Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730
Telephone (803) 327-4192
Facsimile (803) 329-1344

September 30, 2019

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

RE: Michael Brown, #295408 v. State of South Carolina
C.A. No.2016-CP-40-04677

Dear Mr. Shearouse:

The Richland County Court of Common Pleas appointed my office to represent Michael Brown in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the *Notice of Appeal and Proof of Service* in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the *Order Dismissing Post-Conviction Relief Application.*

Thank you for your assistance with this matter.

Sincerely,

Leah B. Moody

Enclosures

Cc Michael Brown
Lindsey McCallister, Esq., SC Attorney General's Office
Jeanette McBride, Clerk of Court, Richland County
Sharon Graham, SCCID

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 08 2019
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Presiding in Richland County

Case No. 2016-CP-40-04677

Michael Brown, #295408, ... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Michael Brown appeals the order of the Honorable Kristi F. Curtis, dated August 30, 2019 and electronically mailed on September 4, 2019. Appellant received written notice of entry of the final order on September 4, 2019.

Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
Post Office Box 1015
Rock Hill, South Carolina 29731

Other Counsel of record:
Lindsey McCallister, SC Attorney General's Office
Attorney for Respondents
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549

RECEIVED
OCT 08 2019
S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Presiding in Richland County

Case No. 2016-CP-40-04677

Michael Orlando Brown, #295408, ... Appellant,

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Lindsey A. McCallister, Esquire, SC Attorney General's Office, by depositing a copy of it in the United States Mail, postage prepaid, on September 30, 2019, addressed to its attorney of record, Lindsey A. McCallister, Esquire, SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina, 29211-1549.

Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

September 30, 2019

Cc Michael Brown
Lindsey McCallister, Esquire, SC Attorney General's Office
The Honorable Jeanette McBride, Clerk of Court, Richland County
Sharon A. Graham, SCCID

Law Office of Leah B. Moody, LLC

Leah B. Moody
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235 East Main Street, Suite 115
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Rock Hill, South Carolina 29730
Telephone (803) 327-4192
Facsimile (803) 329-1344

September 30, 2019

The Honorable Jeanette McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Michael Orlando Brown, #295408 vs. South Carolina
C.A. No.2016-CP-40-04677

Dear Mrs. McBride:

The Richland County Court of Common Pleas appointed my office to represent Michael Brown in his Post-Conviction Relief action. Please find enclosed a copy of the ***Notice of Appeal and Proof of Service*** in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,

Leah B. Moody

Enclosures

cc Michael Brown
Lindsey McCallister, Esq.
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

Leah B. Moody
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Rock Hill, South Carolina 29730
Telephone (803) 327-4192
Facsimile (803) 329-1344

September 30, 2019

Lindsey McCallister, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

RE: Michael Brown, #295408 v. State of South Carolina
C.A. No.2016-CP-40-04677

Dear Ms. McCallister:

The Richland County Court of Common Pleas appointed my office to represent Michael Brown in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you for your attention in this matter.

Sincerely,

Leah B. Moody

Enclosures

cc Michael Brown
The Honorable Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
The Honorable Jeanette McBride, Clerk of Court, Richland County
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

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Rock Hill, South Carolina 29730
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Facsimile (803) 329-1344

September 30, 2019

Sharon Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

RE: Michael Brown v. State of South Carolina
C.A. No.: 2016-CP-40-04677

Dear Ms. Graham:

The Richland County Court of Common Pleas appointed my office to represent Michael Brown in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,

Leah B. Moody

Enclosures

Cc Michael Brown
Lindsey McCallister, Esq.
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Jeanette McBride, Clerk of Court, Richland County

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4004677

Michael Orlando Brown #295403	State Of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY FILED
2019 SEP -4 AM 11:15
JEANETTE W. McBRIDE C.C.P.G.S. F.C.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 September 2019 to attorneys of record or to parties (when appearing pro se) as follows:

Michael Orlando Brown #295403 Leah B. Moody

Lindsey Ann McCallister

Michael Orlando Brown #295403

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Michael Orlando Brown, #295408, Applicant, v. State of South Carolina, Respondent.	)	C. A. No. 2016-CP-40-4677 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 3, 2016, by Michael Orlando Brown (Applicant). The State (Respondent) filed a Return on June 30, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened February 19, 2019, at the Richland County Courthouse before the undersigned. Applicant was present at the hearing and represented by Leah B. Moody, Esquire. Assistant Attorney General Lindsey A. McCallister of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Applicant testified on his own behalf and presented testimony from Judy and Cecilia Castro as purported alibi witnesses. Anastasia Walker, Esquire, Applicant's plea counsel, and Meghan Walker, Esquire, the assistant solicitor who prosecuted the case, testified on behalf of Respondent. This Court also had before it a copy of the records of the Richland County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's Return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. Applicant was indicted by the April 2014 term of the Richland County Grand Jury for attempted armed robbery (2014-GS-40-02050). Anastasia L. Walker, Esquire (Counsel), and Alicia Dyar Goode, Esquire, represented Applicant. Meghan L. Walker (Walker), Kathryn L. Campbell (Campbell), and Sandra V. Moser (Moser), Esquires, prosecuted the case on behalf of the State. On August 4-5, 2014, Applicant proceeded to trial before the Honorable James R. Barber and a jury. The jury found Applicant guilty as indicted. Judge Barber sentenced Applicant to life in prison without the possibility of parole pursuant to section 17-25-45 of the South Carolina Code of Laws.

Applicant filed a timely notice of appeal, which was perfected by Laura Baer, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division. After briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. State v. Brown, Op. No. 2016-UP-349 (S.C. Ct. App. filed July 6, 2016). The case was remitted to the circuit court on August 1, 2016.

Applicant timely filed this PCR application on August 3, 2016.

SUMMARY OF FACTS

On the night of January 3, 2013, a small group of employees were cleaning up the Chuck E. Cheese restaurant in Columbia prior to closing when an armed gunman entered the restaurant wearing a wig and a bandana over his face. The man grabbed an employee, put a gun to the employee's back, and demanded money before fleeing on foot. Portions of the attempted armed robbery were captured on the restaurant's surveillance video. Police responded to the scene and a K9 officer tracked the man's trail away from the building. The dog led officers to a neighboring

property where they recovered a red bandana and a wig matching the description of those used in the attempted armed robbery. These items were tested for DNA, and the bandana was eventually connected to Applicant, which led to his arrest.

Robert Martin (Martin), an Investigator for the Richland County Sheriff's Department, interviewed Applicant in his office on March 14, 2013, after Applicant's arrest. Martin advised Applicant of his Miranda[1] rights both orally and in writing, which Applicant voluntarily waived. Martin asked why Applicant's DNA would be found at the scene of the crime, and Applicant could not give a valid reason. Martin testified that he asked whether Applicant would be willing to give a DNA sample but Applicant said no, because it would convict him. Applicant never denied the validity of the DNA evidence and said he was not going to challenge the DNA because he knew it would be enough to convict him. During this same interview, Applicant asked Martin about the possibly of being charged with a lesser offense and offered to plead guilty to a lesser charge because attempted armed robbery carried the possibility of a life sentence. Martin explained he could not make deals and any negotiations would be between his attorney and the Solicitor's Office. Applicant indicated he did not want to talk about the case anymore, and the interview stopped.

Applicant challenged the admissibility of his statements in a pretrial Jackson v. Denno[2] hearing. The trial judge ruled he would not allow any testimony regarding Martin's request for, and Applicant's refusal to give, a DNA sample, but he would allow testimony about the portion of the statement where Applicant said: "I know the DNA will convict me." Additionally, the trial judge ruled Applicant's statement offering to plead guilty to a lesser charge was admissible.

---

[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] 378 U.S. 368 (1964).

ALLEGATIONS RAISED

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

1. "Ineffective Assistance of Counsel"
    a. "Trial Counsel was ineffective for failing to preserve for appeal whether the trial court erred in admitting my alleged offer to plead guilty"
    b. "Trial counsel was ineffective for failing to preserve for appeal whether the trial court erred in admitting my alleged statement that 'DNA will convict me.'"

At the evidentiary hearing, Counsel for Applicant informed the Court that Applicant intended to raise additional issues. Respondent agreed it had received notice of the additional allegations by way of an email on July 13, 2018. Counsel for Respondent indicated she was prepared to proceed on the following issues:

1. Counsel was ineffective for failing to preserve issues for appeal – specifically whether the trial court erred in admitting Applicant's offer to plead guilty and Applicant's statement "DNA will convict me;"
2. Counsel was ineffective for failing to call alibi witness(es);
3. Counsel was ineffective for failing to call a DNA expert;
4. Counsel was ineffective for failing challenge the admission of DNA evidence under Rule 403;
5. Counsel was ineffective for failing to adequately cross-examine the State's witnesses;
6. Counsel was ineffective for soliciting damaging testimony from witnesses;
7. Counsel was ineffective for failing to file a motion to dismiss the charges;
8. Counsel was ineffective because she lied to Applicant about witness statements; and
9. Prosecutorial misconduct in that the State engaged in the deliberate deception of the Court by presenting false evidence and testimony.

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant testified he is currently incarcerated for the attempted armed robbery of a Chuck E. Cheese restaurant. Applicant explained he was represented on this charge by Counsel and Alicia Goode (Goode), and he ultimately had a jury trial, where he was prosecuted by Walker, Campbell, and Moser. Applicant testified his case was originally assigned to Luke Shealy, Esquire, but Mr.

Shealy was transitioning to private practice, so his case was reassigned to Counsel sometime in August 2013. Applicant testified he first met with Counsel in December 2013 while he was in jail in Lexington County on unrelated charges.

Applicant testified Counsel was still waiting for discovery at the time of their first meeting, but they spoke and she introduced herself. According to Applicant, he was looking for the chain of custody documentation, and he told Counsel he did not commit the crime, nor had he made any statements to the investigator. Applicant stated he also told Counsel he wanted a trial. Applicant further testified he met with Counsel again three or four times, she reviewed the discovery with him, and they talked about his potential sentencing exposure at trial. Applicant stated he and Counsel talked about a plea, but the State gave notice of its intent to seek life without parole (LWOP). Applicant testified he told Counsel about his potential alibi witnesses at their first meeting. Applicant stated that Counsel showed him the video from the restaurant on her laptop during one of her visits at the jail. Applicant explained there was a second video mentioned in the incident report which they did not have. Applicant testified, however, he still wished to go to trial. Applicant further testified he wrote Counsel a letter explaining what he wanted her to do to prepare for the trial. Applicant explained he was particularly concerned with the chain-of-custody documentation, retesting the DNA from the bandana, securing a DNA expert to testify in his defense, and ensuring his alibi witnesses were present.

Applicant testified that, during pretrial motions, Counsel brought up statements Applicant had allegedly made to the investigator along the lines of, "I'm not going to give you DNA" and "I want to plead guilty." According to Applicant, he told Counsel he never made those statements. Applicant stated the investigator read his Miranda rights, but he only asked the officer for a phone call, and "it never got past that." Applicant testified Counsel nonetheless agreed with the trial court

that he had made the statements and did not object to them at trial. Applicant asserted Counsel "lied" when she agreed Applicant had made the statements because Applicant told her he had not. Applicant explained Counsel made a motion *in limine* to exclude the statements, but then did not object when the testimony was presented to the jury, rendering the issue unpreserved for appeal.

Applicant next testified he wanted Counsel to call Judy and Cecilia Castro as alibi witnesses. Applicant stated he told Counsel he was at the Castro home all night and had no time to have committed the crime. Applicant explained he was already at the Castro home when Judy and Cecilia arrived home that evening, and he stayed until approximately 2 a.m. or 3 a.m. According to Applicant, Walker and an investigator spoke to the Castros and confirmed the alibi, but neither Judy nor Cecilia Castro testified at trial. Applicant testified Counsel never told him she was not going to call them to testify, and they were present for the first day of trial, but not the second day. Applicant stated he and Counsel had agreed to an alibi defense, and it was the only defense they discussed. Applicant explained he did not testify on his own behalf because of his prior record. Applicant further testified he did not ask Counsel where the Castros were the second day of trial because he thought they were coming, even though, according to Applicant, Counsel told him the witnesses would not be there until after the trial was over. On cross-examination, however, Applicant testified Counsel told him she was not going to call the Castros because "the State had not put up a good case and she didn't need them."

Applicant testified Counsel retained a DNA expert who was present for trial, but Counsel did not call him to testify. Applicant explained he and Counsel discussed the DNA evidence, and he asked Counsel to have the items retested because he did not believe his DNA was on the bandana. Applicant stated Counsel never told him anything further about the DNA testing, and he was not aware the expert would not be called to testify until the trial was over. Applicant further

testified he wanted Counsel to challenge the DNA under Rule 403, SCRCP, because it was "more prejudicial than anything." Applicant stated he could not answer any of the questions the jury would need to have answered, and thought that was what the defense DNA expert was supposed to do.

Applicant further testified there was only one video provided by the State at trial, but he believed the Chuck E. Cheese restaurant originally had more videos because they were mentioned in the investigative reports. According to Applicant, the investigating officer said he saw the videos, and the videos showed the robbery. When Counsel asked the officer how many videos he saw, the officer answered there were two, but the restaurant manager said there were thirty-two different cameras. Applicant testified only one video was presented at trial, and the State never turned over any additional videos. Applicant explained the video was used to make the bandana and wig relevant, and he wanted Counsel to have any testimony about it suppressed. According to Applicant, Counsel told him she wondered where the other video was, and she filed a subpoena to obtain it, but "it was too late." On cross-examination, Applicant agreed Counsel made a motion specifically asking for the State to turn over any additional videos, and the State told the trial court there were no others. Applicant admitted that as of the date of the evidentiary hearing he still did not have the videos. Additionally, on cross-examination, Applicant testified he wanted the videos so he could dispute where the officers claimed to have found the wig and bandana. Applicant stated he believed the eyewitness testimony offered by the State was not good enough.

Regarding Counsel's examination of witnesses, Applicant next testified the K9 officer testified differently than what was contained in his report. According to Applicant, the report said the dog went around in different directions, but at trial the officer claimed the dog made a track, which is how the officer discovered the wig and bandana. Applicant stated Counsel should have

impeached the officer with the discrepancy. Applicant further asserted Counsel elicited testimony from the officer who obtained the warrant after the DNA match that was damaging to Applicant's case. Applicant stated Counsel brought out that the DNA was not the only factor in obtaining the warrant and opened the door to the State asking about Applicant's other pending charges. However, Applicant conceded the State was not allowed to go into detail about the charges, just that there were additional factors other than the DNA in obtaining the warrant.

Additionally, Applicant testified Counsel should have cross-examined officers regarding discrepancies in the dispatch reports, which at one point says the suspect ran left out the door of the restaurant and later says the suspect ran to the right. Applicant stated he did not receive the reports until he got a new copy of discovery from appellate counsel and PCR counsel. Applicant also testified Counsel should have filed a motion to dismiss the charges at the end of the State's case, instead of making a motion for a directed verdict, because the investigator who obtained the warrant did not know who the victims were and did not do any pretrial investigation. Applicant conceded on cross-examination that the trial court's denial of the directed verdict motion was raised on appeal and denied.

Applicant also testified he wrote Counsel a letter explaining the trial strategy he wanted to use. Applicant explained Counsel informed him the letter went to Megan Walker, in the Solicitor's Office, instead of Counsel, and when Counsel eventually received the letter, it was already open. Applicant stated Counsel did not inform the trial court the State had a letter from him to his attorney, and he only learned what happened right before trial began. Applicant testified he believed different solicitors should have been assigned to his case because Walker had received information about his trial strategy.

Finally, Applicant testified he believed Walker engaged in prosecutorial misconduct because she talked about a "mask" in opening and closing, but the State only ever introduced evidence of a bandana. Applicant explained the only evidence he knew about leading up to trial was the wig and the bandana. Applicant testified Walker also made statements during her closing argument about issues never mentioned during trial. Applicant further testified he alerted Counsel after trial and wrote down "what mask?" on his note pad to show her, but she did not object or correct the statement. On cross-examination, Applicant conceded he understood Walker was using "mask" and "bandana" interchangeably throughout the trial.

Judy Castro testified on Applicant's behalf. She explained Applicant was her neighbor, and they previously dated but remained friends afterwards. Ms. Castro testified Applicant was at her house the day of the robbery, and she gave a statement to Applicant's attorney and investigator. Ms. Castro recalled she was asked to testify, so she showed up to court and spoke with Counsel. Ms. Castro stated she spoke with Counsel by phone after the first day of trial, and she was not present for the second day. Ms. Castro testified Counsel did not give a reason for why she did not call Ms. Castro to testify. Ms. Castro explained if she had been called to testify, she would have explained she brought her daughter home after work and left Applicant and her daughter there together. According to Ms. Castro, she left the house around 7:30 or 8:00 p.m. and woke Applicant up when she returned around 2:30 a.m. Ms. Castro agreed she did not see Applicant from the time she left the house at approximately 7:30 p.m. until she returned around 2:30 a.m.

Cecilia Castro also testified she recalled Applicant being at their home on the night of the incident. Cecilia explained she and her mother were close with Applicant, and she saw him every day. Cecilia testified, on the night in question, she and Applicant watched movies, ate dinner, and then fell asleep around 10:00 or 11:00 p.m. Cecilia testified she slept through the night and woke

up on the couch. She testified Applicant was gone when she woke up, and she did not know what time Applicant left her house. Cecilia further stated she spoke with Applicant's attorney and planned to testify on Applicant's behalf, but her mother told her they did not need to go back to court after the first day of trial.

Counsel testified she currently works for South Carolina Legal Services, but she was a public defender in Richland County from 2007 until 2017. Counsel explained she did not have a file because it could not be located, but she did have a computer printout of her notes from the case, and she recalled some of her representation of Applicant. Counsel explained the main evidence against Applicant in this case was the DNA evidence from the recovered wig and bandana, plus the statements Applicant made to investigating officers. Counsel stated none of the eyewitnesses were able to identify a suspect because the robber had been disguised. Counsel further testified she met with Applicant seven times prior to trial and discussed the evidence, including the DNA evidence, and asked Applicant for potential witnesses to investigate.

Counsel testified Applicant's statements were an issue pretrial, and she made a motion to suppress the content of the statements. Counsel explained the trial judge ruled a portion of Applicant's statement – that he would not give his DNA – was inadmissible, but other portions of the statement were deemed admissible and were in fact admitted at trial. Counsel agreed she did not contemporaneously object when the officer testified about Applicant's statements, rendering the issue unpreserved. Counsel further stated she did not recall Applicant ever denying he made the statements, and she had nothing in her notes to reflect Applicant told her that.

Counsel explained there were several issues with the alibi witnesses which contributed to her decision not to call them at trial. Counsel testified she did not know who the alibi witnesses were until very close to trial, so she spoke to them personally and immediately filed notice of their

intent to present an alibi defense. Counsel reviewed her notes and testified she was not notified of who the alibi witnesses were until July 2014, at either the fourth or fifth meeting with Applicant, although Applicant had previously claimed to have an alibi. Counsel testified the late notice regarding the alibi witnesses concerned her. Additionally, before trial started, Counsel became aware of some jail phone calls between Applicant and the witnesses in which Applicant appeared to be coaching them about what to say.

Counsel testified the Castros told her substantially the same information they testified to at the evidentiary hearing, except, at that time, Cecilia could not recall what time she fell asleep. Counsel testified she felt the alibi was not specific enough to present because Cecilia had fallen asleep and could not account for the whole timeframe of the robbery. Counsel stated Judy Castro was not part of the alibi defense, and if she had called a witness, she would have called Cecilia. Additionally, Counsel testified she listened to the jail phone calls, which involved both Judy and Cecilia Castro, and her assessment was that the phone calls were damaging to Applicant's case. Counsel testified the State notified her it intended to introduce the phone calls as evidence of coaching to rebut the alibi defense, and she discussed her concern about the calls with Applicant. Counsel stated she discussed the problematic nature of the alibi testimony with Applicant prior to trial, and they disagreed over whether she should call the witness. Counsel explained, in her professional opinion at the time of trial, the alibi testimony was overall more harmful than helpful to Applicant's case, and she made the choice not to call Cecilia against Applicant's wishes.

Counsel testified she retained a DNA expert who was not present for the whole trial, but who sat with her during the State's DNA expert's testimony. Counsel explained the expert helped her prepare for direct and cross-examination of the State's expert witness and sat with her in case she had additional questions during that testimony. Counsel stated the DNA expert reviewed the

State's analysis, and she did not call him to testify because he did not disagree with the results. Counsel testified she used the expert to highlight flaws in the DNA identification and to argue it showed a mixture of contributors. Counsel testified she did not recall Applicant offering any explanation for why his DNA was on the bandana. Counsel also testified she did not recall any issues with chain of custody, nor did Applicant tell her he wanted her to challenge it. Finally, Counsel testified she did not believe a Rule 403 objection to the DNA evidence would have been appropriate.

Counsel testified she made a motion pursuant to Riddle v. Ozmint[3] trying to ascertain whether there were additional videos. Counsel did not recall the State saying the video played at trial was the only video, but agreed the transcript would reflect the State's response. Counsel also agreed the victims, who were eyewitnesses to the attempted robbery, testified at trial. Counsel explained the wig and bandana described by the witnesses were found outside of another business by a tracking dog. Counsel could not recall her cross-examination of the K9 officer, but stated the issue with the bandana was the DNA on it, not where it was found. Counsel also testified she did not feel a motion to dismiss was appropriate, and she did not recall Applicant ever asking her to make that motion. Counsel stated she cross-examined the officer who obtained the warrant about the issues Applicant raised. Finally, Counsel testified she did not recall any issue with Walker referring to the robber wearing a mask as she thought Walker was using the terms interchangeably, and she did not believe the references to a mask were problematic.

Finally, Counsel testified she thought this was a good case for trial, and her strategy was to poke holes in the State's case by pointing out the bandana contained a mixture of DNA and none of the eyewitnesses could identify Applicant as the robber. However, Counsel testified

[3] 369 S.C. 39, 631 S.E.2d 70 (2006).

Applicant was offered a plea deal to resolve the Richland County charges in exchange for a fifteen-year sentence, along with a fifteen-to-thirty-year sentence on his Lexington County charges. Counsel testified there were enough "negatives" in the case that she advised Applicant to accept the plea agreement, but Applicant was not interested in doing so.

Meghan Walker, who prosecuted the case for the State, also testified. Walker testified the armed robber used a bandana as a mask to cover his face and when she used the word "mask" during trial, she was referring to the bandana. Walker explained her wording was not meant to mislead the jury, and she felt it was appropriate as the bandana and wig were used as a disguise.

Walker also testified she obtained the phone call recordings from Lexington County, where Applicant was being held prior to trial. Walker explained she turned over all of the calls to the defense, but she specifically alerted Counsel about Applicant's coaching of the alibi witnesses and told Counsel the specific calls the State would introduce to argue coaching. Walker testified she wanted the Castros to testify for the defense so she could impeach them with the phone calls, and if the defense presented a case, it would give her the last closing argument. Walker stated the jail phone calls were only relevant if the Castros testified to an alibi, and she had no way to introduce them if Counsel did not call them as witnesses.

Walker also testified the State only ever had one video, though the video probably showed more than one camera angle. Walker testified this video was all the State received from Chuck E. Cheese, and it was turned over to the defense. Walker stated you could see the wig and bandana on the robber in the video. Finally, Walker testified she did not recall ever receiving a letter from Applicant or having any conversation with Counsel about it.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the evidence presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony and evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's appellate records, and the legal arguments made by the attorneys. This Court finds the combined record of the trial transcript and the testimony from the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

1. Failure to preserve issues for appeal

Applicant alleges Counsel was constitutionally ineffective because she failed to preserve issues for appeal – specifically whether the trial court erred in admitting Applicant's offer to plead guilty and Applicant's statement "the DNA will convict me." These issues were raised on appeal, and the Court of Appeals found they were not preserved. State v. Brown, Op. No. 2016-UP-349 (S.C. Ct. App. filed July 6, 2016). Additionally, Counsel acknowledged on direct examination she failed to properly object during the officer's trial testimony, despite making a motion *in limine* to exclude the statements, and she agreed her failure to do so rendered the issues unpreserved for appeal. Accordingly, this Court finds Counsel's performance was deficient for failing to preserve these issues for appeal.

However, this Court finds Applicant failed to meet his burden as to the prejudice prong because Applicant would not have prevailed on these issues on appeal had they been preserved. The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

At trial, the State argued for the admission of the two statements because they were inculpatory admissions of guilt. The testimony presented at trial showed Applicant was Mirandized orally and in writing prior to being asked if he would give a DNA sample. This Court finds Applicant's response – that he would not submit to DNA testing because he knew the DNA evidence would convict him – clearly evinces consciousness of guilt, which is the same rationale relied upon by the trail court, and the statement was properly admitted at trial. Tr. pp. 74-75, 100. Additionally, this Court finds Applicant's statement offering to plead guilty to a lesser charge was properly admitted for the same reason – it is an acknowledgment of guilt. The State argued, and the trial court agreed, Rule 410(4), SCRE, only applies to keep out a statement made to a prosecuting attorney during plea negotiations, and was inapplicable in this situation.[4] Here, the statement was made to a police officer, not the solicitor, nor was it made during a plea negotiation. The testimony at trial showed the statement was made unprompted by law enforcement, after Miranda warnings had been given to Applicant. Tr. pp. 63-64. Therefore, this Court finds the statement was not made as part of a plea negotiation with a solicitor, and the plain language of Rule 410(4), SCRE, renders it inapplicable to Applicant's situation. Cf. State v. Compton, 366 S.C. 671 (Ct. App. 2005) (finding statements defendant made to police were not barred by Rule 410, SCRE, in prosecution for murder, burglary, and armed robbery where discussions between defendant, solicitor, and investigators were not in furtherance of defendant making a plea on charges). Because this Court agrees the trial court's decision to admit the statement was proper, it finds Applicant was not reasonably likely to prevail on appeal even if the issues had been

[4] A statement "made in the course of plea discussions with *an attorney for the prosecuting authority* which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" is inadmissible. Rule 410(4), SCRE (emphasis added).

preserved. Accordingly, the Court denies relief on this ground because Applicant has failed to prove Counsel's deficiency prejudiced him.

2. Failure to call alibi witness(es)

Applicant alleges Counsel was ineffective for failing to call two alibi witnesses – Judy and Cecilia Castro. In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Although Applicant produced the witnesses at the evidentiary hearing, and Cecilia Castro testified to an alibi for Applicant, this Court finds Counsel's decision not to call the witnesses at trial was not constitutionally ineffective because Counsel articulated several valid strategic reasons for declining to do so.

First, this Court finds Judy Castro's testimony insufficient to establish an alibi as she was not present in the home with Applicant during the time the crime was committed, and therefore, Counsel cannot be deficient for failing to call her as a witness. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014) ("To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime.").

Counsel testified that if she had presented the alibi defense, she would have only called Cecilia Castro as her witness. After talking to Cecilia, however, Counsel decided not to proceed with the alibi defense for several reasons. Counsel explained she was concerned with the defense because Applicant did not notify her of the witnesses until a few weeks before trial. Counsel also testified that the testimony given by Cecilia Castro at the evidentiary hearing, though generally similar to what Cecilia told her when she interviewed the Castros prior to trial, was more specific

on the crucial point of when Cecilia went to bed on the night of robbery. Most importantly, however, Counsel testified she decided not to call Cecilia or proceed with an alibi defense after the State informed Counsel it had rebuttal evidence, in the form of recordings of Applicant's phone calls from jail, arguably showing Applicant had coached the Castros about what their testimony should be. Counsel explained she listened to the calls and was concerned with what she heard, ultimately concluding the alibi defense would do more harm than good to Applicant's case.

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis – and the analysis by the appellate court – is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770-71 (1998) (same); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same)). This Court's "analysis of [C]ounsel's strategic decisions must be 'highly deferential' to counsel's judgment, and 'a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.'" Id. at 320-21, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689).

"[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." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations and quotations omitted) (emphasis added). This Court finds credible Counsel's testimony as to her strategy and

reasoning in declining to present the alibi witnesses. This Court finds the credibility of Celia and Applicant as well as Counsel's concern with opening the door to damaging impeachment evidence were reasonable strategic reasons for deciding not to proceed with the alibi defense. "A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions. . . ." Edwards, 392 S.C. at 458, 710 S.E.2d at 65. Because Counsel had valid strategic reasons to support her decision not to call Judy or Cecilia Castro as alibi witnesses, her performance was not deficient. Therefore, Applicant's request for relief as to this allegation is denied.

3. Failure to call a DNA expert

Applicant alleges Counsel was ineffective for failing to call a DNA expert to refute the State's expert witness testimony. As an initial matter, this Court finds Applicant failed to meet his burden of proof as to this allegation because he did not present the testimony of an expert at the evidentiary hearing, and therefore, he has not established he was prejudiced by Counsel's allegedly deficient representation. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

In any event, this Court finds Counsel offered a reasonable strategic explanation for her decision not to call a DNA expert. Counsel testified she retained a DNA expert who reviewed the DNA testing and analysis done by the State and helped her prepare for cross-examination of the

State's expert witness. Counsel further testified she chose not to call the defense expert as a witness because he did not disagree with the analysis done by the State's expert. The record reflects Counsel strongly cross-examined the State's expert and clearly established the defense's best argument regarding the DNA – the fact that it was a mixture of three different contributors. "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." Harrington v. Richter, 562 U.S. 86, 11 (2011). Further, "[c]ounsel's failure to procure expert witnesses does not render their representation deficient when counsel vigorously cross-examines the State's witnesses and attacked the accuracy of the evidence." Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). Indeed, in this case, Counsel retained an expert to help her fully understand the DNA evidence and prepare a vigorous cross-examination of the State's expert witness.

This Court therefore finds Counsel was not deficient in declining to call the expert as a witness, nor was Applicant prejudiced by Counsel's decision. This Court denies relief as to this allegation.

4. Failure challenge the admission of DNA evidence under Rule 403

Applicant alleges Counsel was ineffective for failing to object to the admission of the DNA evidence under Rule 403, SCRE, because that evidence was "more prejudicial than anything." While this may be true, Rule 403, SCRE, does not prohibit the admission of evidence merely because it is prejudicial to the defendant. Indeed, all of the State's evidence is arguably prejudicial to the defendant. Rule 403, SCRE, only prohibits the admission of evidence when its probative value is substantially outweighed by unfair prejudice. Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). Here, the DNA evidence on the bandana was highly probative in establishing

Applicant's identity as the armed robber. In this particular case, the evidence's prejudicial effect, is low when balanced against its probative value because the DNA sample contained a mixture of three contributors, indicating Applicant was not the only contributor.

Counsel ably argued this point through cross-examination of the State's witnesses and in her closing argument to the jury. Tr. pp. 318-23, 362-64. Further, Counsel testified she did not see any issues with the chain of custody of the evidence, and she did not feel a Rule 403 argument was appropriate under the circumstances of this case. For the foregoing reasons this Court agrees and finds Counsel's performance was not deficient. Therefore, Applicant's request for relief as to this allegation is denied.

5. Failure to adequately cross-examine the State's witnesses

Applicant alleges Counsel was constitutionally ineffective because she failed to adequately cross-examine the State's witnesses. Specifically, Applicant argues Counsel failed to impeach the K9 handler who located the wig and the bandana with discrepancies between his written report and trial testimony, and Counsel failed to point out discrepancies with the dispatch logs from the incident. Applicant testified he disputed the location where the wig and bandana were found, and in his opinion, the discrepancy in the K9 handler's testimony at trial – stating the dog made a track to the items – and in the written report – stating the dog moved in different directions before locating the items – was significant such that Counsel should have impeached the officer. Instead, Counsel declined to cross-examine the witness. Additionally, Applicant testified the dispatch logs from the incident say on page 3 that the robber fled to the right and on page 5 that the robber fled to the left. Counsel testified the issue with the bandana was not the location where it was found, but the DNA obtained from it, which linked Applicant to the crime.

This Court agrees with Counsel's assessment and finds Counsel was not deficient nor was Applicant prejudiced by the lack of cross-examination on these issues. See Abney, 408 S.C. at 48, 757 S.E.2d at 547 ("[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.*") (emphasis added). The bandana was tied to the robbery by the surveillance video and the eyewitness testimony of three victims. This Court finds Counsel correctly recognized the problematic issue in the case for Applicant was the fact Applicant's DNA was found on the bandana, not disputing the location of the bandana making the discrepancies in the dispatch log inconsequential.

6. Soliciting damaging testimony from witnesses

Applicant alleges Counsel was constitutionally ineffective because she elicited damaging testimony from the officer who obtained the warrant in this case. According to Applicant, Counsel "opened the door" for Walker to ask the officer about his Lexington County charges and other factors, aside from the DNA, the officer relied upon in obtaining the warrant.

After a review of the transcript, this Court finds this allegation to be without merit. The transcript reflects the officer merely testified there were factors other than the DNA match which law enforcement relied upon in seeking the warrant against Applicant. Tr. p. 268. Walker was not permitted to ask what those factors were, and the jury did not hear testimony about Applicant's Lexington County charges. Applicant alleges this testimony left the jury confused, but this Court finds the testimony was proper and calculated to safeguard Applicant's rights as he would surely have been prejudiced if Walker had been permitted to elicit details about the Lexington County

charges (i.e. the "other factors" referred to in the officer's testimony). The Court therefore finds Counsel was not deficient in this respect, and the Applicant's request for relief is denied as to this allegation.

7. Failure to file a motion to dismiss the charges

Applicant asserts Counsel was constitutionally ineffective for failing to file a motion to dismiss the charges at the close of the State's case instead of making a motion for a directed verdict. This Court disagrees.

"Decisions primarily involving trial strategy and tactics may be made by trial counsel. . . . *What motions to file* and whether to put on evidence so as to preserve the final word in closing argument are. . . strategic and tactical decisions to be made by trial counsel." Abney, 408 S.C. at 48, 757 S.E.2d at 547 (emphasis added). Counsel's motion for a directed verdict was a proper motion to make, and if successful, would have afforded Applicant the same result as a motion to dismiss. Further, Applicant's appellate counsel raised the denial of that motion on appeal, which affirmed the trial court's denial of relief.

Because this Court finds no deficiency in Counsel's decision to move for a directed verdict rather than file a motion to dismiss the charges, Applicant's request for relief on this ground is denied.

8. Lying to Applicant about witness statements

In the additional allegations enumerated by counsel for Applicant prior to the start of testimony, Applicant alleged Counsel was ineffective for lying to Applicant about witness statements. However, Applicant's only testimony during the evidentiary hearing was that Counsel lied to *the trial court* when she stated the defense was not contesting the fact Applicant made statements or the content of the statements, but that the defense was only contesting the timing and

whether the statements should be admitted. Either way, this Court finds the allegation is without merit.

According to Applicant, he never made the statement to the effect that DNA would convict him. Counsel, however, testified she did not recall Applicant ever denying he had made that statement. Applicant was present for the lengthy pretrial hearing on the issue, and he never objected to Counsel's argument, her statement to the trial court that he was not denying a statement was made, nor informed the trial court he believed Counsel was misrepresenting any facts to the court. Tr. pp. 53-79, 93-100. This Court finds Counsel's testimony on this issue to be credible, while also finding Applicant's testimony to be not credible. Therefore, this Court finds Counsel was not deficient, and Applicant's request for relief as to this allegation is denied.

9. Prosecutorial misconduct

Applicant alleges the assistant solicitor who prosecuted his case, Megan Walker, engaged in the deliberate deception of the Court by presenting false evidence and testimony, amounting to prosecutorial misconduct. Through his testimony, Applicant also alleged the existence of additional video evidence not turned over to the defense. It is not clear to this Court whether Applicant intends this allegation to be a claim of prosecutorial misconduct akin to a Brady violation of which issue he intended to raise or a claim of ineffective assistance by Counsel for failure to obtain the evidence. Regardless, because Applicant offered no proof additional video exists or the content of that video, his application for relief as to this issue is denied. See Brady v. Maryland, 373 U.S. 83, 87 (1996) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

In support of his allegation Walker engaged in prosecutorial misconduct by presenting false evidence and testimony to the trial court, Applicant argues Walker mislead the jury and the trial

court by repeatedly referring to a "mask" and stating the robber wore a mask. However, Walker testified she was using the term "mask" interchangeably with "bandana," which both Counsel and Applicant indicated they understood at the time. Walker explained she did so because there was testimony at trial that the robber wore the bandana and the wig in order to cover his face and conceal his identity. Counsel testified she did not believe this characterization of the bandana as a "mask" was objectionable, and based on its review of the transcript, this Court agrees.

This Court finds credible Walker's testimony she was using the term "mask" to mean the bandana because the bandana was used to help disguise the robbers identity, and her testimony is supported by the transcript. See, e.g., Tr. pp. 172-73, 187, 277. This Court further finds Walker's characterization of the bandana as a "mask" did not deprive Applicant of his right to a fair trial. See, e.g., State v. Barwick, 280 S.C. 45, 47, 310 S.E.2d 428, 429 (1983) (upholding trial court's refusal to dismiss charges due to alleged prosecutorial misconduct where "[n]othing in the record indicate[d], and appellant [did] not argue, that appellate could not receive a fair trial. . . ."). Accordingly, this Court finds Walker did not engage in prosecutorial misconduct, and Applicant has failed to meet his burden of proof on this issue. Applicant's request for relief is therefore denied.

CONCLUSION

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

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453,

409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 30th day of August, 2019.

KRISTI F. CURTIS
Presiding Judge
Fifth Judicial Circuit

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