one through nine and in items eleven and twelve on the Amendment to the Application for Post-Conviction Relief are the only grounds upon which Applicant moved forward at the evidentiary hearing, all other grounds are deemed to be waived and will not be addressed in this Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must

overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Ineffective assistance of trial counsel for failure to properly prepare and investigate. Failure to review and explain the complete discovery materials to Applicant prior to trial. Failure to conduct an independent investigation into the evidence and witnesses that formed the State's case against Applicant. Failure to properly prepare and discuss the defense strategy with

Applicant prior to trial. Failure to advise Applicant about the use of a private fingerprint expert and that the chip bag was not in evidence for said expert to review.

Applicant testified that he retained Mr. Harvey and that Mr. Myers was appointed by the court. He testified that his first meeting with Mr. Harvey was at the end of January in 2006. He testified that Mr. Harvey reviewed the discovery with Applicant and explained it during that meeting. He testified that he attended school through the ninth grade and participated in special education classes. He testified that he does not believe that Mr. Harvey or Mr. Myers spent enough time reviewing the discovery with him.

Applicant testified that the cashier at the convenience store that was target of the robbery in the underlying criminal case was interviewed by police on the night of the robbery, presented herself as a witness to police, and testified against Applicant at trial. He presented voluntary statement provided to police by the witness on the night of the robbery, which contained the witness's description of the physical characteristics of the robber. This voluntary statement was admitted into evidence without objection as Plaintiff's Exhibit 8.[1] Applicant testified that the witness identified both him and another man in a photo lineup before his trial. Applicant presented another document identified as Plaintiff's Exhibit 9, which was admitted into evidence at the evidentiary hearing, and he testified that document was a be-on-the-lookout (BOLO) flyer distributed by the Lexington County Sheriff's Office in November of 2004. He testified that he believed that the individual shown on the police sketch on the BOLO flyer matched the individual described by the witness in her voluntary statement but that, like the witness's

[1] Since many of the exhibits introduced and admitted into evidence at Applicant's evidentiary hearing on June 26, 2019, had been admitted into evidence at Applicant's trial and marked for identification at that time, and because it was simpler for the parties to refer to these items using the same identifiers used in the underlying criminal trial, this Court instructed the parties to use the original exhibit identifiers during the evidentiary hearing. For example, although Plaintiff's Exhibit 8 was the first piece of evidence admitted during Applicant's case at the evidentiary hearing, it is referred to using this identifier since it was the eighth piece of evidence admitted during the State's case at Applicant's underlying criminal trial.

description of the robber given to police on the night of the robbery, the flyer depiction did not match the Applicant's appearance. He testified that his defense attorneys did not conduct an adequate, independent investigation into the possibility that the witness's identification of him at trial was faulty based on the circumstances identified above. He testified that Mr. Myers did mention to him that he would be asked to display his distinguishing physical features to the jury at trial. He testified that he did remember that he was called upon to show his gold tooth to the jury.

Applicant testified that the police lifted fingerprints from chip bags that were touched by the robber at the convenience store. He testified that he could not remember whether the police were able to match his fingerprints to those lifted from the chip bags, but testified that he was aware that analysis or testing was conducted on the fingerprints lifted form the chip bags. He testified that he did not know that Mr. Harvey had consulted with a fingerprint expert until after the conclusion of his trial. He testified that his defense attorneys did not tell him that the police did not preserve the chip bags after lifting the fingerprints from them.

Applicant testified that there were other witnesses and leads that he wanted Mr. Harvey and Mr. Myers to investigate but that he cannot remember who those witnesses were or what those leads were.

Mr. Myers testified that he practices law at Moore Taylor Law Firm and that he has been practicing law for fifteen years. He testified that he was appointed to represent Applicant as co-counsel with Mr. Harvey approximately six months before Applicant's trial. Mr. Myers testified that he reviewed the discovery materials with Applicant on multiple occasions. He testified that he met with Mr. Harvey on multiple occasions to discuss the case and the discovery. He testified that he and Mr. Harvey met with Applicant together on multiple occasions to discuss the

discovery in the case. He testified that Applicant understood the discovery. He testified that he did send letters to Applicant during the course of the representation but that he did not speak on the phone with Applicant independently of Mr. Harvey. He testified that he and Mr. Harvey discussed potential defenses with Applicant. He testified that they discussed a potential alibi defense, but that Applicant was unable to produce any alibi witnesses. He testified that they settled on a defense of mistaken identity. He testified that they discussed the defense with Applicant and that Applicant understood the defense. He testified that he and Mr. Harvey met with Applicant a sufficient number of times in order to prepare Applicant's case for trial. When shown the BOLO flyer, he testified that he does not specifically remember seeing the flyer or discussing it with Applicant, but also testified that he believed the flyer to depict Applicant as he appeared at the time of the robbery. He testified that he believed the flyer to be a depiction of Applicant, and speculated that he did not remember seeing the flyer because it was not exculpatory and might have implicated Applicant in the underlying robbery or another one.

Mr. Harvey testified that he reviewed the discovery with Applicant on multiple occasions alone, that he met with and talked about discovery with Mr. Myers on multiple occasions, and that he and Mr. Myers jointly met with Applicant on multiple occasions to discuss the discovery. He testified that Applicant understood the discovery. He testified that he hired a private fingerprint expert to review the fingerprints lifted by police from chip bags found at the convenience store, which was the crime scene. He testified that his fingerprint expert concluded that the State had properly lifted the fingerprints from the chip bags and that their comparison of the lifted prints to Applicant's prints was done without error. He testified that he reviewed the expert's findings with Applicant before trial. He testified that he did not meet with the witness but he did not feel that any meeting was necessary since he had her statements to police, so he

knew the substance of what she had to say. He testified that he and Mr. Myers discussed potential defenses with Applicant. He testified that, based on the evidence, he and Mr. Myers, in consultation with Applicant, developed the defense of mistaken identity. He testified that, in accordance with this strategy, he and Mr. Myers questioned the witness's identification of Applicant as the robber throughout the trial. He testified that he received the BOLO flyer in discovery and did not believe it to be evidence helpful to Applicant's defense.

This Court finds that Applicant's allegations as to the inadequacy of his meetings with his defense attorneys and that his defense attorneys failed to review discovery with him are without merit and lack credibility in light of the contradictory testimony offered by both Mr. Myers and Mr. Harvey at the evidentiary hearing. This Court finds that Applicant has failed to show how any additional time spent in meetings with his defense attorneys would have benefitted his case, has failed to show that he was prejudiced by not having as many meetings with his attorneys as he would have liked, and has failed to show that his attorneys failed to review discovery with him and explain the contents thereof.

This Court finds that Mr. Myers and Mr. Harvey conducted an adequate and independent investigation into the case. A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Id. at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations

with the defendant may be critical to a proper assessment of counsel's investigation decisions. . ." Strickland, 466 U.S. at 691. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014). The defense attorneys identified through their testimony that the State's case against Applicant was based upon the witness's identification of Applicant as the robber and the fact that Applicant's fingerprints were found on chip bags at the scene of the crime that had been touched by the robber. This Court finds that the attorneys conducted an adequate and independent investigation into the witness's identification of Applicant as the robber. The attorneys conducted a thorough investigation into the witness's identification so that they could contrast Applicant's physical characteristics at the time of trial to those of the robber as described by the witness and captured on the store's security camera recording. The attorneys attacked the witness's identification at trial of Applicant as the robber by arguing that it was untrustworthy using the witness's initial physical descriptions of the robber, the testimony of Applicant's aunt, the physical description of Applicant made on Applicant's booking form, and the physical appearance of Applicant at the time of trial, especially his gold tooth. The attorneys' performance in enacting these various parts of their misidentification defense shows that the attorneys had engaged in thorough investigation and preparation into the witness's statements to police and in the contradictory physical characteristics of Applicant. This Court finds that Applicant has not shown any deficiency in his attorneys' treatment of the BOLO flyer or any prejudice resulting therefrom.

This Court finds that the attorneys conducted a thorough investigation into the fingerprints found on the chip bags by consulting with an independent fingerprint expert.

Although the expert corroborated the State's findings, he provided the attorneys and Applicant with additional information that they could use to inform their trial strategy. In light of the damning nature of the State's fingerprint evidence, the attorneys attempted to exclude the fingerprint evidence from trial and tried to discredit the State's fingerprint evidence through cross-examination of the crime scene investigator and the State's fingerprint analyst.

This Court finds that Mr. Myers and Mr. Harvey did discuss the defense strategy of misidentification with Applicant prior to trial. Applicant's allegations to the contrary are not credible and lack merit in light of the testimony presented at the evidentiary hearing by Mr. Myers and Mr. Harvey. This Court finds that Mr. Myers and Mr. Harvey did review the findings of the independent fingerprint expert with Applicant, and that Applicant's allegations to the contrary are not credible and lack merit in light of the testimony present at the evidentiary hearing by Mr. Myers and Mr. Harvey.

This Court finds that Applicant has failed to meet his burden of proof in showing that Counsel was constitutionally ineffective in regards to these allegations since he has not shown any deficiency in the performance of Mr. Myers or Mr. Harvey or any resulting prejudice. As such, these allegations are denied and dismissed with prejudice.

Ineffective assistance of counsel for failure to properly handle the Jackson v. Denno hearing, specifically, but not limited to: failure to discuss testifying with Applicant and failure to utilize Applicant as a witness and failure to advise Applicant regarding how his alleged statements would be made at trial.

Applicant testified that he remembers giving an initial, verbal statement to police in which he denied involvement in the robbery. He testified that he made the statement verbally and refused to give a written statement. Applicant presented Plaintiff's Exhibit 4, which was

admitted into evidence during Applicant's trial, and it was admitted into evidence at the evidentiary hearing as Plaintiff's Exhibit 4. This Exhibit indicated that Applicant had waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966), but refused to give a written statement to police. He testified that he did not make a second statement to police in which he said that he did not know whether or not he had been involved in the robbery. Applicant presented Plaintiff's Exhibit 5, which was admitted into evidence during Applicant's trial, and was admitted into evidence at the evidentiary hearing as Plaintiff's Exhibit 5. This Exhibit indicated that Applicant had waived his Miranda rights a second time and again refused to give a written statement to police. He testified that he did not tell police that he did not know whether he committed the robbery and that the police made up the second statement. He testified that neither Mr. Myers nor Mr. Myers explained to him that his verbal statements to the police would be used as evidence against him at trial. He was also asked later in the evidentiary hearing whether Mr. Myers and Mr. Harvey had discussed the statements with him, and Applicant testified, "I can't say."

Mr. Myers testified that he and Mr. Harvey discussed with Applicant before trial the affect that the verbal statements to police could have on the case and the possibility of Applicant's testifying as the voluntariness of his two statements to police. Mr. Harvey testified that he did not call Applicant as a witness during the Jackson v. Denno hearing because he believed that Applicant's testimony would not have been beneficial to the defense. He testified that he believed that Applicant would not have held up as a witness under cross-examination. He testified that he did not want to give the solicitor an additional opportunity to cross-examine Applicant. He testified that he did cross-examine Detective Brett Sims, the detective to whom Applicant had given the verbal statements, during the Jackson v. Denno hearing.

This Court finds that Mr. Myers and Mr. Harvey did discuss with Applicant the affect that his two statements to police would have on his defense at trial. The testimony of both attorneys shows that they recognized Applicant's statements to police as harmful to Applicant's case. This Court finds that Applicant's testimony that neither Mr. Myers nor Mr. Harvey explained to him the affect that the admission into evidence of his two statements to police could have on his case lacks credibility and is without merit in light of the testimony of Mr. Myers and Mr. Harvey. The defense attorneys explained to Applicant the affect that his statements could have on his defense. Detective Simms testified during the Jackson v. Denno hearing that Applicant had been warned before he gave either of his statements, pursuant to Miranda, that the statements could be used against him in court. Applicant initialed next to this specific warning on the both statement sheets, indicating that he understood his right to remain silent and that his statement could be used against him. This Court finds that Applicant's testimony was not necessary in light of the attorneys' reasonable, strategic decision not to use Applicant as a witness during the Jackson v. Denno hearing and in light of Mr. Harvey's questioning of the police officer who took Applicant's statements. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "[W]here 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) (citing Goodson v. United States, 561 F.2d 1071 (4th Cir. 1977)). "Accordingly, when

counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

This Court finds that Applicant has failed to meet his burden of proof in showing that his defense attorneys were constitutionally ineffective in regards to his allegations about their handling of the Jackson v. Denno hearing since he has not shown any deficiency in the performance of Mr. Myers or Mr. Harvey or any resulting prejudice. As such, these allegations are denied and dismissed with prejudice.

Ineffective assistance of trial counsel for failure to properly handle the motion to suppress the fingerprint evidence. Specifically, but not limited to the following: failure to call the

referenced expert as a witness; failure to make a request to review the evidence in a timely manner, as was argued by the State; failure to make a chain of custody argument, as was later attempted during the trial; and failure to utilize evidence of prints being analyzed by SLED.

Applicant testified that he could not remember whether police testified at his trial that they had successfully matched his fingerprints to those lifted from the chip bags found at the convenience store that was the site of the robbery. He testified that Detective Sims lifted fingerprints from the chip bags and took them to the South Carolina Law Enforcement Division (SLED) for analysis. He testified that SLED had made a report that concluded that his prints were not a match to the prints lifted from the chip bag. He introduced SLED's report about the fingerprints lifted from the chip bags, and it was admitted into evidence at the evidentiary hearing as Plaintiff's Exhibit 2. He testified that he wanted to testify at his trial about the SLED fingerprint report. He testified that the chip bags were collected as evidence and then destroyed. He testified that his attorneys never told him that the chip bags were missing. He testified that he remembered his defense attorneys raising an argument at trial about the chain of custody of the fingerprints lifted from the chip bags but did not remember the procedure involved.

Mr. Myers testified that he was aware of the SLED fingerprint report, which was admitted into evidence as Plaintiff's Exhibit 2, and that he had discussed it with Mr. Harvey and with Applicant. He testified that the SLED report did not contain the conclusion that Applicant's fingerprints did not match those lifted from the chip bags. Mr. Myers testified that the SLED report did contain the conclusion that SLED was unable to match the fingerprints lifted from the chip bags to the fingerprints stored in their database. He testified that he could not remember any specific reason that Applicant's fingerprints were not included in SLED's fingerprint database. He testified that the Lexington County Sheriff's Office had successfully matched the fingerprints

lifted from the chip bag to Applicant's fingerprints. He testified that he did not see any error in the way that Mr. Harvey handled the pre-trial motion to suppress the fingerprint evidence.

Mr. Harvey testified that he was aware of the SLED fingerprint report, which was admitted into evidence as Plaintiff's Exhibit 2, and that he had received it in discovery from the State. He testified that he had discussed the report with Mr. Myers and Applicant. He testified that the SLED report did not contain the conclusion that Applicant's fingerprints did not match those lifted from the chip bags. He testified that the SLED report did contain the conclusion that SLED was unable to match the fingerprints lifted from the chip bags to the fingerprints stored in their fingerprint database. He testified that he did not call anyone from SLED as a witness to discuss the SLED fingerprint report because he did not believe that the conclusions reached in that report were exculpatory and because he did not want to open the door to testimony about the State's parallel criminal investigations into Applicant for multiple convenience store robberies.

Mr. Harvey testified that the Lexington County Sheriff's Office had compared the fingerprints lifted from the chip bags to Applicant's fingerprints and concluded that the prints were a match, and that the fingerprints on the chip bags had come from Applicant's fingers. He testified that he hired a fingerprint expert to conduct an independent analysis of the fingerprints, and that his expert concluded that the fingerprints lifted from the chip bags were a match to Applicant's fingerprints and that the fingerprints on the chip bags had come from the Applicant's fingers. He testified that his fingerprint expert agreed with the conclusions reached by the Lexington County Sheriff's Office. He testified that he did not call his fingerprint expert as a witness at trial because his expert would have only been able to testify that the State's fingerprint evidence had properly conducted his fingerprint analysis and properly concluded that the fingerprints from the chip bags belonged to Applicant.

This Court finds that Applicant's trial attorneys made a strategic decision not to call the defense's fingerprint expert as a witness in Applicant's trial. Mr. Myers and Mr. Harvey concluded that the defense's fingerprint expert only would have been able to concur with the conclusions of the State's expert, thereby bolstering the State's argument regarding the evidence against Applicant, and this conclusion was reasonable and strategic. Mr. Harvey nevertheless thoroughly questioned Wilbur Johnson, the State's fingerprint expert, on cross-examination during Applicant's trial. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (holding that trial counsel's failure to call an expert witness to rebut expert testimony for the State was not deficient where counsel vigorously cross-examined the expert witness). Additionally, Applicant did not present the fingerprint expert as a witness at the evidentiary hearing, but has merely speculated that the expert's testimony might have been favorable to Applicant at trial. An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)). As such, Applicant has not shown any prejudice in the decision of his defense attorneys not to call the fingerprint witness as an expert. This Court finds that neither Mr. Myers nor Mr. Harvey were constitutionally ineffective for failing to call the defense's independent fingerprint expert as a witness during Applicant's trial or the pre-trial motion to suppress the fingerprint evidence.

This Court finds that neither Mr. Myers nor Mr. Harvey was constitutionally ineffective for failing to request to examine the chip bags in a timely manner. In response to Mr. Harvey's argument that the State's fingerprint evidence should be suppressed at trial due to the fact that the State had not preserved the chip bags from which the prints were lifted, and therefore

deprived the Applicant of the opportunity to conduct testing on the bags, the solicitor commented that the defense had had plenty of opportunity to review the fingerprints lifted from the chip bags prior to trial but had not given the State any notice that it wished to conduct independent testing on them. This Court finds that the solicitor's comment was a mistaken belief that Mr. Harvey wanted to review the fingerprints, when in fact Mr. Harvey was arguing that the defense should be allowed to review the chip bags from which the fingerprints were lifted. The transcript from the trial indicates that Mr. Harvey clarified that he was arguing that the defense needed the opportunity to inspect the chip bags. Mr. Harvey knew that the chip bags had not been preserved by the State once the fingerprints had been lifted from them, and argued that the failure to preserve the chip bags served as a basis for his motion that the fingerprint evidence be suppressed. Applicant's allegation that the defense attorneys failed to give timely notice to the State that the defense needed to inspect the chip bags is based upon Applicant's misreading of the arguments during the hearing on the motion to suppress the fingerprint evidence. Notably, the record indicates that the defense attorneys had submitted a written motion to the trial court in which they put forth their motion to suppress the fingerprint evidence. Judge McMahon denied the motion to suppress and found that the chip bags did not possess any exculpatory value once the fingerprints had been lifted from them. Furthermore, the defense's own fingerprint evidence had concluded that the State's fingerprint evidence was properly collected and indicated that Applicant had touched the chip bags.

This Court finds that neither Mr. Myers nor Mr. Harvey was constitutionally ineffective for failing to make a chain of custody argument during the pre-trial hearing on the defense's motion to suppress the fingerprint evidence. Although Mr. Harvey did not rely on a chain of custody argument during the hearing on the hearing, he did make this argument at multiple

points at trial when objecting to the admission of the fingerprints into evidence when the prints were being offered into evidence; however, Judge McMahon overruled the objections and disregarded the chain of custody argument. This Court finds that Applicant has failed to make a showing as to how Mr. Harvey's chain of custody argument in opposition to the admission of the State's fingerprint evidence, which was overruled by Judge McMahon when it was made during trial, would have been successful if made pre-trial rather than during trial.

This Court finds that neither Mr. Myers nor Mr. Harvey were constitutionally ineffective for failing to introduce evidence or testimony as to SLED'S fingerprint report. "[W]here 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) (citing Goodson v. United States, 561 F.2d 1071 (4th Cir. 1977)). This Court finds that Mr. Myers and Mr. Harvey both articulated a sound trial strategy in not introducing evidence or testimony regarding SLED's fingerprint report. They both had reasonably concluded that the conclusions found in that report would not have aided Applicant's defense and they were concerned that introducing any testimony or evidence on the topic could open the door to have the State bring in evidence regarding the multiple criminal investigations into Applicant. They did not want evidence as to these other investigations to come in as evidence because they feared that it would have negatively affected Applicant's defense.

As to these allegations, Applicant has failed to meet his burden of proof in showing that either Mr. Myers or Mr. Harvey was constitutionally ineffective since he has not shown any deficiency or resulting prejudice from their performance. As such, these allegations are denied and dismissed with prejudice.

Ineffective assistance of trial counsel for failure to properly advise Applicant on the plea offer and failure to ensure that Applicant knowingly and voluntarily went forward with trial. Specifically, failure to ensure that Applicant was correctly advised as to whether the sentence on the plea offer would be classified as violent or non-violent.

Applicant testified that Mr. Harvey once asked him about the possibility of Applicant's taking a plea offer while Applicant was in jail. He testified that Mr. Harvey also brought it up again before Applicant's trial. He testified that he turned down the plea offer because he was innocent. He testified that the plea offer was for a fifteen-year, non-violent sentence. He testified that neither Mr. Harvey nor Mr. Myers explained the difference between a violent and a non-violent offense. He testified that he had never been incarcerated before, and did not understand those things. He testified that he is innocent. He testified that Mr. Harvey rushed him to trial and wanted Applicant to take the plea offer. He testified that he tried to ask questions of Mr. Harvey and was told that he was heading to trial for a sentence of twenty years, violent.

Mr. Myers testified that Applicant insisted on going to trial because he maintained his innocence. He testified that Applicant was not interested in accepting a plea deal because he wanted a trial. Mr. Harvey testified that he did discuss the possibility of Applicant pleading guilty in accordance with a plea deal from the State, and that his goal with the discussion was that Applicant would be able to make an informed and intelligent choice about whether to plead guilty or proceed to trial. He testified that Applicant was facing multiple criminal charges and trials because he was accused of robbing multiple convenience stores. He testified that he represented Applicant on the underlying criminal case and in another armed robbery case. He testified that he achieved a not guilty verdict for Applicant in a second armed robbery trial that occurred after he was convicted in the underlying case. He testified that he and the solicitor had

agreed to try the distinct robberies separately so as to not confuse the jury with the various issues and evidence. He testified that the solicitor had suggested that Applicant enter into a global plea deal so as to dispose of all of the criminal charges against him. He testified that the plea offer was for a fifteen-year sentence. He testified that he explained the difference between a violent and non-violent sentence to Applicant. He testified that he explained all relevant details regarding the plea offer and that Applicant did not give him any indication that he did not understand. He testified that Applicant rejected the plea offer and demanded a trial because Applicant said that he was innocent.

This Court finds that Mr. Myers and Mr. Harvey notified Applicant of the only plea offer extended in this case and that Applicant refused it because he maintained his innocence and wanted to proceed to trial. This Court finds that Applicant's allegations that his defense attorneys coerced him into proceeding to trial and did not discuss with him the difference between a violent and non-violent sentence are without merit and lack credibility in light of the testimony presented by Mr. Myers and Mr. Harvey at the evidentiary hearing. Even if the defense attorneys had failed to inform or misinformed Applicant as to whether he was facing a sentence that would be classified as violent rather than non-violent, this Court finds that confusion on this particular collateral consequence would not have affected the voluntary nature of Applicant's decision to proceed to trial. See Smith v. State, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997). This Court finds that Applicant has failed to demonstrate that he did not knowingly and voluntarily proceed to trial. Indeed, Applicant's own testimony at the evidentiary shows that he still maintains his innocence and desire to challenge the evidence against him.

As to these allegations, Applicant has failed to meet his burden of proof in showing that either Mr. Myers or Mr. Harvey was constitutionally ineffective since he has not shown any

deficiency or resulting prejudice in their performance, and has failed to meet his burden in establishing that he did not knowing and voluntarily proceed to trial. As such, these allegations are denied and dismissed with prejudice.

Ineffective assistance of counsel for failure to properly handle the fingerprint evidence at trial. Specifically, but not limited to the following: failure to mention the missing bag during chain argument and failure to utilize evidence of prints being analyzed by SLED.

Applicant testified that he remembered his defense attorneys raising an argument at trial about the chain of custody of the fingerprints lifted from the chip bags but did not remember the procedure involved. Applicant did not present any other testimony about his allegation that his defense attorneys were constitutionally ineffective for failing to mention the missing bag during Mr. Harvey's argument that the fingerprint evidence should be inadmissible due to the fact that the State did not preserve the chip bags from which the fingerprints were lifted. This Court finds that neither Mr. Myers nor Mr. Harvey was constitutionally ineffective for failing to mention the missing bag during Mr. Harvey's argument that the fingerprint evidence should be inadmissible since the State had not preserved the chip bags from which the fingerprints were lifted. Mr. Harvey argued during the pre-trial hearing on the motion to suppress the fingerprint evidence that the missing chip bags required the suppression of the fingerprint evidence. Judge McMahon had denied the motion and ruled that the missing chip bags did not make the State's fingerprint evidence inadmissible. Mr. Harvey was therefore prohibited from arguing the missing chip bag issue further. See Rule 18, SCRCrimP. Mr. Harvey did renew the pre-trial motion to suppress, which was grounded on the missing chip bags, when the fingerprint evidence was offered as evidence in trial. As to this allegation, Applicant has failed to meet his burden of proof in showing that either Mr. Myers or Mr. Harvey was constitutionally ineffective since he has not

shown any deficiency or resulting prejudice in their performance. As such, this allegation is denied and dismissed with prejudice.

Applicant's allegation here that his defense attorneys were constitutionally ineffective for failing to utilize evidence of his prints being analyzed by SLED is a duplicate allegation from elsewhere in his Application for Post-Conviction Relief. This Court relies upon its findings elsewhere in this Order of Dismissal as to this duplicate issue, and reaffirms those findings here. This allegation is again denied and dismissed with prejudice.

Ineffective assistance of counsel for failure to properly handle the issues involving the identification of Applicant by Chandra Wright both pre-trial and during trial. Specifically, but not limited to the following: failure to advise Applicant regarding Ms. Wright's testimony and identification; failure to raise a notice argument; and requesting that the show-up be excluded from jury instead of using it as a basis for defense argument (not questioning Detective Sims regarding it).

Applicant testified that Mr. Harvey told him before trial that the witness could not testify at Applicant's trial. He testified that he was surprised when trial began that the witness was present because he had believed that she would not be present because of what Mr. Harvey told him. Both Mr. Myers and Mr. Harvey testified that they expected the witness to testify at Applicant's trial and that they explain this to Applicant. They testified that they discussed her identification of Applicant as the robber, and that there defense of misidentification was based on her previous identification of Applicant and the identification that they expected her to make in court. They testified that they never told Applicant that the witness would not be at trial and that he thoroughly understood the significance of her identification of him in the case. This Court finds that the testimony of Applicant that the defense attorneys told him that the witness would

not testify at his trial lacks credibility and is without merit in light of the testimony of Mr. Myers and Mr. Harvey. This Court finds that the defense attorneys were not constitutionally ineffective for failing to advise Applicant that the witness to testify or the import of her identification in the case because they did so advise Applicant.

Applicant testified that some police officer had performed a show up with the witness, meaning that an officer went to the witness with one or more photographs and asked the witness if any of those photographs were of the robber. Applicant testified that he first learned of the show-up during trial. He testified that he did not remember whether his defense attorneys moved for a continuance due to lack of notice of the show up or if they moved to suppress the witness statements based on the show up.

Mr. Harvey testified that the solicitor let him know during trial that he had just learned that someone had performed a show up with the witness. Mr. Harvey testified that he argued in a pre-trial hearing that any in-court identification by the witness should have been inadmissible because it would have been tainted by the impermissible show up. He testified that Judge McMahon denied the motion and ruled that the in-court identification would be admissible. He testified that Applicant's defense was that of misidentification, and that he and Mr. Harvey conducted the trial by trying to show, among other things, that the witness's identification of Applicant was incorrect. Though Mr. Harvey had unsuccessfully moved pre-trial to suppress the witness's in-court identification, he testified that he and Mr. Myers did not want to argue that the show up had tainted the in-court identification during his cross-examination of the State's witnesses during trial because they were afraid that this would have opened the door for the State to bring in testimony that would have shown that Applicant was under multiple criminal investigations for having allegedly committed armed robbery at other convenience stores. He

testified that he believed that this would have prejudiced Applicant and that he felt it was better to use evidence to call into question the accuracy of the witness's in-court identification of Applicant without running the risk of allowing the jury to know that Applicant was accused of other, similar crimes. He testified that he came to this conclusion because of his familiarity with Applicant's position as a defendant or suspect in multiple criminal cases and his involvement in at least one of the other cases.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "[W]here 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) (citing Goodson v. United States, 561 F.2d 1071 (4th Cir. 1977)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which

witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

This Court finds that neither Mr. Myers nor Mr. Harvey was constitutionally ineffective for moving to suppress the witness's identification of Applicant rather than using the show up as a basis for argument. Mr. Harvey articulated a reasonable strategic reason for using the lack of notice of the show up and its potential effect on the witness's in-court identification of Applicant as the bases for the suppression of the identification in a pre-trial hearing instead of also using it as a basis for cross-examination and argument during trial. This Court finds that Mr. Harvey incorporated a notice argument into his argument during the hearing. This Court finds that Applicant has not demonstrated any deficiency in these allegations, nor has he shown any resulting prejudice.

As to these allegations, Applicant has failed to meet his burden of proof in showing that either Mr. Myers or Mr. Harvey was constitutionally ineffective since he has not shown any deficiency in their performance or resulting prejudice. As such, these allegations are denied and dismissed with prejudice.

Ineffective assistance of counsel for introducing Chandra Wright's statement, which bolstered her testimony.

Applicant testified that the cashier at the convenience store that was target of the robbery in the underlying criminal case was interviewed by police on the night of the robbery, presented herself as a witness to police, and testified against Applicant at trial. Her description of the robber, which she gave on the night of the robbery, was admitted into evidence at Applicant's trial. Applicant alleges that it was ineffective assistance of counsel for Mr. Myers to have admitted the witness's statement into evidence because it made her in-court testimony and identification of Applicant more credible.

Mr. Myers testified that the defense used at trial was misidentification. He testified that he and Mr. Harvey were trying to cast doubt upon the accuracy of the witness's in-court identification of Applicant by demonstrating that her descriptions of the robber near the time of the robbery did not match Applicant's appearance. He testified that he had the witness's statement admitted into evidence at trial as Defendant's Exhibit 1 because it was necessary that the witness's statement be in evidence so that the defense could argue that the witness had misidentified Applicant as the robber.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "[W]here 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) (citing Goodson v. United States, 561 F.2d 1071 (4th Cir. 1977)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

This Court finds that neither Mr. Myers nor Mr. Harvey was constitutionally ineffective for introducing the witness's statement to police. This Court finds that the defense attorneys articulated a reasonable and strategic reason for introducing the witness's statement. They testified that they had to cast doubt on the accuracy of the witness's in-court identification of Applicant, and that they believed that pointing out deficiencies in the witness's statement was a good way of accomplishing that goal. While cross-examining the witness on her statement, Mr.

Myers drew out the fact that the statement did not include a reference to the robber having a gold tooth. Mr. Harvey cross-examined Detective Brett Sims about the lack of any reference to the robber having a gold tooth in the physical descript of the robber found in the witness's statement and discrepancies in the physical description of the robber from the statement and the description in the Lexington County Sheriff's Office's booking form for Applicant. Mr. Myers later questioned Applicant's aunt about Applicant's distinctive and visible gold tooth. Mr. Harvey argued in closing that the witness's statement to police on the night of the robbery failed to mention that the robber had a gold tooth, and contrasted that with the noticeability of Applicant's gold tooth. As to this allegation, Applicant has failed to meet his burden of proof in showing that either Mr. Myers or Mr. Harvey was constitutionally ineffective since he has not shown any deficiency in their performance or resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

Ineffective assistance of counsel for agreeing to allow the State to explain how Applicant was arrested due to vehicle information when inconsistent information regarding the vehicle(s) existed. Failure to question the State's witnesses or raise an argument to the jury regarding the inconsistent vehicle information.

Applicant testified that the witness gave police a description of the car in which the robber left the convenience store, but that the witness did not give police a tag number. He testified that his car was not the car identified by the witness. He was alleging that the defense attorneys should have done more at trial to bring out these facts in order to further cast doubt on the accuracy of the witness's identification of Applicant as the robber.

Mr. Myers and Mr. Harvey testified that they did not think that the fact that the witness had identified a car that was not Applicant's was a serious issue in the case, especially in light of

the fact that Applicant's fingerprints were found at the convenience store. They testified that police had found Applicant by tracing the getaway vehicle used in a separate armed robbery for which Applicant was also being investigated. They testified that police began investigating Applicant as the suspect in the armed robbery at issue in this case once they had found him while conducting that separate investigation. Mr. Harvey testified that they did not want to get into much detail on the fact that the armed robbery's getaway car was not Applicant's car because they did not want to open the door for the State to bring in testimony that would have shown that Applicant was under multiple criminal investigations for having allegedly committed armed robbery at other convenience stores.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "[W]here 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) (citing Goodson v. United States, 561 F.2d 1071 (4th Cir. 1977)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402

(2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

This Court finds that neither Mr. Myers nor Mr. Harvey was constitutionally ineffective for failing to question witnesses about the fact that the getaway car identified by the witness was not Applicant's car or for agreeing with the State to limit the explanation for the police's discovery of Applicant through their investigation. This Court finds that the State gave a limited explanation for the way in which they identified Applicant as a suspect in the armed robbery case in agreement with the defense attorneys so that the door would not be opened for prejudicial evidence as to Applicant's potential involvement in other, similar armed robberies. Mr. Myers did cross-examine the witness on the getaway car to some extent, but kept this limited due to the fact that the solicitor would have wanted to open the door to the additional, potentially prejudicial testimony, had Mr. Myers gone further. This was a reasonable and strategic decision employed by the defense attorneys so as to protect Applicant from damaging testimony or evidence. The trial record demonstrates that the defense attorneys thoroughly called into question the accuracy of the witness's identification through other means that did not carry such a risk for

Applicant. As to these allegations, Applicant has failed to meet his burden of proof in showing that either Mr. Myers or Mr. Harvey was constitutionally ineffective since he has not shown any deficiency in their performance or resulting prejudice. As such, these allegations are denied and dismissed with prejudice.

Ineffective assistance of counsel for requesting that the sequestration order be lifted to call witnesses and then failing to utilize those witnesses.

Applicant testified that he had discussed having his girlfriend and mother testify on his behalf at his trial but also testified that he could not remember what the substance of their testimonies would have been. He testified that he did not remember whether either of them was called to testify as a witness at his trial.

Mr. Myers testified that he and Mr. Harvey discussed a potential alibi witness with Applicant, but that Applicant failed to produce any alibi witnesses. He testified that he discussed having Applicant's mother testify at trial as to Applicant's physical characteristics so as to sow doubts about the accuracy of the witness's identification of Applicant and to raise doubts that Applicant was the robber captured in the store's security camera recording. He testified that he and Mr. Harvey had also discussed using a second witness during Applicant's trial, and that this witness would have either been Applicant's sister or Applicant's girlfriend. He testified that he could not remember whether the second potential witness was the sister or girlfriend. He testified that he and Mr. Harvey ultimately decided to call Applicant's aunt as a witness to testify about Applicant's physical characteristics because they believed that she would have presented as a better witness than Applicant's mother since the aunt was an employee with the South Carolina Department of Social Services and generally had a better presentation than Applicant's mother.

He testified that he and Mr. Harvey discussed the matter with Applicant and that he understood their reason for using Applicant's aunt as a witness instead of his mother.

Mr. Harvey testified that he and Mr. Myers discussed potential alibi witnesses with Applicant, but that Applicant failed to produce any alibi witnesses. He testified that he discussed having Applicant's mother testify at trial but that he and Mr. Myers decided, with Applicant's acceptance, to call Applicant's aunt as a witness instead based on their belief that the aunt would have presented as a better witness than Applicant's mother. He testified that Applicant understood the reason for this decision.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "[W]here 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) (citing Goodson v. United States, 561 F.2d 1071 (4th Cir. 1977)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for

using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

This Court finds that Mr. Myers and Mr. Harvey made the reasonable and strategic decision to call Applicant's aunt as a witness rather than Applicant's mother because they believed that the aunt would have been a more beneficial witness for Applicant's defense than the mother based on factors like her work experience at the Department of Social Services. This Court finds that Applicant has not produced either his mother or girlfriend as a witness and has therefore merely speculated that they would have provided beneficial testimony had they been called as witnesses at his trial. Furthermore, Applicant's inability to remember the facts of his discussions on this topics with Mr. Myers and Mr. Harvey has resulted in his inability even to meaningfully speculate as to what they could have added to his defense at trial. This Court finds that Applicant has failed to meet his burden of proof in showing that either of his defense attorneys was constitutionally ineffective by not calling his mother or girlfriend as a witness at trial since he has not shown any deficiency or resulting prejudice from their performance. This Court finds that Applicant has presented no testimony alleging that there was any prejudice resulting from the decision of his defense attorneys and the solicitor to lift the sequestration order

put in place at the beginning of the trial; therefore, this Court finds that there was no prejudice that resulted from the lifting of the order. As such, these allegations are denied and dismissed with prejudice.

Ineffective assistance of counsel for failure to object to the State's closing argument, about what Applicant did not say, during closing argument.

Applicant exercised his constitutional right to remain silent by not testifying during his trial. At the evidentiary hearing, Applicant testified that, during his trial, the solicitor mentioned during the State's closing argument that there were things that Applicant didn't say, and that Applicant was prejudiced thereby. Applicant was alleging that the solicitor was making an impermissible reference to Applicant's exercising his right to remain silent. Mr. Myers and Mr. Harvey testified that they did not believe that the solicitor was making a reference to Applicant's exercising his right to remain silent but that the solicitor was referring to the content of Applicant's two statements to police, which were brought into evidence through testimony during Applicant's trial.

"It is impermissible for the prosecution to comment, directly or indirectly, upon the defendant's failure to testify. However, improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant. The defendant bears the burden of demonstrating the improper comment deprived him of a fair trial." Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (finding that the solicitor's comments were a comment on the evidence presented to the jury and on the defendant's failure to testify) (citations omitted). The Court in Johnson also held that, even assuming that the solicitor's comment had been improper, the trail court's instruction to the jury that it not use the

defendant's failure to testify at trial against him was sufficiently curative. Id. at 188, 480 S.E.2d at 735-36. In the present case, the solicitor made the following comment:

> Firmly convinced: Fingerprints, the I. D. by [the victim], and [Applicant's] own statements. You can consider what [Applicant] didn't say. He didn't say anything about the potato chip bag, like: I've been in that store a million times. He didn't say anything like that.

Trial Tr. 418.

This Court finds that the solicitor's statement was not a comment, either directly or indirectly, on Applicant's failure to testify at trial. The solicitor explicitly refers to Applicant's "own statements," referring to Applicant's two statements to police, which were brought into evidence through testimony during Applicant's trial. Rather than commenting upon Applicant's failure to testify at trial, the solicitor was arguing to the jury that the content of Applicant's two statements to police were not credible because they lacked any account or explanation as to how his fingerprints were found on chip bags that the robber touched during a robbery. This Court finds that the solicitor's comment was a comment upon evidence presented in the case and an argument as to the meaning of that evidence in the context of all of the State's evidence against Applicant. Although the evidence that was the subject of the solicitor's comments, the two statements that Applicant made to police, the solicitor's comments were about the lack of credibility of exculpatory value at the time at which the statements were made and not about Applicant's failure to testify at trial. Furthermore, Judge McMahon instructed the jury that it would not draw any inference as to the guilty or innocence from Applicant's failure to testify during his trial, and this Court finds that this jury instruction would have cured any potential error, should the solicitor's comments have been improper references to Applicant's failure to testify at trial.

As to this allegation, Applicant has failed to meet his burden of proof in showing that either Mr. Myers or Mr. Harvey was constitutionally ineffective since he has not shown any deficiency or resulting prejudice from their performance. As such, this allegation is denied and dismissed with prejudice.

Ineffective assistance of counsel for failure to make an argument to the jury regarding the video, which was replayed for the jury.

During Applicant's trial, the State introduced into evidence the security camera recording from the convenience store that was the site of the robbery. The video showed the robber entering the store and buying a bag of chips, returning to the store using the ruse of wanting to exchange the bag of chips for a different bag, and then robbing the store while he was in there for the second time. Applicant did not present testimony at the evidentiary hearing in support of his allegation that his defense attorneys failed to make an argument to the jury regarding this security camera recording. Mr. Harvey testified that he addressed the security camera recording in closing argument during Applicant's trial.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "[W]here 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) (citing Goodson v. United States, 561 F.2d 1071 (4th Cir. 1977)). "Accordingly, when counsel articulates a valid reason for employing a certain

strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

This Court finds that Applicant's allegation that his defense attorneys failed to make an argument to the jury as to the security camera recording is unquestionably contradicted by the record from Applicant's trial. Mr. Myers questioned Maxine Brown, Applicant's aunt, during Applicant's trial. Ms. Brown testified that the robber in the security camera recording was not Applicant. She testified that she was able to distinguish the man in the video from Applicant because Applicant walked with a distinctive limp although the man in the recording did not have a limp, Applicant had a bigger physical build than the man in the recording, Applicant had a distinctive and visible gold tooth and the man in the recording did not, and Applicant had darker

skin complexion than did the man in the recording. Mr. Harvey argued in closing argument during Applicant's trial that the fact that the police had not extracted a still from the security camera recording in order to get an accurate estimate of the robber's height should have discounted to the jury the thoroughness of the law enforcement investigation into the robbery. Mr. Harvey argued in closing argument that the fact that the security camera recording introduced into evidence did not continue from the conclusion of the robbery until the chip bags were recovered from the scene by investigators should have discounted to the jury the value of the fingerprints lifted from the bags. Mr. Harvey argued in closing argument that the fact that the State had not put into evidence the contents of the robbers transaction at the convenience store despite the fact that the transaction had been captured on the security camera recording should have discounted the State's case to the jury. Mr. Harvey argued in closing that Ms. Brown's testimony as to Applicant's distinguishing physical characteristics did not match the robber as shown in the security camera recording. Mr. Harvey told the jury during his closing argument to anticipate the State's reliance on the security camera recording and asked the jury to consider "the doubt in the details." As to this allegation, Applicant has failed to meet his burden of proof in showing that either Mr. Myers or Mr. Harvey was constitutionally ineffective since he has not shown any deficiency or resulting prejudice from their performance. As such, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his Application for Post-conviction Relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 23 day of July, 2019.

BROOKS R. GOLDSMITH, IV
Presiding Judge
Eleventh Judicial Circuit

Aiken, South Carolina

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TO:

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina