ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

August 29, 2019

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Jeremy Jerome Knight v. State
2005-CP-42-00520

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST.• GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

2005-CP-42-00520

Jeremy Jerome Knight, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Jeremy Jerome Knight appeals the Honorable J. Mark Hayes, II's Order of Dismissal filed August 23, 2019.

This 29 day of August, 2019.

Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Jacob A. Isenberg, AAG
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA	)	
	)	**IN THE SUPREME COURT**
COUNTY OF GREENVILLE	)	
	)	
JEREMY JEROME KNIGHT,	)	
APPELLANT,	)	
	)	
	)	
VS.	)	**CERTIFICATE OF SERVICE**
	)	**BY MAIL**
	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
RESPONDANT.	)	
	)	

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Attn. Jacob A. Isenberg, AAG

Attorney for Defendant

This 29 **day of** August, **2019**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Jeremy Jerome Knight, S.C.D.C. No. 283089,	)	Case No.: 2005-CP-42-00520
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed February 23, 2005. The State made its Return to the application on July 22, 2005. This Court presided over an evidentiary hearing on September 18, 2006 in Spartanburg County, South Carolina. Applicant was represented by his appointed counsel C. Kevin Miller. Respondent was represented by S. Prentiss Counts and Paula Magargle of the South Carolina Attorney General's Office. Following the end of testimony at the hearing, the record was left open to allow for the deposition of appellate counsel. As of today, the matter remains open.

Applicant's appointed counsel, C. Kevin Miller, was disbarred from the practice of law in South Carolina, effective March 7, 2012. In the Matter of C. Kevin Miller, Appellate Case No. 2013-002345, Filed January 2, 2014. On August 22, 2018, Jordan A. Cox, of the South Carolina Attorney General's Office indicated that based upon Mr. Miller's disbarment, Applicant required the appointment of new counsel to resolve his outstanding application for post-conviction relief. On August 27, 2018, the Court signed an order that both relieved Miller and required new counsel be appointed for Applicant. Susannah Ross, Esq. was appointed to represent Mr. Knight

on September 14, 2018. On January 28, 2019, Applicant moved for a *de novo* evidentiary hearing to be held. Respondent opposed this motion and requested a final ruling based upon the record. On February 24, 2019, the Court ordered a *de novo* evidentiary hearing should be scheduled in fairness to all parties.[1] On May 7, 2019, Applicant filed an amended application for post-conviction relief.

On May 14, 2019, this Court presided over an evidentiary hearing at the Spartanburg Court Courthouse in South Carolina. Applicant was represented by Susannah Ross. Respondent was represented by Jacob A. Isenberg and Johnny James of the South Carolina Attorney General's Office. Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Karen Hatcher ("Trial Counsel") testified on behalf of Respondent. Also, Applicant's appellate counsel, Joseph Savitz ("Appellate Counsel") testified on behalf of Respondent. Finally, the Seventh Circuit Solicitor who prosecuted Applicant, Trey Gowdy, III, ("Congressman Gowdy") testified on behalf of Respondent. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, appellate records, and records of the Horry County Clerk of Court regarding the subject convictions. After a thorough review of all the evidence and testimony in the record, this Court finds Applicant has not met his burden of establishing any constitutional deprivations or other grounds entitling him to relief and denies and dismisses this application with prejudice.

[1] Judge Doyet A. Early based this order on the following facts: 1) Applicant is serving life in prison for murder; 2) Original PCR Counsel presented one issue at the 2006 evidentiary hearing and failed to address the matter before being disbarred six years later; 3) the Court had no independent recollection of the 2006 PCR hearing or witness testimony; and 4) the Court's impending retirement would not allow time to follow through on the matter.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the April 2002 term of the Spartanburg County Grand Jury for murder (2002-GS-42-1401).

Beginning on July 8, 2002, Applicant sat for trial based upon the charge of murder. At trial Applicant was represented by Karen Quimby and Michael Bartosh. The State was represented by Solicitor Trey Gowdy, III, and Assistant Solicitor Susan Olmert. On July 10, 2002, the jury found Applicant to be guilty of murder. Later that day, Judge Derham Cole sentence Applicant to life in prison without the possibility of parole.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Deputy Chief Attorney, Joseph Savitz, III, from the South Carolina Office of Appellate Defense. Appellate Counsel raised the following issue:

> Whether the Judge erred in refusing to instruct the jury on a voluntary manslaughter charge.

By unpublished opinion decided on February 18, 2004, the South Carolina Court of Appeals affirmed Applicant's convictions. 2004-UP-105. The Remittitur was issued on March 5, 2004.

II. PRESENT APPLICATION

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

1. Ineffective assistance of trial counsel
    a. Failure to review discovery and trial strategy with applicant
    b. Failure to convey plea offer
    c. Eliciting and failure to object to investigator's testimony as to the ultimate issue when he said that only the murderer could tell what happened and he did; (Tr. 256, L. 23)
    d. Failure to advise the applicant to testify
    e. Failure to take exception to the jury instruction on murder (Tr. 367)

2. Ineffective Assistance of Appellate Counsel
    a. Failure to brief the argument that the Applicant's statements were improperly admitted
    b. Failing to argue that Judge Cole's reasoning that the ambiguous statement attributed to the Applicant that he "tried to set her up from behind" meant that he initiated a physical assault or restraint was an improper judgment of the facts.

Applicant requests relief as follows:

- New Trial

At the evidentiary hearing, Applicant proceeded forward on all allegations except failure to convey a plea offer. Instead, Applicant's Counsel notified the Court he knowingly and voluntarily withdrew this claim.

III. SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant

Applicant testified on his own behalf at the evidentiary hearing. Applicant testified he briefly reviewed the case with Trial Counsel. He further testified to not being satisfied because they only met once before trial. Applicant testified he did not return to Spartanburg from SCDC until it was time to prepare for trial. Applicant testified there was very little discussion of his thirty year plea offer. He testified Trial Counsel did not give an opinion about his chances at trial.

Applicant testified Trial Counsel reviewed the details of a pre-trial voluntary statement hearing with him. He could not recall whether she reviewed specific case law with him. Applicant testified he could not remember whether they reviewed options after losing the pre-trial hearing based upon a confession.

Applicant testified Trial Counsel did not review voluntary manslaughter with him beyond the minimum and maximum sentencing range. He further testified they never discussed

involuntary manslaughter. Applicant testified he would have pled if he had known voluntary manslaughter would not be charged to the jury. He further testified he would have pled guilty if they had discussed the offer more.

Applicant testified he discussed the pre-trial hearing with Appellate Counsel. Applicant further testified he believed the statements coming in at trial were damaging.

Applicant testified he did not recall agreeing he spent a good amount of time with Trial Counsel at his original PCR hearing. However, Applicant agreed his current testimony is inconsistent with his opinion of Trial Counsel at the original PCR hearing.

Applicant acknowledged he had an opportunity to sleep on the day he gave his first confession. Applicant acknowledged he had an opportunity to sleep the night before giving a second confession. However, Applicant claimed he could not sleep based upon doing cocaine sometime that day.

Applicant testified it was his decision not to testify at trial. However, Applicant did not recall telling the trial court he reviewed all discovery with Trial Counsel. Applicant testified he had not reviewed the transcript. Applicant further testified he could not remember talking to the trial court seventeen years ago. However, Applicant testified he did remember his necklace being found next to the victim.

Applicant testified he did not remember anything between being arrested and giving the first statement. Applicant testified he remembered giving the first statement. He claimed his first statement was based upon just agreeing with law enforcement. However, they were not satisfied so they wanted a second statement. Applicant did not remember whether he requested food, water, or sleep between giving statements. He did not know why the statements should have been considered involuntary.

Trial Counsel

Trial Counsel testified on behalf of Respondent at the evidentiary hearing. Trial Counsel testified the Public Defender's Office took Applicant's case on the same day he made his second confession. A day later, an employee in the Public Defender's Office interviewed Applicant in jail. Trial Counsel was assigned the case sometime within a week.

Trial Counsel testified she first met Applicant March 4, 2002. She brought two investigators from her office to this meeting. At the meeting, Trial Counsel went over both statements with Applicant. She had a copy of the second statement, but not the first. Trial Counsel further reviewed Applicant's record, drinking, willingness to do polygraph, general background information, preliminary hearing rights, and bond hearing details. She further gave Applicant the opinion that his bond would likely be revoked. Additionally, she reviewed information Applicant had about the victim which included getting a list of mutual friends with Applicant. Finally, Trial Counsel got Applicant's parental contact information so she could inform them about the details of his case.

Thereafter, Applicant was relocated to Kirkland. Trial Counsel received discovery on April 9, 2002. At this point, she had a copy of both confessions given by Applicant. Shortly after, Applicant was moved to McCormick. Trial Counsel testified it was difficult to meet with Applicant because he was housed in SCDC.

On May 16, 2002, Trial Counsel received an email from Congressman Gowdy. The email contained information that a thirty year offer would probably be the best he could give Applicant. Trial Counsel testified Congressman Gowdy followed up sometime later asking if Applicant would have been willing to accept this offer.

Trial Counsel testified she was notified by the Seventh Circuit Solicitor's Office that DNA test results were coming in June 2002. On June 14, 2002, Trial Counsel was given advance notice about the results of the DNA test. On June 21, 20002, Trial Counsel received official results of the DNA test. The results showed this victim's DNA was on Applicant's sweater. Furthermore, Applicant's DNA was found under the victim's fingernails.

On June 26, 2002, Trial Counsel met with Applicant. They went over the benefits and consequences of going to trial as opposed to taking a plea offer, results of the DNA test, Emergency Medical Services report, and material phone records. Additionally, Trial Counsel testified they reviewed trial strategies, taking a plea offer, alibi defense, elements of murder, elements of voluntary manslaughter, elements of involuntary manslaughter, and the burden of proof for a guilty verdict. She testified Applicant rejected taking a plea offer. At the conclusion of this meeting, Trial Counsel and Applicant agreed the focus should be on suppressing the two confessions.

On June 27, 2002, Trial Counsel asked Congressman Gowdy for full access to review Applicant's file. Congressman Gowdy has an open door policy which provided Trial Counsel full access to anything needed in discovery. Trial Counsel went and reviewed the file. To the best of her knowledge, Trial Counsel would have had anything needed after reviewing the entire file. On the same day, Trial Counsel met with Applicant. She testified they would have went over anything not previously reviewed. She further testified Applicant again rejected taking a plea offer.

On July 1, 2002, Trial Counsel met with Applicant. Trial Counsel testified Applicant still wanted to go to trial instead of taking a plea offer.

Trial Counsel testified she would have customarily warned her clients of their chances at each stage of the case. In this case, Trial Counsel testified she would have warned Applicant of his chances of suppressing both confessions. Furthermore, Trial Counsel testified she would have warned Applicant of his chances of securing a lesser included offense jury charge at trial.

Trial Counsel testified she notified the Solicitor's Office Applicant desired to reject the plea offer. On July 2, 2002, Trial Counsel received final discovery. Trial Counsel testified nothing was introduced at trial that she did not have access to in final discovery.

After plea rejection, Trial Counsel spent the following week preparing for trial. She met with witnesses as well as the investigators from her office.

Trial Counsel testified her strategy was to suppress the two confessions. Trial Counsel testified she notified Applicant there was not much else to go on. Trial Counsel testified she met with Applicant to prepare for the pre-trial suppression hearing. She testified they were same page with a timeline of events. She further testified they went over what questions would be asked as well as other witnesses to expect.

Trial Counsel testified she remembered the confessions being ruled admissible at a pre-trial hearing. Trial Counsel testified her custom in this situation would be to consult with the client about a change of heart. Trial Counsel testified she would ask if they wanted to plead straight up in these situations. However, Trial Counsel testified Applicant wanted to proceed with trial.

Appellate Counsel

Appellate Counsel testified on behalf of Respondent at the evidentiary hearing. Specifically, he worked at the Office of Appellate Defense for 26 years. Appellate Counsel testified half of the cases he took were homicides.

Appellate Counsel testified, based upon experience, about ninety percent of cases with confessions in evidence also had Jackson Hearings in transcript. Appellate Counsel testified a person would need to have been misled, tricked, denied food, denied water, or on drugs for the confession to be inadmissible. He further testified Jackson Hearings are a run of the mill issue to raise on appeal. Appellate Counsel elaborated by saying defendants are always tired and hungry. Therefore, raising it based upon being tired or hungry was not meritorious. Appellate Counsel further stated he had to look at the totality of circumstances standard when assessing this issue.

Appellate Counsel testified it was not unusual, based upon experience, Applicant did not write his own statement. Based upon experience, Appellate Counsel testified defendants routinely asked law enforcement to write their statement. Appellate Counsel further testified the failure to record this confession made no difference on appeal. Appellate Counsel testified he purposefully did not brief the Jackson Hearing. Instead, Appellate Counsel testified he only briefed the failure to charge involuntary manslaughter issue. Appellate Counsel testified he would not have changed, added, or subtracted any issues concerning this brief. However, Appellate Counsel testified he would have spent more time on the issue briefed.

Appellate Counsel testified he does not remember anything about the malice instruction. Appellate Counsel further testified he did not remember why he forgot to put certain items from the transcript in his brief. Specifically, Appellate Counsel testified he did not remember why he decided not to include a comment from the Trial Judge concerning Applicant provoking the confrontation. Appellate Counsel testified he did not know if this would have made a difference.

Congressman Gowdy

Congressman Gowdy testified on behalf of Respondent at the evidentiary hearing. Congressman Gowdy testified he worked at the United States Attorney's Office for six years before becoming the Seventh Circuit Solicitor in 2001.

Congressman Gowdy testified he had an open file discovery policy. He further testified this was identical to his practice at the United States Attorney's Office. Specifically, he testified this policy allowed opposing counsel access to everything. He further testified his office would supplement discovery as needed, give notice of new discovery, and make copies for anything opposing counsel required.

Congressman Gowdy testified his plea offer policy centered upon the victim in the crime. Congressman Gowdy testified he would figure out whether there was an easily identifiable victim or not. Thereafter, Congressman Gowdy testified he would consult the family on a plea offer for homicide cases. Based upon track record, Congressman Gowdy opined he did not make many offers for homicide cases. Congressman Gowdy testified his policy was usually not to stop a defendant from pleading straight up. Finally, Congressman Gowdy never re-offered earlier plea when the case got to trial.

In this case, Congressman Gowdy testified he remembered meeting the victim's father. He further did not recall making an offer to Applicant.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the

legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Trial Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant 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 v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; 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, 286 S.C. at 442, 334 S.E.2d at 814. "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). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain

the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

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. Strickland, 466 U.S. at 696. 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. Id. at 696-97.

I. Failure to review discovery and trial strategy

Applicant contends Trial Counsel failed to adequately review how the lesser-included offenses of voluntary manslaughter and involuntary manslaughter applied to his case.

Here, Trial Counsel credibly testified she reviewed all discovery with Applicant before getting his final answer on the plea offer. In this meeting, Trial Counsel testified to going over voluntary manslaughter, involuntary manslaughter, and trial strategies with Applicant. That same day, Trial Counsel credibly recalled reviewing the file at the Seventh Circuit Solicitor's Office.[2] Trial Counsel credibly assessed she would have reviewed anything outstanding with Applicant at their meeting documented the following day. Trial Counsel credibly testified she told Applicant the best strategy would be to attempt to suppress the two confessions. She credibly recalled preparing Applicant for the pre-trial suppression hearing. Counsel remembered losing the hearing. She credibly testified her custom would be to ask if a client wanted to proceed with trial or plea straight up. Trial Counsel testified her custom was also to evaluate her client's chance at each stage of the case. She credibly recalled Applicant wanting to move forward with trial as planned.

On the other hand, Applicant testified he was not satisfied because they only met once before trial. Applicant testified they only reviewed the sentencing range of voluntary manslaughter. He testified they reviewed nothing about involuntary manslaughter. Finally, Applicant could not recall whether they discussed case law on admitting confessions.

Accordingly, Applicant has failed to provide consistent testimony. Applicant testified at his original evidentiary hearing that Trial Counsel spent a "good bit of time" with him. (PCR Tr. 7, L. 17-9). This is inconsistent with his current position that they only met once which included a brief conversation. On the other hand, Trial Counsel provided a detailed explanation about meeting three times in one week. Among those meetings, Trial Counsel reviewed all discovery as well as finalized a trial strategy. After the suppression hearing, Trial Counsel re-evaluated the

[2] Congressman Gowdy credibly testified his custom was to make all documents in evidence available in the file for opposing counsel.

situation with Applicant. This Court finds Trial Counsel to be more credible on the issue of discovery and trial strategy review. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient for failing to review discovery and trial strategy with him.

2. Failure to convey plea offer[3]

Applicant contends Trial Counsel did not give an opinion about his chances at trial during their brief discussion about a thirty year plea offer. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145 (2012); see also Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance"). When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant "must demonstrate a reasonable probability that: (1) he 'would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;' (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of

[3] PCR Counsel withdrew this allegation after Applicant and Trial Counsel testified. For cautionary reasons, this Court will make meritorious findings of fact and conclusions of law on the allegation.

intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"). If an applicant is able to meet the requirements set forth above, the appropriate relief is to require the State to re-extend the previous plea offer to Applicant. Lafler, 566 U.S. at 174. ("The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.")

Communication of Plea Offer

Here, it is undisputed Trial Counsel made Applicant aware of a thirty year plea offer. The dispute lies in just how much this offer was discussed before it went off the table. Applicant indicated in his testimony the conversation about this plea with Trial Counsel was too brief. He further testified they only met one time before trial. Applicant felt Counsel wronged him by not offering an opinion on the plea. Specifically, Applicant felt Counsel should have compared it to the potential consequences of going to trial.

On the other hand, Trial Counsel credibly recalled going over the plea offer in multiple meetings with Applicant. Trial Counsel credibly recalled Applicant rejected the plea multiple times. Trial Counsel credibly reasoned Applicant wanted to focus on suppressing the two confessions. Trial Counsel also credibly proffered she would customarily warn clients of their trial chances as well as chances at each stage of the case.

Accordingly, Applicant has failed to provide consistent testimony. Applicant testified at his original evidentiary hearing that Trial Counsel spent a "good bit of time" with him. (PCR Tr. 7, L. 17-9). This is inconsistent with his current position that they only met once which included a brief conversation about the plea offer. It is also inconsistent with Trial Counsel's version of events who recalled discussing the plea multiple times with Applicant. In those discussions, her

custom was to warn clients about their chances with each stage of the case including suppression hearings and lesser-included offense convictions. She concluded Applicant rejected multiple times with the instruction to stay focused on suppressing his confessions. The plea offer was formally rejected on or before July 2, 2002. The pretrial suppression hearing was not until July 8, 2002. There is no evidence the offer was made available after the trial court ruled both confessions were admissible. Therefore, this Court finds Counsel provided testimony consistent with the record. Additionally, this Court finds Applicant has failed to provide sufficient evidence to overcome the burden to prove he would have accepted the plea offer with effective assistant from Trial Counsel.

Entering Plea without Solicitor interference

Applicant must prove the prosecution would not cancel the plea offer if he had accepted it. Applicant testified he would have pled if he had known the confessions were admissible. Applicant also testified he would have pled if he had known voluntary manslaughter would not be charged to the jury at trial.

Additionally, Congressman Gowdy credibly testified his custom was to never re-offer a plea after the expiration date.

Trial Counsel testified she reviewed the plea offer with Applicant three times in the week leading up to the expiration date. Trial Counsel credibly testified Applicant rejected the offer each time. Trial Counsel testified she also reviewed the probability of success for each upcoming stage of the case. This included a discussion about confession suppression and voluntary manslaughter. Subsequently, Trial Counsel credibly testified she formally rejected the offer on the expiration date. Thereafter, Trial Counsel testified she spent the next week preparing for

trial. Trial Counsel testified Congressman Gowdy did not make a plea offer after the expiration date.

Accordingly, Applicant has failed to provide evidence the material information would have been available in a timely manner. First, Applicant believes he would have pled knowing the confessions were admissible. However, the plea offer clearly expired before the trial court ruled on this issue. Applicant has not alleged he was unaware this pre-trial hearing would fall after expiration. Second, Applicant believes he would have pled knowing voluntary manslaughter would be disallowed from jury consideration. However, the motion to prevent a voluntary manslaughter instruction was not made until after all the evidence was presented in trial. (Tr. 323). Congressman Gowdy testified he did not customarily extend the plea offer to these two stages in the case. Trial Counsel testified there was no plea offer available during these two stages of the case. The information Applicant required to plead guilty was simply unavailable before the offer expired. Congressman Gowdy was under no duty to extend it again in either circumstance. Therefore, this Court finds Congressman Gowdy would not have followed through with the plea offer at either stage of the case Applicant would have accepted it.

Entering Plea with approval from Court

Additionally, Applicant must prove the court would have accepted his plea agreement. The alleged offer was to plead guilty to voluntary manslaughter. "Voluntary manslaughter" is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence. State v. Norris, 253 S.C. 31, 39, 168 S.E.2d 564, 567 (1969).

Here, the trial court ruled as follows:

> In this case from both of the statements given by the defendant there is no evidence from which you could reasonably find that any any heat of passion, if it did exist, was based upon sufficient legal provocation.

(Tr. 327). Thereafter, the trial court reasoned as follows

> Whether he had good intentions or bad intentions, it doesn't matter. A person has a right to be free from assault and restraint, and a person has an absolute right to resist an assault or a freedom of their restraint. And the exercise of legal right can never be considered as sufficient legal provocation to justify an assault or taking a life.

(Tr. 328). The South Carolina Court of Appeals affirmed the trial court with the following analysis:

> Considering either version of events as stated by Knight, no facts exist indicating Knight and Aull were fighting. Rather, the evidence indicates Knight attempted to physically and verbally restrain Aull, while she attempted to defend herself. This evidence, without more, is insufficient to establish facts or inferences demonstrating a legal provocation for reducing the crime from murder to voluntary manslaughter. Thus, the circuit court did not err by denying Knight's motion to charge the jury on the law of voluntary manslaughter.

Accordingly, this Court finds the evidence in the record suggests the facts were perceived, at the time, as appropriate for voluntary manslaughter. Applicant has failed to provide evidence any material evidence in rebuttal. Therefore, this Court finds Applicant has not overcome the burden to prove a court would have accepted the facts and circumstances being appropriate for a voluntary manslaughter plea.[4]

3. Eliciting and failure to object to testimony on the ultimate issue

[4] Accordingly, this Court declines to address whether the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Applicant contends Trial Counsel failed to object to an opinion on the ultimate issue after eliciting the testimony. To prove prejudice when challenging a conviction, the question is whether there is a reasonable probability that, absent the errors, the jury would have had a reasonable doubt respecting guilt. Brown v. State, 383 S.C. 506, 514, 680 S.E.2d 909, 914 (2009). "Reasonable probability" is identified as probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 329, 642 S.E.2d 590, 596 (2007). The testimony at issue is as follows:

> Q: Well, what do you think it was?
>
> A: I don't have an opinion on what the truth is. I wasn't there and didn't commit the murder. Only the person that did could tell me that, and he did.

(Tr. 256, L. 22-5).

Here, the testimony came during the cross examination of Steve Denton by Applicant's other trial lawyer, Michael Bartosh.[5] Denton was the investigator who conducted a meeting with Applicant leading to the second confession. This testimony came during a line of questioning about Denton's interrogation techniques. (Tr. 255). Initially, Denton testified he could not identify any manuals or textbooks to support his technique for interrogation. (Tr. 255, L. 10-2). Thereafter, Denton testified he wanted to conduct a subsequent interrogation after identifying inconsistencies with the first confession. (Tr. 256, L. 10-4). This led to question at issue. However, the testimony immediately after that is as follows:

> Q: So you had no idea what it was you were going to ask him or tell him that you felt were inconsistencies.
>
> A: I knew what the inconsistencies were as far as what I saw on the body and the first statement.

[5] Bartosh is now deceased.

(Tr. 257, L. 1-4). It appears Bartosh decided to stick with his line of questioning on the Denton's identification of inconsistencies. It would have be unusual for Bartosh to object to a question he elicited. Instead, a motion to strike along with a curative instruction would have been the more practical route. However, this may have brought unnecessary attention to the testimony. The jury had the confession, recorded by Denton on behalf of Applicant, in evidence. The Assistant Solicitor only mentioned Denton in closing arguments to reiterate Applicant understood his legal rights before signing the confession in evidence. (Tr. 342, L. 17-23). Accordingly, Denton's importance to this case was merely to reflect the confession was voluntary. Therefore, this Court finds there is no reasonable probability a jury would have doubted guilt if the singular opinion had been struck from the record. As a result, Applicant has failed to overcome the burden to prove he suffered prejudice based upon the failure to object to the comment by Denton.

4. Failure to advise to testify at trial

Applicant contends Trial Counsel was deficient for failing to advise him he should testify at trial. A defendant's knowing and voluntary waiver of statutory or constitutional right must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both. State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 175 (1993). The trial court handled this issue as follows:

Court:	Mr. Knight, do you understand that when you are charged with a criminal offense that you – when your case comes to trial you have an absolute right to remain silent.
Defendant:	I understand.
Court:	No one can require that you take the witness stand; not your lawyers, not the prosecutors, not the Court, not anyone. If you wish to take the witness stand and testify, that's a decision that you can make. And you have the right to testify if you wish to, but

no one can require that you do so. Do you understand that nobody can make you testify?

Defendant: Yes, sir, I understand that.

Court: Do you also understand that if you wish to testify, now is the only opportunity that you will have to do so? And by that I simply mean that you can't wait until after the jury has reached a decision and if it does not go to suit you, then you say, well, I'd prefer to tell the juror or give them facts or evidence or testimony. So you have to make your decision when the time comes for you to make your presentation. Do you understand that this is the only opportunity that you will have to testify if you wish to?

Defendant: Yes, sir, I understand.

Court: And have your lawyers discussed with you the advantages and disadvantages of testifying or not testifying?

Defendant: Yes, they have.

Court: And do you understand what those advantages and those disadvantages are?

Defendant: Yes, I do.

Court: Have you made a decision as to whether or not you will testify?

Defendant: Yes, I have.

Court: And what is your decision?

Defendant: I do not wish to testify.

Court: And the fact that you do not wish to testify, is that decision that you made of your own free will and accord?

Defendant: Yes, it is.

Court: Did anyone suggest that decision to you?

Defendant: No, they didn't.

(Tr. 321, L. 12-25) (Tr. 322, L. 1-25) (Tr. 323, L. 1-4).

Here, Counsel credibly testified she customarily advised a client about the benefits and consequences of testifying on their own behalf. In this case, Counsel credibly recalled it was always Applicant's final decision. However, Applicant testified he never had a conversation with her about the benefits of testifying at trial. This is inconsistent with the record. Therefore, this Court finds Counsel provided credible testimony on this issue. Accordingly, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient for failing to advise him about the benefits of testifying on his own behalf.

Additionally, Applicant contends he was prejudiced based upon not understand his rights when he waived the right to testify. However, this completely contradicts his above-mentioned colloquy with the trial court. Therefore, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced by any alleged failure to advise him to testify.

5. Failure to object to jury instruction on murder

Applicant contends Trial Counsel should have objected to a jury instruction given about permissible inference of malice with murder. Counsel is not required to be clairvoyant or to anticipate changes in the law that were not in existence at the time of trial. Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), overruled, on other grounds, by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). The South Carolina Supreme Court held malice may not be inferred from use of a deadly weapon where evidence was presented to mitigate, excuse, or justify the homicide. State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009), overruled by State v. Burdette, No. 2017-001990, 2019 WL 3437783 (S.C. July 31, 2019). However, The S.C. Supreme Court specifically held did not apply to convictions challenged on post-conviction

relief. Belcher, 385 S.C. at 613, 685 S.E.2d at 810. In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution. Battle v. State, 382 S.C. 197, 204, 675 S.E.2d 736, 740 (2009). A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense. Lowry v. State, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). The instruction at issue is as follows:

> Court: You may also infer the existence of malice from proof of the intentional commission of an act which is inherently dangerous to human life.

(Tr. 368, L. 2-4).

Here, Applicant argues this instruction reduced the burden on the Assistant Solicitor. However, Applicant fails to provide substance to support the assertion this argument burden shifts. However, this instruction was given with a large set of instances where the jury was permitted to infer malice. (Tr. 267-8). For cautionary purpose, this Court extends the analysis to the instruction on malice inference as a whole. The Belcher decision did not happen until seven years after this trial took place. Moreover, it did not extend to convictions challenged on post-conviction relief. Therefore, this Court finds Counsel had no duty to object to the permissible malice inference instruction based upon not knowing the law would change seven years later. Accordingly, Applicant has failed to prove he suffered prejudice when Counsel failed to object.

B. Ineffective Assistance of Appellate Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

1. Failure to brief argument about improperly admitted statements

Applicant contends Appellate Counsel failed to brief a material issue in the trial court's decision to admit both confessions in a pre-trial hearing.

Here, Applicant testified he wanted Appellate Counsel to raise the issue that his confessions were involuntary. On the other hand, Appellate Counsel credibly recalled he believed the voluntary manslaughter issue was the only one worth briefing. Appellate Counsel credibly testified involuntary confession issues were fairly ordinary so he came across them a lot. Appellate Counsel credibly testified he purposefully did not brief this issue in Applicant's case. Appellate Counsel credibly assessed a person would need to be misled, tricked, denied food or water, or intoxicated for a confession to be inadmissible. He credibly reasoned this case was similar to many others where individuals are merely tired or hungry when they carry out a confession statement. Appellate Counsel credibly assessed this was not enough to make the confession involuntary. He further credibly recalled routinely reading cases where law enforcement wrote the confession for somebody. Appellate Counsel also credibly assessed the failure to record a confession with audio or video did not make it inadmissible.

Accordingly, Appellate Counsel reviewed involuntary confession issues several times based upon the totality of circumstances. He strategized not to raise based upon routine situations where the individual was tired, hungry, not recorded, or did not write the statement. Instead, Appellate Counsel chose to raise it in more extraordinary circumstances like denial of food, denial of water, coercion, or intoxication. In this case, Appellate Counsel assessed Applicant was simply tired and hungry after reviewing the record. Accordingly, this Court finds Appellate Counsel used reasonable professional judgement when he decided not to brief this

issue. Therefore, Applicant has failed to overcome the burden to prove Appellate Counsel was deficient for a failure to brief alleged involuntary confessions.

To prove prejudice, Applicant must prove the issue would have been successful on appeal. A defendant's confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by exertion of improper influence. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990). A trial court's determination of whether the statement was knowingly, intelligently and voluntarily made, requires examination of totality of circumstances surrounding waiver. Rochester, 301 S.C. at 200, 391 S.E.2d at 247. On appeal, conclusion of trial judge on issues of fact as to voluntariness of confession will not be disturbed unless so manifestly erroneous as to show abuse of discretion. Id. Finally, Applicant is only entitled to a new trial where the result of the appeal would have been different based upon appellate counsel's deficient representation. Ezell v. State, 345 S.C. 312, 315, 548 S.E.2d 852, 854 (2001)

According to the record, Applicant had a twelve hour window to eat or sleep before being detained by law enforcement. (Tr. 52). After detainment, Applicant was Mirandized twice before giving the first statement. (Tr. 15, 16). Applicant admitted he remembered being read his rights at the station. (Tr. 39). He did not make any material requests, outside of a smoke break, while giving this statement.[6] (Tr. 23). Applicant admitted this statement was in his own words. (Tr. 43). Thereafter, he was sent to a designated sleeping area. (Tr. 46). In the morning, Applicant was Mirandized again before giving the second statement to Denton. (Tr. 29). Applicant did not make any material requests after being offered food and water by Denton. (Tr. 34). The record does not indicate noticeable improper influence, promise, threat of violence, or

[6] His request for a smoke break was granted.

failure to accommodate material requests. Moreover, the record is clear that law enforcement Mirandized him before both confessions. Therefore, this Court finds Applicant would probably not be successful in appealing the voluntariness of his confession based upon the facts in the record. This Court further finds the result would not have been different even if Counsel would have briefed the issue. Accordingly, Applicant has failed to overcome the burden to prove he suffered prejudice in an alleged failure to brief the issue of voluntariness of both confessions.

2. Failure to brief argument about improper finding of fact at trial

Applicant contends Appellate Counsel failed to brief a material argument based upon an improper finding of fact by the trial court. In a murder prosecution, the defendant is entitled to an instruction on voluntary manslaughter unless "it should clearly appear that there is no evidence" whatsoever to reduce the crime from murder to manslaughter. Casey v. State, 305, S.C. 445, 446, 109, S.E.2d, 391, 392 (1991).

Here, the trial court's conclusion at issue occurred during a decision on whether to charge voluntary manslaughter to the jury. (Tr. 328). Specifically, Applicant argues the trial court improperly concluded Applicant initiated a physical assault based upon dialogue from his confession. (Tr. 328). The trial court based this conclusion upon Applicant stating he "tried to set her up from behind." (Tr. 328). Appellate Counsel does not remember the reason he did not include this specific finding in his brief about the failure to charge voluntary manslaughter. He did credibly testify the failure to charge voluntary manslaughter was the only issue he would have briefed. In that brief, Appellate Counsel argued the trial court erred in refusing to instruct the jury on voluntary manslaughter because there was evidence to support it. (BOA. 7). He cited and submitted both confessions to support his argument. (BOA. 5). He also cited to the trial court finding that both statements indicated Applicant first assaulted the victim. (BOA. 6).

Accordingly, Applicant believes Appellate Counsel should have focused on the finding instead of the facts. However, Appellate Counsel argued on the factual issue which had a compelling standard that any material evidence of voluntary manslaughter in a murder trial constitutes entitlement to the instruction. Appellate Counsel contended there was evidence of voluntary manslaughter, and submitted both confessions in their entirety for review. Therefore, Appellate Counsel exercised reasonable professional judgement in submitting all potentially favorable evidence to meet the burden for entitlement to a voluntary manslaughter charge. Therefore, this Court finds Applicant has failed to overcome the burden to prove Appellate Counsel was deficient for not briefing the improper finding of fact issue.

Applicant contends he would have been successful on appeal if Appellate Counsel briefed the trial court's improper finding of fact. He is only entitled to a new trial where the result of the appeal would have been different based upon appellate counsel's deficient representation. Ezell v. State, 345 S.C. at 315, 548 S.E.2d at 854.

Here, Appellate Counsel actually argued the trial court erred in refusing to instruct the jury on voluntary manslaughter. (BOA. 7). However, the S.C. Court of Appeals affirmed the trial court's decision not to charge the jury on voluntary manslaughter. In doing so, it reasoned as follows:

> Considering either version of events as stated by Knight, no facts exist indicating Knight and Aull were fighting. Rather, the evidence indicates Knight attempted to physically and verbally restrain Aull, while she attempted to defend herself. This evidence, without more, is insufficient to establish facts or inferences demonstrating a legal provocation for reducing the crime from murder to voluntary manslaughter. Thus, the circuit court did not err by denying Knight's motion to charge the jury on the law of voluntary manslaughter.

Accordingly, the Court of Appeals agreed no facts in the record suggested there was legal provocation. Moreover, the trial court made the finding of fact outside the presence of the jury. (Tr. 323-8). Therefore, it is difficult to differentiate the current argument from the one already briefed. Applicant failed to offer any guidance to distinguish the arguments. Therefore, this Court finds briefing an issue based upon the trial court's finding of fact on initiating physical contact would not have provided a more favorable result. Accordingly, Applicant has failed to overcome the burden to prove he suffered prejudice based upon the failure to brief this issue.

III. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 23rd **day of** August, **2019.**

J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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