

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LAURENS COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2019-000948

Robert Harbuck,

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX

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Columbia, SC 29201
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**THE FOLLOWING EXHIBIT IS ON FILE WITH THE LAURENS COUNTY CLERK OF
COURT’S OFFICE: EXHIBIT #2 (C.D.)**

Donna Schwartz Maddox, MD
Curriculum Vitae

- 1989-1998 American Psychiatric Association, General Member
- 1989-1998 South Carolina Psychiatric Association
1995-1998 Federal Legislative Representative (President appointed)
1995-1999 Executive Council
1996-1998 Secretary-Treasurer
- 1997 NAMI Advisory Board Physician Representative

PUBLICATIONS:

Dehart, D., Dwyer, G., Seto, M., Letourneau E., Schwartz-Watts, D. Internet solicitation of children. A proposed typology of offenders based on their chats, E-mails and social network posts. *Journal of Sexual Aggression*, 2016

Schwartz-Watts DM: "Commentary: Stalking Risk Profile." The Journal of the American Academy of Psychiatry and the Law, 34:455-457, 2006.

Schwartz-Watts DM, Frierson RL: "20: Crisis Stabilization in Correctional Settings." in Clinical Practice in Correctional Medicine, Second Edition, edited by Michael Puisis, D.O., S.C. Mosby, Inc affiliate of Elsevier, Inc 2005.

Schwartz-Watts DM "Asperger's Disorder and Murder." Analysis & Commentary The Journal of the American Academy of Psychiatry and the Law 33:390-3, 2005.

Schwartz-Watts DM, Rowell CN. "Commentary: Update on Assessing Risk for Violence Among Stalkers." The Journal of the American Academy of Psychiatry and the Law 31:440-3, 2003.
Giorgi-Guarnieri D, Zonana HV, Schwartz-Watts DM. "Practice Guideline: Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense." Supplement to The Journal of the American Academy of Psychiatry and the Law 30:2, 2002.

Frierson R, Schwartz-Watts D, Malone T, Morgan D. "Capital Versus Noncapital Murderers" in revision The Journal of the American Academy of Psychiatry and the Law, 1998.

Schwartz-Watts D, Morgan D. "Violent Versus Nonviolent Stalkers," accepted, The Journal of the American Academy of Psychiatry and the Law, 1998.

Schwartz-Watts D, Morgan D, Barnes C. "Stalkers: The South Carolina Experience," The Journal of the American Academy of Psychiatry and the Law, 1997, 24:541-545.

Schwartz-Watts D, Montgomery L, Morgan D. "Seroprevalence of Human Immunodeficiency Virus Among Pre-Trial Detainees," The Bulletin of the American Academy of Psychiatry and the Law, 1995, 23:285-289.

POSTERS:

Donna Schwartz Maddox, MD
Curriculum Vitae

Internet Chat Rooms: Who Solicits Children? R. Gregg Dwyer, MD, EdD, Donna Schwartz-Watts MD, William Burke, PhD, American Academy of Psychiatry and the Law 39th Annual Meeting, Seattle, WA October, 2008

PRESENTATIONS:

"Mass Murderers and Mental Illness" 5/18/18 Southeastern Symposium Mental Health, Greenville, South Carolina

"How To make Your Expert Shine" 2/7/18 Deep South Capital Defense Conference, Bay St. Louis Mississippi

"Communicating with Clients" 2/7/18 Deep South Capital Defense Conference, Bat St. Louis, Mississippi

"Truths and Myths About Mass Murder" 9/15/17, Department of Mental Health Day Long CME, Columbia SC

"How To Make Your Expert Shine" South Carolina Attorney General CLE, January 20, 2017 Columbia, SC

"Expert Testimony" Lecture to Medical University of South Carolina Forensic Residents, Charleston, SC 1/13/16

"Death Penalty and South Carolina" Lecture to Medical University of South Carolina Forensic Residents, Charleston, South Carolina, February 6, 2013

"Autistic Spectrum Disorders; What Capital Lawyers Should Know." Death Penalty 2013, Sheraton Four Seasons, Greensboro January 25, 2013

"Predators Among Us" University of South Carolina 2012 Mini Med School, October 2, 2012, Columbia, South Carolina

"How Death is Different-Using ABA Guidelines to Meet the Standard of Care in Death Penalty Cases and Social History Investigations: The team Approach" with Joe VonKallist, Capital Case Workshop, September 19, 2012, Wilmington, North Carolina

"Protecting Mental Health" South Carolina Attorney General's Continuing Legal Education Ethics Seminar, Blatt Building, Columbia, SC 12/2/11

"Autistic Spectrum Disorders and the Legal System ", DMH Annual CME, William S Hall Psychiatric Institute 9/11

"Issues of Mental Competency" South Carolina Circuit Court Judges Conference, Spartanburg, South Carolina, May 4-6, 2011

Donna Schwartz Maddox, MD
Curriculum Vitae

"Stalking in the New Millennium": Department of Mental Health Day Long CME, Columbia SC, October 2009

"Internet Predators": South Carolina Psychiatric Association Annual Meeting, Myrtle Beach, South Carolina, 1/2009

"Internet Predators": Panel Speaker, South Carolina Bar Association Annual Meeting, Myrtle Beach South Carolina, 1/2009

Internet Predators: ICAC Quarterly Meeting, Columbia, South Carolina 11/21/2008

Project Safe Childhood, Advanced Online Child Exploitation Seminar, National Advocacy Center Columbia, SC, July 29, 2008

"Violent Crimes and the Commitment of Sexually Violent Predators, MUSC Judges and Attorneys Substance Abuse and Ethics Seminar, Charleston, South Carolina, December 7, 2007

"Autistic Spectrum Disorders and Corrections" South Carolina Department of Corrections Mental Health Seminar, Columbia, South Carolina, December, 2007

"Pitfalls in Sex offender Commitment Hearings" Panel Speaker, American Academy of Psychiatry and the Law 38th Annual meeting, Miami, Florida, October 22, 2007

"Treating the Untreatable" Panel Speaker, American Academy of Psychiatry and the Law 38th Annual Meeting, Miami, Florida, October 19, 2007

"Risk Assessment in General Psychiatry: Department of Mental Health Annual Day Long CME, Columbia, SC September 21, 2007

"Mitigation in Noncapital Cases" SC Public Defender's Conference, Myrtle Beach, SC October 2007.

"Nuts and Bolts of Sexually Violent Predator Proceedings" SC Bar CLE, Columbia, South Carolina July 27, 2007

University of South Carolina School of Medicine Founder's Day Speaker for Woman in Medicine, Columbia, South Carolina, April 2007.

"Autistic Spectrum Disorders and Mitigation," Washington DC March 2007

"Sex Crimes and their Aftermath II" Panel Discussion and Presentation, Jack Swerling Moderator, South Carolina Bar Association Conference, Charleston, SC, January 25, 2007

Donna Schwartz Maddox, MD
Curriculum Vitae

"Psychiatry for the Brilliant Fact Finders" Invited Speaker, South Carolina Judges Conference, Greenville, SC, May 12, 2006.

"Sex Crimes and their Aftermath" Panel Discussion and Presentation, Jack Swerling Moderator, South Carolina Bar Association Conference, Charleston, SC January 27, 2006.

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, Atlanta Georgia, June 4-5, 2005

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, Atlanta Georgia, June 5-6, 2004

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, New York, New York, June 20-21, 2003

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York. June 20-22, 2002.

South Carolina Probation, Paroles and Pardons Annual Conference. "A State of Mind". Myrtle Beach, SC. November 11, 2002.

American Academy of Psychiatry and the Law, "Difficult Case? Consult your Colleagues." Newport Beach, California. October 26, 2002

South Carolina Public Defender's Conference, "Issues and Concerns Regarding the Sexually Violent Predator Statue" Litchfield Beach, South Carolina, September 30, 2002

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York, June 28-30-2002.

American Academy of Psychiatry and the Law, "Death Penalty" Boston, MA, October 28, 2001

American Academy of Psychiatry and the Law, "Ask the Expert" and "The Difficult Case" Panel Discussions. Boston, MA, October 28, 2001

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York, June 14-17-2001.

Annual Capital Defense Training Seminar, "The Importance of Timing in the Presentation of Your Client's Story: Frontloading Mitigation" with John Blum, Attorney, Jekyll Island, Georgia, February 9, 2001

University of Texas, Department of Psychiatry Grand Rounds "Profile of a Stalker" San Antonio, Texas, December 19, 2000

Willford Hall Medical Center, Lackland Air Force Base, Texas, "Death Penalty Evaluations,"

Donna Schwartz Maddox, MD
Curriculum Vitae

December 18, 2000.

Willford Hall Medical Center, Lackland Air Force Base, Texas, "Texas Sexually Violent Predator Statute," December 18, 2000

American Academy of Psychiatry and the Law, "Juveniles Who Carry Weapons on School Grounds" Baltimore, Maryland, October 15, 1999

American Academy of Forensic Science, Workshop Presenter, San Francisco, 1998 "Classification and Typology of Stalkers."

Kansas City, Western Missouri Forensic Department, 1997 "Evaluation of Stalking."

University of South Carolina School of Medicine Women's Month Featured Presenter, 1997 "Stalkers: The South Carolina Experience."

American Academy of Psychiatry and the Law, Denver, CO, 1997 "Psychotic versus Nonpsychotic Stalkers."

American Academy of Psychiatry and the Law, Denver, CO, 1997 "Harassing Telephone Callers."

American Academy of Psychiatry and the Law, Denver, CO, 1997 Panel on Maintaining Competence sponsored by Education Committee

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Violent Versus Nonviolent Stalkers",

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Capital Versus Noncapital Murderers"

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Treatment of Insanity Acquittes Across the United States."

William S. Hall Psychiatric Institute Forensic Forum, 1996 "Evaluation and Treatment of Sexual Offenders."

Georgia Regional Forensic Forum, 1996 "Evaluation and Treatment of Sexual Offenders."

American Academy of Psychiatry and the Law, Seattle, Washington, 1995 "Stalkers: The South Carolina Experience"

South Carolina Psychiatric Association, Hilton Head Symposium, 1995 "What General Psychiatrists Need to Know About Forensic Psychiatry."

American Academy of Psychiatry and the Law Annual Conference, San Antonio, Texas 1993 "Seroprevalence of HIV Among Inpatient Pre-trial Detainees"

Donna Schwartz Maddox, MD
Curriculum Vitae

American Medical Association, North Carolina 1990 "Tertiary Metastases Presenting As
Panhypopituitarism"

Present Grants:

Internet Chat Room Solicitation of Children: A Study of Psychosocial and Criminal Justice Factors as
They Relate to Public Safety Risk; American Academy of Psychiatry and the Law Institute for Education
and Research (AIER) Grant; Principal Investigator: RG Dwyer; Co-investigators: D DeHart, DM
Schwartz-Watts, W Burke & R Moran; 2009- 2010
(Revised 21/23)

Psychiatric Evaluation**Robert Clinton Harbuck****Date of Birth:** [REDACTED]**Date of Evaluation: 11/6/17****Place of Evaluation: Allendale Correctional Institution****Date of Report: 5/8/18**

Identifying Information: Mr. Harbuck is a 29-year-old trans female evaluated pursuant to a request from his attorney Dayne Phillips.

Reason for Referral: Mr. Harbuck is seeking post-conviction relief in regards to his convictions for Failure to Stop for a Blue Light, Assault and Battery third degree (two counts) ABHAN and Resisting Arrest. He was represented by Tom Quinn. He was originally charged with ABWTK, 4 counts, MIRP two counts, Failure to stop, Resisting Arrest with Assault, DUI ad DUS. He was found guilty by a jury trial and sentenced to 9 years by the Honorable Don Hocker. Mr. Harbuck alleges that his trial counsel did not obtain his prior mental health records, have him evaluated nor present expert testimony.

Statement of Nonconfidentiality: Mr. Harbuck understood the undersigned is an agent of his attorney and that all communication would be shared with Mr. Phillips. He also understood his communications may be used in his upcoming legal proceedings.

Sources of Information:

PCR Application 7/7/17

Certificate of release or Discharge from Active Duty 3/6/14

Order Setting Bond Laurens County

Letter from Steven Johnson LCSW-PIP, confirming treatment 5/11/16, 8/22/16

Letter from Cpt. Ryan Kenny undated

Letter Major Schofield 2/16/15

Letter Staff Sgt Marvin Howard undated

Confidential Questionnaire for Criminal Cases

ASAP Outpatient Treatment Plan and Review

Sentence Sheets-8/26/16

Indictments Attempted Murder X 4

Indictment Assault on an Officer While Resisting Arrest

Indictment for Failure to Stop

Arrest Warrants (3010200167-71, 3010101356)

Mental health Discharge Instructions 1/18/14-1/21/14

Transcript of record 8/24-/8/26/16

Transcript 911 call

Laurens County Hospital Records Steven Lindler

MAIT Report

VA Records Birmingham



Medical record military
Document Archive Forms
Womac Family Practice Records Cape Fear, NC

Pertinent Statements:

Mr. Harbuck has been confined for one year at the time of the evaluation. He reported a good adjustment to incarceration.

He reports he was involved in an accident and injured his back prior to his charges. He reported this evidence was struck from the jury because the VA records were not available. He also reported he was treated for Post Traumatic Stress Disorder and this evidence was not presented. He stated his counsellor was present but was not qualified as an expert.

He reported that he resided in Alabama prior to his charges. He reported he returned to Alabama after he secured a \$30,000 bond.

He reports that he served in the United States Army for 6.5 years. He reports he was a member of the 82nd Airborne and did "two tours in Afghanistan...one for 13 months and another for 7 months." He reported while serving our country, he was hit with indirect fire on two occasions. He reported his unit "was blown in half" while stationed at Camp Stone. He reported their 18 wheeler rolled two or three times, and he jumped out of the truck. He also reports he saw a suicide bomber blow himself up at their front gate. "I saw his face pulled off the skull. He was lying in a pool of blood." He reported he attempted to get service connected for his back and mental injury. At the time of his discharge, he was an E-5 and a Sergeant. He worked as a Senior Nodal Network Systems Operator.

He reported his father was an Apache pilot in Desert Storm and Desert Shield.

He reported that he left the military for selfish reasons. He stated his marriage was falling apart. He was smoking marijuana. He reported he saw good men not be cared for and equivalent people pulled. He reported he worked in the civilian sector as a network Engineer in Cobb County. He stated he and his wife separated eight months prior to his charges.

He reported he attended school for Information Technology. He reported he was attending school at Liberty University in Lynchburg Virginia and had been enrolled for two weeks at the time of his charges. He reported he had taken his bare essentials with him for school and was driving back to get his things.

He reported that during his trial he had two letters from his counsellor. He reported a ruling was made that his counsellor was not qualified to testify.

He reported his max out date is February 2024. He reported he has received 60 days credit. He reports he serves as a mentor in the Second Chance program.

He reported he joined the military in 2008 at age 19. He reported he married at 22 years of age and was married five years. They do not have children.

He reported long standing anger issues. He reported resentment for his father. He reported his father flew Blimps and was only home two weeks a year. "He was a dictator who would bust my ass." He reported his father "drank a lot."

He reported he drank also and had a DUI one Christmas after deployment. He reported he and his wife were drinking and were stopped in Jacksonville with 24 beer cans, a marijuana pipe, marijuana and 20 methadone. He reported the charges were dropped once their passenger admitted to the methadone. He reported he received a DUI in North Carolina. He reported his wife got him out of trouble but it weakened their marriage. He reported he was living for himself and drinking approximately a case of beer per night. He reported his paternal grandfather was an alcoholic. He reported a period of time where he was using K-2 and spice and methamphetamine. "I was self-medicating. He reported he disclosed his substance abuse to his therapist. He stated the plan was to get clean and get back into the service.

He reported after his divorce, he disclosed his gender identity issues to his mother. He reported at the age of six, he would wear his sister's tights under his pajamas. He reported his mother recalled seeing the tights when he had a hole in his pajamas and asked him what he was doing. He reported he told his father at age 26, but his father did not understand.

He reported he was hospitalized after he sent a picture to his ex-wife of an upside down cross from his sternum to his navel. He reported she called his mother and a friend came over. He stated he was drink and they got into a fight. He reported he was hospitalized for seven days. He was diagnosed with an adjustment disorder and prescribed lnderal for anxiety. He was treated after his charges by the VA in Alabama. He was prescribed the antidepressant citalopram and was treated for Post Traumatic Stress Disorder. He reported his substance abuse to his care providers.

He reported he was intoxicated with methamphetamine when his charges occurred. He reported he and his wife had been separated for two years. He reported he had been depressed for a period of six months. He reported he was shooting 3 grams per day. He reported he became extremely paranoid. He believed employees of his apartment complex were spying on him. He reported he was calling the police and reporting imaginary people but did not get arrested. He reported he was chasing ghosts. He reported he had gone five nights without sleep. He reported he believed witchcraft was occurring. He stated his energy would transfer at night and he could not sleep. He reported sleep paralysis when he did crash. He reported an incident where he saw a black vapor cloud and hallucinated.

He stated prior to the offense he had been three days without sleep. He reported he was still using methamphetamine. He reported he felt like he was being followed. He reported there was one guy on a cell phone. Another guy made a deal. He reported he felt like they were a satanic cult. He reported he made it to Virginia. He stated he called his mother because he was

"tripping." She came to Marietta. He reported he saw a car pass him and a guy jump into the back with an AK 47. He reported he drove 100mph because he thought someone was shooting at him. He reported he drove two hours before the police got him. He stated when he was pulled, he heard voices stating: "This is all a government training exercise. Ram the vehicle in front of you." He reported he hit the police car. He reported the officer asked him if he was under the influence and he said no.

On mental status examination, he was well kept. He maintained good eye contact throughout the evaluation. His speech was normal in rate and tone. His thinking was goal directed. He was not psychotic. He was not suicidal or homicidal. His affect was bright. He has good judgment and insight. He did not have cognitive deficits.

Mr. Harbuck suffers from Post-Traumatic Stress Disorder, substance abuse and gender identity issues.

Discussion of Diagnoses:

In 1952, The American Psychiatric Association produced the first Diagnostic and Statistical Manual of Mental Disorders, which included "gross stress reaction." This diagnosis was eliminated in the DSM-II. In 1980, the APA added PTSD to its classification based on research from the 1970s involving returning Viet Nam veterans. The diagnosis has evolved with continuing research. It is no longer classified as an anxiety disorder because mood states and reckless behaviors can also be present.¹

The Diagnostic and Statistical Manual of Mental Disorders, Fifth edition DSM-5, published in 2013 classifies Post Traumatic Stress Disorder under Trauma and Stressor Related Disorders. It was previously classified as an anxiety disorder. The essential feature of this disorder is the development of specific symptoms after an exposure to a traumatic event. Emotional reactions are no longer a part of the criterion. Included in the experience of traumatic events is exposure to war as a combatant or civilian. The traumatic event is experienced in various ways including recurrent, intrusive thoughts, negative alterations in cognitions, irritable behavior and angry outbursts, symptoms persist longer than one month and are not attributable to other medical or substance induced conditions.

According to the DSM-5, the lifetime risk of PTSD in the United States is 8.7%. Rates of PTSD are higher among veterans. Highest rates are found among survivors of rape, military combat and captivity. Symptoms usually occur within three months of the trauma. Symptoms can intensify with life stressors. Pre-traumatic risk factors include: prior traumatic exposure and family dysfunction. Environmental factors for military personnel include being a perpetrator, witnessing atrocities or killing in the area. Posttraumatic factors include subsequent adverse life events and financial or other trauma-related losses. In community and veteran samples, PTSD is

¹ Official Blog of the U.S. Department of Veterans Affairs, PTSD from Armistice Day to DSM-5, 11/7/13.

associated with poor family and social relationships, absenteeism from work, lower income and lower occupational success.

Individuals with PTSD are likely to experience co-morbid depression. Co-morbid substance abuse and conduct disorder are more common in males. Exacerbating his PTSD and substance use are his longstanding gender identity issues which have not been treated.

Opinions:

1. Mr. Harbuck was competent to stand trial at the time of his trial. Review of his trial transcript indicates he had a rational and factual understanding of the proceedings and the capacity to assist in his defense.
2. Mr. Harbuck was psychotic at the time of his offense.
3. His psychosis was secondary to a stimulant use disorder.
4. His underlying PTSD did play a role in predisposing him to substance abuse.
5. He was criminally responsible for his acts since his psychosis was secondary to voluntary intoxication.
6. He had significant mitigation which should have been presented prior to sentencing.
7. There is evidence from his medical and psychiatric records that he had a prior history of mental health treatment and a poor adjustment after his service and combat experience.

Donna Schwartz Maddox, MD
Consulting Forensic Psychiatrist

Applicant's
Exhibit

7

April 20, 2018

Mr. Dayne Phillips
Price Benowitz, LLP
1614 Taylor Street, Suite D
Columbia, SC 29201

RE: Consultation report regarding the trial of Mr. Robert Clinton Harbuck

Dear Mr. Phillips:

Enclosed is my consultation report regarding the trial of Mr. Robert Harbuck. The opinions stated in this report are mine alone and do not represent those of my employer and are based on my expertise in forensic pathology and a thorough review of the materials provided including the trial transcript, Officer Lindler's medical records from 9/6/2015, and the video of the collision. Please let me know if you have any further questions. Thank you for this consultation.

Sincerely,



Nicholas I Batalis, MD
Professor, Department of Pathology and Laboratory Medicine
Medical University of South Carolina

Enclosure: Consultation report

CONSULTATION REPORT

Review Date: 4/20/2018

Case: Review of State of SC vs. Robert Clinton Harbuck

Records Reviewed: Medical records from 9/6/2015 for Officer Steven Lindler, Transcript of State of SC vs. Mr. Robert Clinton Harbuck, and the dashboard camera video from 9/6/2015 (49:06 running length).

Background: I am a board certified forensic pathologist and am currently a Professor of Pathology at the Medical University of South Carolina, where I have been on staff for approximately the last 10 years. Pathology is a medical specialty dealing with the study of disease, and forensic pathology is a subspecialty that predominantly involves examining individuals to determine the cause and manner of death, interpreting injuries and wound patterns, establishing identification, and conducting death investigations, which includes a review of the death scene and scenario. Though the majority of our work involves performing autopsies, forensic pathologists may also be consulted to examine living individuals. In my practice, I have performed well over 2000 autopsies, of which I would estimate approximately 15% (or ~300 cases) have been deaths due to motor vehicle collisions. In addition, I have reviewed, or taken histories on, numerous other deaths due to motor vehicle collisions. As such, I have a solid understanding of the types and characteristics of collisions that are most likely to result in death or significant injuries.

Case History: According to the records reviewed, Mr. Harbuck was driving erratically on the evening of 9/6/2015 when he ultimately came to a stop on an entrance ramp to Interstate 26. Mr. Harbuck's truck is then seen to move forward and strike a sports utility vehicle in front of him at least once before changing gears into reverse. The vehicle then begins moving backward toward the officer's vehicle and the officer retreats and attempts to avoid Mr. Harbuck's truck before the truck eventually strikes the officer's cruiser a single time on the bumper/brush bar on the driver's side. The collision knocks loose the dashboard camera, but the officer maintains consciousness and is able to apprehend Mr. Harbuck a short time later. In the subsequent audio, Officer Lindler is heard complaining of back pain on several occasions; no other injuries are reported. Upon examination at a hospital that evening, Officer Lindler was diagnosed with "acute traumatic lumbar back pain associated with muscle strain." Additionally a radiograph of the spine was obtained and showed wedging of two vertebrae along with degenerative changes, which were noted to likely be chronic changes.

Opinion: It is my opinion, to a reasonable degree of medical certainty, that the injuries sustained by Officer Lindler do not meet the definition of "Great bodily injury" as provided to me. Further, it is my opinion to a reasonable degree of medical certainty that the collision viewed on the dashboard camera video is unlikely to have caused death or great bodily injury. While many, if not most, motor vehicle collisions are potentially fatal due to the various factors involved, it is my opinion that the collision seen on the dashboard camera video had an extremely low probability of causing death or great bodily injury.



Nicholas I. Batalis, MD

Professor, Department of Pathology and Laboratory Medicine
Medical University of South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS
 FOR THE EIGHTH JUDICIAL CIRCUIT

2017-CP-30-648

Robert Clinton Harbuck, #369560,)

Applicant,)

BRIEF IN SUPPORT OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed on August 7, 2017, by Robert Harbuck (Applicant) and amended on June 14, 2018. The State (Respondent) filed a Return on December 18, 2017, requesting an evidentiary hearing. Respondent filed an Amended Return responding to Applicant's amended allegations on September 25, 2018. An evidentiary hearing into the matter was convened on March 1, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Dayne Phillips, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf and presented testimony from two expert witnesses: Dr. Donna Schwartz Maddox, forensic psychiatrist and Dr. Nicholas Batalis, forensic pathologist. Thomas Quinn (Counsel), also testified. After the hearing, this Court requested briefing from both parties. This brief follows.

I. PROCEDURAL HISTORY

Robert Harbuck (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Laurens County Clerk of Court. During the October 2015 term, the Laurens County Grand Jury indicted Applicant for assault on an officer

while resisting arrest (2015-GS-30-1622); four counts of attempted murder (2015-GS-30-1618, -1619, -1620, -1621); and failure to stop for a blue light (2015-GS-30-1710). Thomas Quinn, Esquire, represented him. Assistant Solicitors Dale Scott and Jim Todd of the Eighth Circuit Solicitor's Office prosecuted the case. On August 24-26, 2016, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, circuit court judge.

The jury convicted Applicant of resisting arrest as a lesser-included offense of assault on an officer while resisting arrest (2015-GS-30-1622), three counts of third-degree assault and battery as a lesser-included offense of attempted murder (2015-GS-30-1618, -1619, -1620), assault and battery of a high and aggravated nature as a lesser-included offense of attempted murder (2015-GS-30-1621), and failure to stop for blue lights (2015-GS-30-1710). Applicant was sentenced to one year imprisonment for resisting arrest, thirty days imprisonment for each third-degree battery conviction, nine years imprisonment for assault and battery of a high and aggravated nature, and three years imprisonment for failure to stop for blue lights. All sentences were to run concurrently. Applicant did not file a notice of appeal.

II. SUMMARY OF FACTS

On September 6, 2015, Applicant was driving down I-26 in his gold Chevrolet Silverado "like a NASCAR driver, cutting through traffic, using the emergency lane as a speed lane." (Trial Tr. 35.) A group of co-workers (witnesses) who were traveling on I-26 the same morning, observed Applicant's driving and made a frantic call to 911. (Trial Tr. 35.) Trooper Lindler caught up to Applicant and attempted to pull Applicant over. (Trial Tr. 50.) The witnesses got in front of Applicant and exited the interstate. (Trial Tr. 49.) At that point, Applicant was behind them and began to follow them. (Trial Tr. 50.) The witnesses noticed Applicant and pulled over on the interstate ramp to let him pass as they believed he was fleeing from Trooper Lindler. (Trial Tr.

50.) Instead of passing the witnesses, Applicant pulled up behind them and rammed their vehicle. (Trial Tr. 50.) Trooper Lindler pulled in behind Applicant and, after ramming the witnesses' car, put his truck in reverse and sped towards Trooper Lindler's police cruiser. (Trial Tr. 50-51.) Applicant then drives his truck and pulls it in front of the witnesses' vehicle. (Trial Tr. 51.) Trooper Lindler then positioned his police cruiser between the witnesses' vehicle and Applicant's vehicle. (Trial Tr. 51.) Trooper Lindler ordered Applicant out of the vehicle at gunpoint and Applicant complied. (Trial Tr. 87.) Applicant complied with Trooper Lindler's commands until Applicant was put in handcuffs and he began fighting. (Trial Tr. 88.) Another Trooper showed up at that time, and shortly thereafter, officers from the Clinton Police Department arrived on the scene. (Trial Tr. 88.) Applicant remained combative and officers had to wait for a caged vehicle to transport Applicant from the scene. (Trial Tr. 88.) Once the caged vehicle arrived, multiple officers had to be used to put Applicant in the vehicle as he continued to fight. (Trial Tr. 90.) Officers "drive stunned" Applicant two times during the arrest in order to get him to comply with their commands. (Trial Tr. 140.) Applicant would stop fighting temporarily, but would eventually become combative again. (Trial Tr. 140-142.)

While being transported, Applicant attempted to shimmy out of his handcuffs back of the caged unit and officers had to pull over and radio for assistance. (Trial Tr. 36, 143.) Officers spoke to Applicant, attempted to calm him down, and Applicant appeared to be cooperative. (Trial Tr. 144.) Once officers opened the car door, Applicant became combative again. (Trial Tr. 144.) Applicant was eventually transported to the hospital for an exam. (Trial Tr. 146-147.) Applicant would not consent to an exam and told the doctors, "You're not touching me." (Trial Tr. 147.) Due to Applicant's non-compliance, no blood was drawn at the hospital. (Trial Tr. 148.) Applicant was then taken to jail without further incident. (Trial Tr. 148)

At trial, Applicant testified on his own behalf. During cross-examination, Applicant testified he was not intoxicated at the time of the incident and had only ingested a Red Bull and cigarettes prior to the incident. (Trial Tr. 205.) Applicant testified regarding his military service, which included details of his two tours overseas, a truck accident he was involved in, and coming under indirect fire. (Trial Tr. 179-189.) Applicant also testified he had been treated for mental health issues while in the military. (Trial Tr. 201.)

In mitigation, Counsel submitted a statement from Steven Johnson from the Department of Veterans Affairs and a letter from Major Clinton Schofield. (Trial Tr. 328.) Counsel also explained to the court Applicant had been diagnosed with PTSD and was currently in treatment. (Trial Tr. 328.) Counsel also highlighted Applicant's military service and distinctions. (Trial Tr. 329.)

During sentencing, Judge Hocker stated he was taking into account, to some extent, the fact that Applicant is currently being treated for PTSD. (Trial Tr. 331.) Judge Hocker also noted the significance of the impact involved with Corporal Lindler's patrol vehicle. Judge Hocker stated, "... the impact involved caused the in car video camera to come off the mount. And I've always understood that those things are mounted pretty good just to prevent people that they arrest [from] jerking the thing off. And the impact was such that it knocked that camera off the mount. That's pretty strong. That's pretty strong." (Trial Tr. 332.) Judge Hocker went on to say, "... if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case." (Trial Tr. 332.) Applicant received concurrent sentences of nine years for ABHAN, thirty days for each of the assault and battery (3rd degree) charges, three years for the failure to stop, and one year for

the resisting arrest. (Trial Tr. 333.)

III. ALLEGATIONS RAISED

During the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel:

- a. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- b. Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-419 and 430.
- c. Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f), SCRCrimP; see also S.C. Code § 17-24-10.
- d. Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.
- e. Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronin, 466 U.S. 648 (1984).
- f. Trial Counsel failed to object to inadmissible evidence during Applicant's trial.
- g. Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.
- h. Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction

and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

- i. Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.
- j. Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.
- k. Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.
- l. Trial Counsel failed to hire an expert witness to conduct an independent review of Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or whether the act that caused those injuries was likely to produce "Great Bodily Injury" to satisfy that element of Assault and Battery of a High and Aggravated Nature when it was reasonable and necessary in requesting a lesser-included offense.
- m. Trial Counsel failed to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this evidence.
- n. Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

An evidentiary hearing was held on March 1, 2019. Prior to the hearing, Applicant expressly waived the allegation pertaining to the Blair hearing and Counsel's failure to request jury instructions on the affirmative defense of insanity or guilty but mentally ill. As such, those allegations should be denied and dismissed. During the hearing, Applicant abandoned the allegation pertaining to Counsel's failure to object to inadmissible evidence during Applicant's

trial as Applicant failed to provide any testimony regarding this claim. As such, that allegation should be denied and dismissed. At the conclusion of the hearing, counsel for each side was allowed time to provide a brief in support of their case. This brief follows.

V. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

Ineffective Assistance of Counsel

Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Cl. App. 2015).

Applicant presented an expert witness in forensic psychiatry, Dr. Donna Schwartz Maddox, who testified Applicant was competent to stand trial and criminally responsible for his actions on the date of the incident. Dr. Maddox's report also indicates Applicant was voluntarily intoxicated at the time of the incident, which contradicts his trial testimony. Her report was entered as Applicant's Exhibit #6. Dr. Maddox also testified she would not have been helpful for Applicant at trial as there is no question regarding Applicant's criminal responsibility or capacity in this case.

Counsel testified there was no question Applicant was competent to stand trial. Counsel testified he did not consider using insanity as a defense in this case.

Counsel was not deficient in failing to have Applicant evaluated for competency as Applicant's own expert indicates Applicant was competent to stand trial and criminally responsible for his actions. Counsel did not pursue an insanity defense because Applicant did not qualify for such a defense. Applicant has not provided this Court with any information showing he was not competent to stand trial or would have been successful pursuing an insanity defense.

Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-410 and 430.

This allegation was expressly waived by Applicant on the record during the evidentiary hearing.

Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f). SCR CrimP; see also S.C. Code §17-24-10.

Although Applicant maintained that he was not intoxicated at the time of the incident, Dr. Maddox testified Applicant admitted to her that he was under the influence of methamphetamine and had been up for three days at the time of the incident. In Dr. Maddox's opinion, she found Applicant was criminally responsible for his actions.

Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

At the hearing, Dr. Maddox testified Applicant suffers from PTSD as a result of his service in the U.S. Army. Dr. Maddox testified Applicant told her about his two tours in Afghanistan and his exposure to trauma overseas. Dr. Maddox testified Applicant told her about seeing a suicide bomber blow himself up, and an incident where his camp was blown in half. Dr. Maddox testified Applicant had pre-existing trauma and gender identity issues. Dr. Maddox testified it is common for someone with those issues to join the military to try to overcome the gender identity issues. Dr. Maddox testified Applicant was an alcoholic and had issues with his wife when he was married. Dr. Maddox testified Applicant was using three grams of methamphetamine a day at the time of the accident. Dr. Maddox testified Applicant believed he was being followed on the day of the incident and Applicant had not slept in three days. Dr. Maddox testified she did not believe there is a capacity issue or criminal responsibility issue, but she would have presented this during mitigation at Applicant's sentencing.

Counsel testified he could not have used Dr. Maddox's report at trial because Applicant admitted to Dr. Maddox that he was intoxicated and had been up for three days prior to the incident, which was a drastically different story than what Applicant testified to at his trial. At trial, Applicant testified he had only ingested a Red Bull and cigarettes on the date of the incident and

denied any drug use despite the law enforcement witnesses testifying that he appeared to be "on something." (Trial Tr. 205.) Applicant also testified that he had been treated for mental health issues in the military. (Trial Tr. 201.) Counsel testified Dr. Maddox's report would have completely changed their trial strategy and would not have been helpful at trial. Dr. Maddox's testimony seemed to concede this point as she testified she did not think there was a criminal responsibility or capacity issue that she could have assisted with at trial.

Although Applicant alleges Counsel was deficient for failing to call an expert on PTSD during the trial, Applicant's own expert testified she would not have been helpful during the trial as she found Applicant criminally responsible for the incident. Additionally, Applicant told Dr. Maddox a completely different story than what he told Counsel and, as Counsel testified, Dr. Maddox would not have been helpful in their case at trial. Applicant has failed to show this Court how Dr. Maddox's report could have changed the outcome of the trial and thus has failed to meet his burden as set forth in Strickland.

Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronin, 466 U.S. 648 (1984).

Applicant argues Counsel should have presented an expert during trial to show Applicant suffers from PTSD. Applicant also argues Counsel should have presented an expert at trial to show the impact of the collision with Corporal Lindler's vehicle did not cause and could not have caused great bodily injury to Corporal Lindler and, therefore, Applicant could not be found guilty of ABHAN.

Counsel testified his trial strategy was to show Applicant could not have formulated the intent necessary to be convicted of the charges. Based on what Applicant told Counsel, this was a reasonable trial strategy since Counsel was unaware of Applicant's intoxication at the time of the incident. Counsel had Applicant testify regarding his military experience and symptoms he

experienced on the date of the incident. During his closing argument, Counsel provided argument regarding Applicant's inability to formulate intent as Applicant, "was not in his right mind." (Trial Tr. 250.)

If Counsel had presented the case through Dr. Maddox, Applicant would have had to tell the truth during his testimony that he was under the influence of methamphetamine and had been up for three days prior to the incident. As Counsel testified, that would have destroyed his trial strategy of negating Applicant's intent. Under Counsel's strategy, Applicant was convicted on all lesser included offenses – except for the failure to stop for blue lights charge – and received only nine years out of a possible twenty-four year sentence. Applicant cannot show that the outcome of his trial would have been different had Counsel's trial strategy acknowledge Applicant's voluntary intoxication because he lied about it during his trial. Applicant was able to keep confirmation of his intoxication from being considered by the jury or the trial judge and, based on the comments by the trial judge during sentencing, Applicant was clearly not prejudiced by Counsel's trial strategy.

Trial Counsel failed to object to inadmissible evidence during Applicant's trial.

Applicant failed to present any testimony regarding this claim at the evidentiary hearing, consequently abandoning this allegation.

Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.

During its closing argument, the solicitor argued, "[W]hen you use a deadly weapon, a four ton truck that is capable of traveling at great rates of speed and you intentionally ram somebody's car with it, the inference there is malice. The inference that you mean great harm." (Trial Tr. 279.) Counsel objected and a sidebar conference was held. The State went on to argue malice can be

inferred from the use of a deadly weapon. The Court excused the jury at the end of the State's closing and Counsel was able to put on the record his objection to the State's comment regarding malice. Counsel cited the holding in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), to the trial court in support of his argument that the jury should not be able to infer malice because Counsel had presented evidence that would "reduce, mitigate or excuse, or justify an assault and battery with an intent to kill" (Trial Tr. 290.) In Belcher, the South Carolina Supreme Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." Id. at 612, 685 S.E.2d at 810. The Court's ruling only pertains to the trial court's instruction on implied malice to the jury, it does not limit the State's ability to argue implied malice during their closing argument.

The trial court found, "[U]nder Belcher the mitigation offered would be sufficient enough to not charge inference of malice by use of a deadly weapon." (Trial Tr. 294.) The trial court removed the inference language from the jury charge over the State's objection. (Trial Tr. 294.) Counsel requested the trial court provide a curative instruction to the jury regarding the State's closing argument on inferring malice. (Trial Tr. 295.) The trial court provided the jury with a charge that requires them to follow the law as the court charges, even if it contradicts what the lawyers have argued. (Trial Tr. 295.)

Applicant has alleged Counsel was deficient for failing to object to the trial court's curative instruction to the jury and move for a mistrial. "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." State v. Wilson, 3889 S.C. 579, 698 S.E.2d 862 (2010). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial

effect can be removed in no other way.” State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (2009) (citing State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (2005)).

Here, the trial court acknowledged the issue as to whether Belcher applied in this case was an “extremely close issue.” (Trial Tr. 294.) The trial court provided the remedy it believed to be appropriate in this case, which was similar to the remedy the trial court provided when Counsel moved for a mistrial during Corporal Lindler’s testimony regarding his injuries. (Trial Tr. 91-94.)

The trial court made it clear the issue of whether malice can be inferred in this case was an “extremely close issue” and, even if Counsel had moved for a mistrial, it would not have been appropriate to grant such a motion because Belcher does not prevent the State from arguing implied malice in their closing argument. The trial court, even though it believed the issue to be close, followed the Court’s ruling in Belcher and appropriately instructed the jury. Applicant has failed to show how Counsel was deficient or how he was prejudiced by Counsel’s failure to move for a mistrial after the State’s closing argument.

Trial Counsel failed to object to the Solicitor’s improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel’s credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

Counsel objected twice during the State’s closing argument. Counsel objected when the State started talking about affirmative defenses in South Carolina. (Trial Tr. 275.) In his objection, Counsel argued the State’s comments were not a true statement of law and it was not relevant to the case. (Trial Tr. 275.) The trial court overruled the objection and urged the solicitor to move on with his argument. (Trial Tr. 275.) Counsel again objected when the State argued implied malice to the jury. (Trial Tr. 279.) Counsel stated the solicitor’s argument was “a complete misstatement” and then noted there were Supreme Court cases. (Trial Tr. 279-280.) The trial

court held a sidebar conference and allowed the State to proceed with their argument. (Trial Tr. 280.)

Applicant has alleged he should have objected more based on the content of the State's closing argument. During the PCR hearing, Counsel testified he did not continue to object to the State's closing because it was not hurting their case. He elaborated the jury was not paying a bit of attention to the Solicitor and he did not feel any additional objections were necessary.

Applicant alleges the State made inappropriate comments regarding Applicant's drug use during his closing argument and Counsel was deficient for failing to object. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (citing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998)). The State had two law enforcement officers testify during their case-in-chief that they believed Applicant was impaired during the incident. Corporal Lindler testified Applicant exhibited, "normal behavior for an impaired driver." (Trial Tr. 76.) Corporal Lindler also testified intended to conduct a field sobriety test on Applicant after pulling him over, but Applicant was too violent. (Trial Tr. 89.) Officer Scott Peay with Clinton Public Safety testified in his opinion Applicant was "definitely impaired." (Trial Tr. 146.) The State's comments regarding Applicant's alleged drug use were reasonable inferences that could be drawn from the testimony of the officers at trial. Counsel was not deficient because the solicitor's comments were not objectionable.

Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.

Applicant alleges Counsel did not preserve his motion for a mistrial after Corporal Lindler testified regarding medical injuries he suffered. During the trial, Counsel moved for a mistrial following testimony by Corporal Lindler that he suffered herniated discs as a result of the collision

caused by Applicant. (Trial Tr. 93.) The trial court denied Counsel's motion, but, following an in-camera examination of Corporal Lindler, issued a curative instruction to the jury to disregard Corporal Lindler's testimony regarding his injury. (Trial Tr. 98.) Counsel objected stating the instruction was not sufficient and again moved for a mistrial. (Trial Tr. 98.) The trial court did not address Counsel again regarding the mistrial. Applicant alleges Counsel's failure to have the trial court address his follow-up motion prevented him from preserving the issue for appeal.

The South Carolina Supreme Court held in State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), that a defendant adequately preserved for appeal his claim that admission of testimony concerning proposed polygraph test required a mistrial where defendant immediately objected, moved for a mistrial after the jury was removed, and renewed his motion for a mistrial following the court's curative instructions.

Here, directly after Corporal Lindler's testimony, Counsel requested a sidebar conference after which the judge excused the jury. (Trial Tr. 91.) Counsel provided a thorough argument regarding his motion for a mistrial and the trial court allowed Counsel to engage in an in-camera examination of Corporal Lindler regarding his injury and "depending on what he testifies to, it may justify the Court issuing some curative instruction to disregard his testimony." (Trial Tr. 94.) At the conclusion of the in-camera examination, the trial court explained it would instruct the jury to disregard the testimony of Corporal Lindler as it related to the existence of his herniated discs. (Trial Tr. 98.) Once again, Counsel objected to the instruction as it was not sufficient and requested a mistrial. (Trial Tr. 98.)

Counsel made the proper objections at the appropriate times and this issue is clearly preserved for appeal. Therefore, Applicant has failed to meet his burden to show how Counsel is deficient or how he was prejudiced by Counsel's representation.

Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.

This allegation was expressly waived by Applicant on the record during the evidentiary hearing.

Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.

Applicant alleges Counsel should have filed a Motion for Reconsideration in order to provide the trial court with mitigation evidence that was not presented during sentencing regarding Applicant's PTSD. Counsel testified he did present mitigation during the sentencing phase of Applicant's trial. Counsel testified he presented a statement from Steven Johnson with the Department of Veteran Affairs and a letter from Major Schofield on Applicant's behalf. Counsel also testified the trial court was aware of Applicant's PTSD diagnosis and the record shows the trial judge took that into account during the sentencing. (Trial Tr. 331.) The record also shows the trial court was bothered by the force of the collision Applicant caused when he rammed Corporal Lindler's vehicle. (Trial Tr. 332.)

During the PCR hearing, Applicant presented testimony from Dr. Maddox to show Counsel should have provided additional mitigation to the trial court during sentencing, however, Counsel testified Dr. Maddox's report would not have been useful in Applicant's case. Counsel testified he could not have used Dr. Maddox for mitigation because Applicant testified during the trial he was not intoxicated during the incident. Dr. Maddox's report clearly states the PTSD was secondary to the voluntary intoxication. Counsel would not have been able to present an expert witness to provide mitigation regarding Applicant's PTSD without conceding the voluntary intoxication, which, as Counsel testified, would have completely changed their trial strategy.

Applicant has failed to show how the trial court would have imposed a more favorable sentence on Applicant had Counsel filed a Motion for Reconsideration and presented an expert on

PTSD. During the sentencing, Applicant received the benefit of the trial court taking his PTSD into account while being able to maintain he was not under the influence at the time of the incident. Counsel would not have been able to present an expert during mitigation on Applicant's PTSD alone because, as Dr. Maddox's report clearly states, the PTSD was secondary to Applicant's voluntary intoxication. Applicant has failed to meet his burden on this issue as he cannot show how he was prejudice by Counsel's failure to file a Motion for Reconsideration.

Trial Counsel failed to have an expert review Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or call an expert to rebut the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Lindler's injuries did not meet the definition of "Great Bodily Injury."

Applicant argues Counsel was deficient for failing to have an expert review Corporal Lindler's medical records or testify that his injuries did not meet the definition of "great bodily injury." Applicant maintains he could not have convicted of ABHAN if Counsel had presented an expert on "great bodily injury."

Assault and battery of a high and aggravated nature is defined as:
A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and:

- (a) great bodily injury to another person results; or
- (b) the act is accomplished *by means likely to produce death or great bodily injury.*

S.C. Code Ann. §16-3-600 (B)(1) (1976) (emphasis added).

During the hearing, Dr. Nicholas Batalis was admitted as an expert in forensic pathology. Dr. Batalis provided testimony regarding the medical report on Corporal Lindler's herniated discs and whether the collision between Applicant's truck and Corporal Lindler's vehicle was likely to produce "great bodily injury." The State objected to Dr. Batalis' testimony regarding the collision as he does not have the training and experience necessary to provide an expert opinion regarding vehicle collisions.

Counsel testified he does not believe the trial court would have allowed Dr. Batalis' testimony. Counsel testified Dr. Batalis would not have been helpful at trial because the report was speculative and would have infringed on the province of the jury. Counsel testified the trial judge submitted all lesser included offenses with definitions, so there was no need for an expert on great bodily injury because the jury had already been provided all of the necessary information. Counsel also testified he would not have used Dr. Batalis at trial because Dr. Batalis cannot say anything regarding moderate bodily injury and Counsel believed the facts of this case supported the jury's verdict. Counsel testified the jury was properly instructed on assault and battery of a high and aggravated nature.

During sentencing, the trial court stated,

What I felt like was significant as it relates to Corporal Lindler, the impact involved caused the in car video camera to come off the mount. And I've always understood that those things are mounted pretty good just to prevent people that they arrest [from] jerking the thing off. And the impact was such that I knocked that camera off the mount. That's pretty strong. That's pretty strong.

(Trial Tr. 332.) The trial court evaluated the force of the impact to be severe based on the video of the collision. Dr. Batalis testified on cross-examination he did not know how fast the Applicant's vehicle was going at the time of the collision and he did not know how much force it would take to knock the camera off the mount in Corporal Lindler's vehicle.

Dr. Batalis' opinion on whether the collision could have caused great bodily injury is outside the scope of his expertise as he testified he did not have any training or experience in estimating the speed of a vehicle, accident reconstruction, or how much force would be necessary to cause great bodily injury. Applicant has failed to meet his burden to show Counsel was deficient for failing to call an expert on great bodily injury because, as Counsel testified, Dr. Batalis' report was speculative and would not have been admissible at trial.

Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

Applicant argues Counsel should have presented an expert to testify at the sentencing phase of the trial regarding Applicant's PTSD and other mental health issues. Applicant presented testimony from Dr. Maddox who testified about Applicant's military deployments, gender identity issue, and substance abuse issues. Dr. Maddox testified she found Applicant to be criminally responsible for the incident and found his PTSD to be secondary to his voluntary intoxication.

Counsel testified he would not have used Dr. Maddox's report at trial because it would have destroyed their trial strategy of negating intent. Additionally, Dr. Maddox's report contradicts Applicant's trial testimony that he was not under the influence at the time of the incident. Applicant insinuated during cross-examination at the PCR hearing that Counsel should have obtained an expert solely on the issue of PTSD as if the substance abuse aspect of Dr. Maddox's report could somehow be isolated from her overall opinion. As Dr. Maddox's report shows, Applicant's PTSD is *secondary* to his substance abuse and any qualified expert who examines Applicant regarding his mental health would not be able to separate PTSD from Applicant's drug abuse.

Counsel testified the judge was aware of Applicant's PTSD and Counsel testified he also provided a information from the Department of Veteran Affairs and letter from a U.S. Army Major Schofield on Applicant's behalf. During sentencing, the trial judge stated, "I am taking into account to some extent the fact that you are currently being treated for PTSD." (Trial Tr. 331.) Later, the trial judge stated,

You know, if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, which is 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case.

(Trial Tr. 332.)

The trial court clearly afforded Applicant mitigation from the information Counsel presented, yet Applicant alleges Counsel should have called a PTSD expert to provide additional mitigation during his sentencing. However, as Dr. Maddox's report shows, Applicant would not have benefited from expert mitigation as it would have shown Applicant was voluntarily intoxicated during the incident. Applicant, who admittedly lied under oath at his trial, would not have benefited from an expert because, just like Dr. Maddox's report indicates, Applicant is criminal liable and the PTSD was secondary to Applicant's voluntary intoxication. The trial judge was clearly disturbed by Applicant's actions towards Corporal Lindler, and, had mitigation been provided showing Applicant was voluntarily intoxicated during the incident, the trial court likely would have increased Applicant's sentence. Applicant was able to receive the benefit of mitigation for his PTSD while denying his intoxication during sentencing and he has failed to show how the outcome of his trial would have been different had Counsel provided expert mitigation.

CONCLUSION

Consequently, Applicant has failed to meet his burden to show how Counsel was deficient in his representation or any prejudice resulting from the alleged deficiencies. Therefore, this application should be denied and dismissed with prejudice.

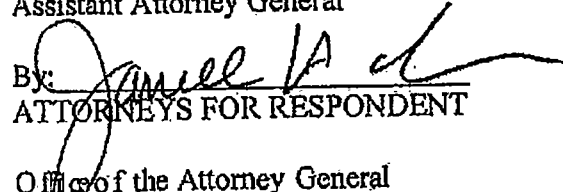
Respectfully submitted,

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By: 
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March 13, 2019

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

IN THE COURT OF COMMON PLEAS

2017-CP-30-648

ROBERT C. HARBUCK, #369560,

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Brief in Support of Dismissal in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Dayne C. Phillips, Esquire
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, South Carolina 29201

DATED this the 13th day of March, 2019.



Caroline Collins, Administrative Coordinator
For Respondent

THE STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

ROBERT C. HARBUCK,
Applicant

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Case No.: 2017-CP-30-0648

MEMORANDUM IN SUPPORT OF
POST-CONVICTION RELIEF

LENN W. LANCASTER

2019 MAR 18 PM 12:11

LAURENS COUNTY
CLERK OF COURT

TO: The Honorable Brian M. Gibbons
Assistant Attorney General Janell Gregory

The Applicant, by and through the undersigned Counsel, submits this memorandum in support of Applicant's application for Post-Conviction Relief (PCR), and the testimony presented during the evidentiary hearing at the Greenwood County Courthouse on March 1, 2019. See *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Applicant is solely challenging his conviction for Assault and Battery of a High and Aggravated Nature in this PCR action.

Procedural History

On August 24, 2016, Applicant proceeded to trial before the Honorable Donald B. Hocker and a jury on the following indictments: Four counts of Attempted Murder, Assault on an Officer while Resisting Arrest, and Failure to Stop for a Blue Light. Thomas J. Quinn represented Applicant at trial. The jury found Applicant guilty of three counts of Assault and Battery, Third Degree (AB3D), Assault and Battery of a High and Aggravated Nature (ABHAN), Resisting Arrest (RA), and Failure to Stop for a Blue Light (FTSBL) on August 26, 2016. The Trial Court sentenced Applicant to nine years imprisonment for the

ABHAN conviction, three years imprisonment on the FTSBL conviction, one year for the RA conviction, and thirty-days imprisonment for each of the AB3D convictions. The Trial Court further ordered that the sentences be served concurrently.

Applicant did not file a Notice of Appeal.

On August 7, 2017, Applicant filed his first application requesting PCR. The South Carolina Attorney General's Office filed a Return to the PCR application on December 18, 2017. Applicant filed an Amended PCR application on June 14, 2018, and the SCAG's Office filed their Amended Return on September 25, 2018.

PCR Evidentiary Hearing

On March 1, 2019, Applicant appeared before the Honorable Brian Gibbons for an evidentiary hearing on the allegations of ineffective assistance of counsel. Attorney Dayne Phillips represented Applicant, and Assistant Attorney General Janell Gregory represented the State. Dr. Nicholas Batalis, Dr. Donna Schwartz-Maddox, Applicant, and Thomas Quinn (Trial Counsel) testified at the hearing.

Dr. Batalis's Expert Testimony

The PCR Court qualified Dr. Nicholas Batalis as an expert in forensic pathology at the hearing. Dr. Batalis testified that he reviewed Officer Steven Lindler's medical records from September 6, 2015; the relevant portions of Applicant's trial transcript; and Officer Lindler's dashboard camera video recording from September 6, 2016. Dr. Batalis testified that, in his expert opinion and based on a reasonable degree of medical certainty, the injuries sustained by Officer Lindler did not meet the definition of "Great Bodily Injury" as provided by the South Carolina General Assembly in Section 16-3-600 of the South Carolina Code of Laws ("Assault and battery; definitions; degrees of offenses"). Dr.

Batalis also testified that, in his expert opinion and based on a reasonable degree of medical certainty, the collision viewed on the dashboard camera video recording was unlikely to have caused death or great bodily injury. Notably, the Court admitted Dr. Batalis's CV and report into evidence at the hearing.

Dr. Schwartz-Maddox's Expert Testimony

The PCR Court also qualified Dr. Donna Schwartz Maddox as an expert in forensic psychology at the hearing. Dr. Maddox testified that she reviewed the Applicant's medical and mental health records. Specifically, Dr. Maddox reviewed the following documents based on her report: "PCR Application 7/7/17; Certificate of release or Discharge from Active Duty 3/6/14; Order Setting Bond Laurens County; Letter from Steven Johnson; LCSW-PIP, confirming treatment 5/11/16, 8/22/16; Letter from Cpt. Ryan Kenny undated; Letter Major Schofield 2/16/15; Letter Staff Sgt Marvin Howard undated; Confidential; Questionnaire for Criminal Cases; ASAP Outpatient Treatment Plan and Review; Sentence Sheets-8/26/16; Indictments Attempted Murder X 4; Indictment Assault on an Officer While Resisting Arrest; Indictment for Failure to Stop; Arrest Warrants (3010200167-71, 3010101356); Mental health Discharge Instructions 1/18/14-1/21/14; Transcript of record 8/24-/8/26/16; Transcript 911 call; Laurens County Hospital Records, Steven Lindler; MAIT Report; VA Records Birmingham; Medical record military; Document Archive Forms; Womac Family Practice Records Cape Fear, NC".

Dr. Maddox testified that, in her expert opinion, the Applicant's PTSD diagnosis contributed to predisposing him to substance abuse and that he had significant mitigation evidence which should have been presented to the Trial Court during the sentencing phase. Specifically, Dr. Maddox could have testified as to the mitigation evidence

regarding Applicant's prior mental health history and treatment, and his poor adjustment after his combat service.

Furthermore, Dr. Maddox testified that Applicant suffers from PTSD as a result of his combat service in the United States Army. Dr. Maddox also testified to specific traumatic events that Applicant witnessed during combat. Dr. Maddox further testified to Applicant's pre-existing trauma, gender identity issues, family history of substance abuse, marital problems due to his PTSD, and Applicant's own struggle with substance abuse. Notably, the Court admitted Dr. Maddox's CV and report into evidence at the hearing.

Applicant's Testimony

Applicant testified at the hearing that Trial Counsel never discussed hiring an expert witness to conduct an independent review of any evidence (i.e., mental health records or the alleged injuries of the complaining witnesses), to testify at his trial in rebuttal of the State's evidence, or to present mitigation evidence at sentencing. Notably, Applicant testified that he had informed Trial Counsel regarding his history of mental health treatment, combat service, and diagnosis of PTSD.

Trial Counsel Thomas Quinn's Testimony

At the hearing, Trial Counsel admitted that he did not consider consulting an expert witness to conduct an independent review of Applicant's medical and mental health records or to review the alleged injuries of the complaining witnesses based on the definitions provided in Section 16-3-600 of the South Carolina Code of Laws. Trial Counsel also admitted that he did not obtain or review all of Applicant's medical and mental health records in preparation for trial. Trial Counsel further admitted that he did not obtain or review Officer Steven Lindler's medical records in preparation for trial.

Based on Dr. Maddox's report and testimony, Trial Counsel admitted that Applicant had significant mitigation evidence and that it was not fully presented to the Trial Court. Trial Counsel also admitted that, had he obtained this evidence prior to trial, his strategy would have been different because it was inconsistent with the defense he presented to the jury and Applicant's testimony at trial.

Based on Dr. Batalis's report and testimony, Trial Counsel admitted that he did not move for a continuance based on Officer Steven Lindler's testimony regarding his injuries and medical records. Specifically, he did not move for a continuance to hire an expert witness to review and rebut the State's evidence and arguments. Trial Counsel also admitted that having an expert witness testify in rebuttal of the State's evidence regarding the Officer Lindler's injuries could have changed the jury's determination regarding their verdict of the lesser-included offense of ABHAN. Specifically, Trial Counsel admitted that, if the jury would have heard expert testimony directly contradicting the State's argument regarding the severity of Officer Lindler's injuries, the jury could have convicted Applicant of one of the lesser-included offenses that does not include the definition of "Great Bodily Injury".

Briefs in Support

After hearing testimony, the PCR Court allowed the parties to submit briefs instead of immediately presenting arguments in support or against the allegations of ineffective assistance of counsel. The arguments presented in support of PCR are as follows.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective

assistance of counsel, an applicant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, a [applicant] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a **preponderance of the evidence**." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP) (emphasis added). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive,

such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

At the evidentiary hearing, Applicant raised the following allegations of ineffective assistance of counsel:

(A) Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Trial Counsel's acts or omissions included, but not are not limited to the following allegations:

(1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial. See *Wiggins v. Smith*, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records in preparation for trial. See *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

(2) Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's

diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence based on Trial Counsel's unreasonable trial strategy.

(3) Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

(4) Trial Counsel failed to hire an expert witness to conduct an independent review of Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury", or whether the act that caused those injuries was likely to produce "Great Bodily Injury" to satisfy that element of Assault and Battery of a High and Aggravated Nature, when it was reasonable and necessary in preparation of trial.

(5) Trial Counsel failed to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this evidence.

(6) Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.

(7) Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.

(8) Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

(9) Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase. Specifically, Trial Counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of Applicant's potential sentence.

(10) Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See *United States v. Cronin*, 466 U.S. 648 (1984).

NOTABLE PAGES IN THE RECORD

The relevant portion of Trial Counsel's opening statement. Tr. 40, ll. 2-7; Tr. 40, ll. 23-25. Officer Steven Linder's testimony is contained on pages 71 through 117 in the trial transcript. See also Tr. 83 - 98 (Tr. 90, ll. 15-21; Tr. 93-94; Tr. 95, l. 3-97, l. 22). The testimony related to Trial Counsel's motion for a mistrial is contained on pages 91 through 94 and 164 through 176 in the trial transcript. Trial Counsel's closing argument is contained on pages 249 through 270, and the State's closing argument is contained on pages 270 through 289 in the trial transcript. See also Tr. 263, ll. 12-24; Tr. 272; Tr. 275; Tr. 279-283; Tr. 286; Tr. 288-291; Tr. 293. The relevant jury instructions are contained on pages 305 through 308 in the trial transcript. See also Tr. 296-314. The jury sent a

note requesting to watch the dashcam video recording. Tr. 315 – 317. Trial Counsel's mitigation presented during the sentencing phase is contained on pages 327 through 331 in the trial transcript.

ARGUMENT

Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution.

In this case, Trial Counsel's performance was deficient, as it fell below an objective standard of reasonableness "under prevailing professional norms." See *Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. 115, 386 S.E.2d 624; see also S.C. Code § 17-27-20(A)(1), (4), and (6). Counsel's deficient performance prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Therefore, Trial Counsel provided ineffective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

- I. **Trial Counsel failed to conduct a reasonable investigation and failed to develop all available, relevant, and admissible or mitigating evidence in preparation for Applicant's trial.**

The Supreme Court of the United States has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; See *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Notably, our Supreme Court held that "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available

mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); see also *Ard v. Caloe*, 372 S.C. 318, 642 S.E.2d 590 (2007) ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.") (internal quotation omitted)).

Furthermore, "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597). The duty to conduct a reasonable investigation extends to consulting and possibly presenting expert witnesses. See *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360-61; see also *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) ("Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder."). Therefore, "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527.

Discussion

In this case, Trial Counsel provided ineffective assistance of counsel by failing to consult an expert witness to conduct an independent review of Applicant's medical and mental health records and to review Officer Stephen Lindler's injuries based on the definitions provided in Section 16-3-600 of the South Carolina Code of Laws. Trial

Counsel's performance is objectively unreasonable. Trial Counsel admitted that he did not obtain or review all of Applicant's medical and mental health records in preparation for trial. Trial Counsel further admitted that he did not obtain or review Officer Lindler's medical records in preparation for trial. Therefore, it is unreasonable for Trial Counsel not to have obtained and reviewed this necessary evidence in preparation for trial, or consulted with expert witnesses. See *Strickland*, 466 U.S. at 691; See *Wiggins*, 539 U.S. at 527; *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743. Trial Counsel testified that her failure to consult with this type of expert witness was not a strategic decision. See *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360 (finding "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.>").

- II. Trial Counsel failed to consult with an expert witness for an independent review of Applicant's mental health records in preparation for trial and in mitigation. Trial Counsel also failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence based on Trial Counsel's unreasonable trial strategy. Trial Counsel further failed to call an expert witness during the mitigation phase of the sentencing hearing to testify regarding Applicant's diagnosis of PTSD and history of mental health treatment when it was reasonable and necessary to present this critical evidence to the Trial Court.

In *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360, our Supreme Court found that "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State" and that the duty to conduct a reasonable investigation extends to consulting and possibly presenting expert witnesses. See *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)

("Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder."); see also *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding it "was not objectively reasonable given the defense theory of the case" for trial counsel not to call witnesses who would have "added significantly to the credibility of petitioner's case"); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

In *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312, 313 (1995), our Supreme Court held that "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness". See *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.").

Discussion

In this case, Trial Counsel's decision not to consult an expert witness regarding Applicant's medical and mental health treatment history "was not objectively reasonable given the defense theory of the case" (i.e., no intent). See *Lounds*, 380 S.C. at 462, 670 S.E.2d at 650 (finding that it "was not objectively reasonable given the defense theory of the case" for counsel not to call witnesses that were critical to his client's defense). Trial Counsel's failure to consult with an expert witness to present critical mitigation evidence to the Trial Court during sentencing was not reasonable based on the information known to Trial Counsel. See *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360. Notably, based on Dr.

Maddox's report and testimony, Trial Counsel admitted that, had he obtained this evidence prior to trial, his strategy would have been different because it was inconsistent with the defense he presented to the jury and Applicant's testimony at trial. See *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313. Therefore, the outcome could have been different if Trial Counsel would have consulted with an expert witness prior to trial and presented expert testimony in mitigation during sentencing.

III. Trial Counsel failed to consult an expert witness to conduct an independent review of Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or whether the act that caused those injuries was likely to produce "Great Bodily Injury" to satisfy that element of Assault and Battery of a High and Aggravated Nature when it was reasonable and necessary. Trial Counsel failed to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this critical evidence to the jury.

In *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360, our Supreme Court found that "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State" and that the duty to conduct a reasonable investigation extends to consulting and possibly presenting expert witnesses. See *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) ("Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder."); see also *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding it "was not objectively reasonable given the defense theory of the case" for trial counsel not to call witnesses who would have "added significantly to the credibility of

petitioner's case"); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

Discussion

In this case, Trial Counsel's failure to consult an expert witness to review Officer Lindler's injuries and to call an expert witness at trial to testify in rebuttal of the State's evidence and arguments is objectively unreasonable based on the expert testimony presented at the evidentiary hearing. Specifically, Trial Counsel admitted that, if an expert witness would have testified that Officer Lindler's injuries did not satisfy the definition of "Great Bodily Injury", the jury could have convicted Applicant of one of the lesser-included offenses that does not include the definition of "Great Bodily Injury" (i.e., Assault and Battery, Second or Third Degree). See *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360 (finding "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.")

- IV. Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.

If applicant's trial counsel failed to object to the error or properly preserve it for appeal, then a proper claim is that counsel was ineffective for failing to object or properly preserve the issues. *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993); see *State v. Hudgins*, 319 S.C. 232, 460 S.E.2d 388 (1998) (finding issue procedurally barred where defense counsel objected to the solicitor throwing a ski mask at defendant during cross-examination, but the court did not rule on the objection and counsel did not object further

or demand a ruling).

Discussion

Trial counsel was ineffective for not preserving his motion for a mistrial for appellate review based on the non-disclosure of Officer Lindler's medical records. Tr. 91-94; Tr. 164-176. See *Drayton*, 312 S.C. 4, 430 S.E.2d 517; *Hudgins*, 319 S.C. 232, 460 S.E.2d 388.

- V. Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

During closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Yet, the "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); See *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (finding a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury).

In *State v. Northcutt*, our Supreme Court explained the boundaries for prosecutors in closing arguments:

Solicitors are bound to rules of fairness in their closing arguments ... While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of

the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted).

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."); See *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."); *Vaughn v. State*, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868 (1974)).

Discussion

In this case, Trial Counsel provided ineffective assistance of counsel by failing to move for a curative instruction and/or mistrial based on the undue prejudice created by the numerous disparaging comments attacking Trial Counsel's credibility. See *Humphries*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."); *State v. Kennedy*, "272 S.C. 231, 250 S.E.2d 338 (1978) (finding curative instruction could not cure the prejudice to the defendant). Trial Counsel also failed to object when the Solicitor repeatedly argued that Applicant was on

drugs despite when there was no corroborating evidence presented at trial.

- VI. Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase. Specifically, Trial Counsel failed to present all reasonable and necessary evidence to the Judge during the sentencing phase in mitigation of Applicant's potential sentence.

See Case law provided in Arguments I and II of this brief.

- VII. Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See *United States v. Cronin*, 466 U.S. 648 (1984).

The United States Supreme Court has held that "prejudice is presumed" when defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 659 (1984); See *Nance v. Ozmint*, 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (holding that "pre-se prejudice occurs if there has been a constructive denial of counsel," which arises when defense counsel's deficient performance constitutes "a classic example of a complete breakdown in the adversarial process"); see also *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an applicant "must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary").

Discussion

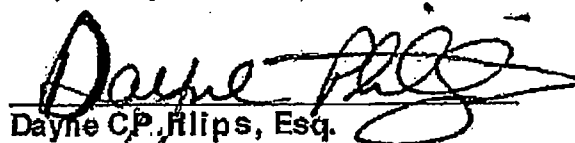
In this case, Trial Counsel "abandoned his role as defense counsel" and "failed to act as an adversary to the prosecution". Specifically, Trial Counsel did not, at a minimum, even attempt to investigate or interview reasonable and necessary expert witnesses in preparation for Applicant's trial. See *Cronin*, 466 U.S. at 659. However, even if trial counsel's deficient performance does not amount to *per se* prejudice, Applicant was

prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). In sum, Trial Counsel provided ineffective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 1038 – 1039; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See *Strickland*, 466 U.S. 668.

CONCLUSION

Based on the foregoing reasons, the undersigned Counsel respectfully requests that this Court grant Applicant's application for PCR. See *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; See S.C. Code§ 17-27-20(A)(1), (4), and (6).

Respectfully submitted,



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ATTORNEY FOR THE APPLICANT

March 15, 2019

CERTIFICATE OF SERVICE

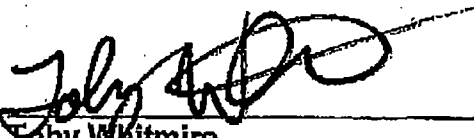
I hereby certify that I have this date served the within and foregoing Memorandum in Support of Applicant's PCR Application by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

The Honorable Brian M. Gibbons
 140 Main St.
 P.O. Drawer 580
 Chester, SC 29706

Lindsey Anne McCallister, Assistant Attorney General
 South Carolina Attorney General's Office
 1000 Assembly Street, Room 519
 Columbia, SC 29201

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 CLERK OF COURT
 2019 MAR 18 PM 12:11
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The Honorable Lynn W. Lancaster
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March 15, 2019

STATE OF SOUTH CAROLINA)
 COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS
 FOR THE EIGHTH JUDICIAL CIRCUIT

2017-CP-30-648

Robert Clinton Harbuck, #369560,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

Order of Dismissal

This matter comes before the Court by way of an application for post-conviction relief filed on August 7, 2017, by Robert Harbuck (Applicant) and amended on June 14, 2018. The State (Respondent) filed a Return on December 18, 2017, requesting an evidentiary hearing. Respondent filed an Amended Return responding to Applicant's amended allegations on September 25, 2018. An evidentiary hearing into the matter was convened on March 1, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Dayne Phillips, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf and presented testimony from two expert witnesses: Dr. Donna Schwartz Maddox, forensic psychiatrist and Dr. Nicholas Batalis, forensic pathologist. Thomas Quinn (Counsel), also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

I. PROCEDURAL HISTORY

Robert Harbuck (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Laurens County Clerk of Court. During the October 2015 term, the Laurens County Grand Jury indicted Applicant for assault on an officer

while resisting arrest (2015-GS-30-1622); four counts of attempted murder (2015-GS-30-1618, -1619, -1620, -1621); and failure to stop for a blue light (2015-GS-30-1710). Thomas Quinn, Esquire, represented him. Assistant Solicitors Dale Scott and Jim Todd of the Eighth Circuit Solicitor's Office prosecuted the case. On August 24-26, 2016, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, circuit court judge.

The jury convicted Applicant of resisting arrest as a lesser-included offense of assault on an officer while resisting arrest (2015-GS-30-1622), three counts of third-degree assault and battery as a lesser-included offense of attempted murder (2015-GS-30-1618, -1619, -1620), assault and battery of a high and aggravated nature as a lesser-included offense of attempted murder (2015-GS-30-1621), and failure to stop for blue lights (2015-GS-30-1710). Applicant was sentenced to one year imprisonment for resisting arrest, thirty days imprisonment for each third-degree battery conviction, nine years imprisonment for assault and battery of a high and aggravated nature, and three years imprisonment for failure to stop for blue lights. All sentences were to run concurrently. Applicant did not file a notice of appeal.

II. SUMMARY OF FACTS

On September 6, 2015, Applicant was driving down I-26 in his gold Chevrolet Silverado "like a NASCAR driver, cutting through traffic, using the emergency lane as a speed lane." (Trial Tr. 35.) A group of co-workers (witnesses) who were traveling on I-26 the same morning, observed Applicant's driving and made a frantic call to 911. (Trial Tr. 35.) Trooper Lindler caught up to Applicant and attempted to pull Applicant over. (Trial Tr. 50.) The witnesses got in front of Applicant and exited the interstate. (Trial Tr. 49.) At that point, Applicant was behind them and began to follow them. (Trial Tr. 50.) The witnesses noticed Applicant and pulled over on the interstate ramp to let him pass as they believed he was fleeing from Trooper Lindler. (Trial Tr.

50.) Instead of passing the witnesses, Applicant pulled up behind them and rammed their vehicle. (Trial Tr. 50.) Trooper Lindler pulled in behind Applicant and, after ramming the witnesses' car, put his truck in reverse and sped towards Trooper Lindler's police cruiser. (Trial Tr. 50-51.) Applicant then drives his truck and pulls it in front of the witnesses' vehicle. (Trial Tr. 51.) Trooper Lindler then positioned his police cruiser between the witnesses' vehicle and Applicant's vehicle. (Trial Tr. 51.) Trooper Lindler ordered Applicant out of the vehicle at gunpoint and Applicant complied. (Trial Tr. 87.) Applicant complied with Trooper Lindler's commands until Applicant was put in handcuffs and he began fighting. (Trial Tr. 88.) Another Trooper showed up at that time, and shortly thereafter, officers from the Clinton Police Department arrived on the scene. (Trial Tr. 88.) Applicant remained combative and officers had to wait for a caged vehicle to transport Applicant from the scene. (Trial Tr. 88.) Once the caged vehicle arrived, multiple officers had to be used to put Applicant in the vehicle as he continued to fight. (Trial Tr. 90.) Officers "drive stunned" Applicant two times during the arrest in order to get him to comply with their commands. (Trial Tr. 140.) Applicant would stop fighting temporarily, but would eventually become combative again. (Trial Tr. 140-142.)

While being transported, Applicant attempted to shimmy out of his handcuffs back of the caged unit and officers had to pull over and radio for assistance. (Trial Tr. 36, 143.) Officers spoke to Applicant, attempted to calm him down, and Applicant appeared to be cooperative. (Trial Tr. 144.) Once officers opened the car door, Applicant became combative again. (Trial Tr. 144.) Applicant was eventually transported to the hospital for an exam. (Trial Tr. 146-147.) Applicant would not consent to an exam and told the doctors, "You're not touching me." (Trial Tr. 147.) Due to Applicant's non-compliance, no blood was drawn at the hospital. (Trial Tr. 148.) Applicant was then taken to jail without further incident. (Trial Tr. 148)

At trial, Applicant testified on his own behalf. During cross-examination, Applicant testified he was not intoxicated at the time of the incident and had only ingested a Red Bull and cigarettes prior to the incident. (Trial Tr. 205.) Applicant testified regarding his military service, which included details of his two tours overseas, a truck accident he was involved in, and coming under indirect fire. (Trial Tr. 179-189.) Applicant also testified he had been treated for mental health issues while in the military. (Trial Tr. 201.)

In mitigation, Counsel submitted a statement from Steven Johnson from the Department of Veterans Affairs and a letter from Major Clinton Schofield. (Trial Tr. 328.) Counsel also explained to the court Applicant had been diagnosed with PTSD and was currently in treatment. (Trial Tr. 328.) Counsel also highlighted Applicant's military service and distinctions. (Trial Tr. 329.)

During sentencing, Judge Hocker stated he was taking into account, to some extent, the fact that Applicant is currently being treated for PTSD. (Trial Tr. 331.) Judge Hocker also noted the significance of the impact involved with Corporal Lindler's patrol vehicle. Judge Hocker stated, "... the impact involved caused the in car video camera to come off the mount. And I've always understood that those things are mounted pretty good just to prevent people that they arrest [from] jerking the thing off. And the impact was such that it knocked that camera off the mount. That's pretty strong. That's pretty strong." (Trial Tr. 332.) Judge Hocker went on to say, "... if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case." (Trial Tr. 332.) Applicant received concurrent sentences of nine years for ABHAN, thirty days for each of the assault and battery (3rd degree) charges, three years for the failure to stop, and one year for

the resisting arrest, (Trial Tr. 333.)

III. ALLEGATIONS RAISED

During the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel:

- a. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- b. Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-410 and 430.
- c. Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f), SCR.CrimP; see also S.C. Code § 17-24-10.
- d. Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.
- e. Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronin, 466 U.S. 648 (1984).
- f. Trial Counsel failed to object to inadmissible evidence during Applicant's trial.
- g. Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.
- h. Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction.

and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

- i. Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.
- j. Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.
- k. Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.
- l. Trial Counsel failed to hire an expert witness to conduct an independent review of Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or whether the act that caused those injuries was likely to produce "Great Bodily Injury" to satisfy that element of Assault and Battery of a High and Aggravated Nature when it was reasonable and necessary in requesting a lesser-included offense.
- m. Trial Counsel failed to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this evidence.
- n. Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

An evidentiary hearing was held on March 1, 2019. Prior to the hearing, Applicant expressly waived the allegation pertaining to the Blair hearing and Counsel's failure to request jury instructions on the affirmative defense of insanity or guilty but mentally ill. As such, those allegations should be denied and dismissed. During the hearing, Applicant abandoned the allegation pertaining to Counsel's failure to object to inadmissible evidence during Applicant's

trial as Applicant failed to provide any testimony regarding this claim. As such, that allegation should be denied and dismissed. At the conclusion of the hearing, counsel for each side was allowed time to provide a brief in support of their case. This brief follows.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

V. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

Applicant presented an expert witness in forensic psychiatry, Dr. Donna Schwartz Maddox, who testified Applicant was competent to stand trial and criminally responsible for his actions on the date of the incident. Dr. Maddox's report also indicates Applicant was voluntarily intoxicated at the time of the incident, which contradicts his trial testimony. Her report was entered as Applicant's Exhibit #6. Dr. Maddox also testified she would not have been helpful for Applicant at trial as there is no question regarding Applicant's criminal responsibility or capacity in this case.

Counsel testified there was no question Applicant was competent to stand trial. Counsel testified he did not consider using insanity as a defense in this case.

Counsel was not deficient in failing to have Applicant evaluated for competency as Applicant's own expert indicates Applicant was competent to stand trial and criminally responsible

for his actions. Counsel did not pursue an insanity defense because Applicant did not qualify for such a defense. Applicant has not provided this Court with any information showing he was not competent to stand trial or would have been successful pursuing an insanity defense.

Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-410 and 430.

This allegation was expressly waived by Applicant on the record during the evidentiary hearing. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f), SCRCrimP; see also S.C. Code §17-24-10.

Although Applicant maintained that he was not intoxicated at the time of the incident, Dr. Maddox testified Applicant admitted to her that he was under the influence of methamphetamine and had been up for three days at the time of the incident. In Dr. Maddox's opinion, she found Applicant was criminally responsible for his actions.

This Court finds Dr. Maddox's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to pursue the affirmative defense of insanity as Applicant was not entitled to such defense.

Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

At the hearing, Dr. Maddox testified Applicant suffers from PTSD as a result of his service in the U.S. Army. Dr. Maddox testified Applicant told her about his two tours in Afghanistan and his exposure to trauma overseas. Dr. Maddox testified Applicant told her about seeing a suicide bomber blow himself up, and an incident where his camp was blown in half. Dr. Maddox testified Applicant had pre-existing trauma and gender identity issues. Dr. Maddox testified it is common for someone with those issues to join the military to try to overcome the gender identity issues. Dr. Maddox testified Applicant was an alcoholic and had issues with his wife when he was married. Dr. Maddox testified Applicant was using three grams of methamphetamine a day at the time of the accident. Dr. Maddox testified Applicant believed he was being followed on the day of the incident and Applicant had not slept in three days. Dr. Maddox testified she did not believe there is a capacity issue or criminal responsibility issue, but she would have presented this during mitigation at Applicant's sentencing.

Counsel testified he could not have used Dr. Maddox's report at trial because Applicant admitted to Dr. Maddox that he was intoxicated and had been up for three days prior to the incident, which was a drastically different story than what Applicant testified to at his trial. At trial, Applicant testified he had only ingested a Red Bull and cigarettes on the date of the incident and denied any drug use despite the law enforcement witnesses testifying that he appeared to be "on something." (Trial Tr. 205.) Applicant also testified that he had been treated for mental health issues in the military. (Trial Tr. 201.) Counsel testified Dr. Maddox's report would have completely changed their trial strategy and would not have been helpful at trial. Dr. Maddox's testimony seemed to concede this point as she testified she did not think there was a criminal responsibility or capacity issue that she could have assisted with at trial.

This Court finds Dr. Maddox's testimony and Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient or any resulting prejudice from the alleged deficiency as Counsel testified Dr. Maddox would not have been helpful at trial because he told her a completely different story than what he testified to at trial. Additionally, Dr. Maddox's own testimony also indicates she would not have been helpful for Applicant at trial.

Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronin, 466 U.S. 648 (1984).

Applicant argues Counsel should have presented an expert during trial to show Applicant suffers from PTSD. Applicant also argues Counsel should have presented an expert at trial to show the impact of the collision with Corporal Lindler's vehicle did not cause and could not have caused great bodily injury to Corporal Lindler and, therefore, Applicant could not be found guilty of ABHAN.

Counsel testified his trial strategy was to show Applicant could not have formulated the intent necessary to be convicted of the charges. Based on what Applicant told Counsel, this was a reasonable trial strategy since Counsel was unaware of Applicant's intoxication at the time of the incident. Counsel had Applicant testify regarding his military experience and symptoms he experienced on the date of the incident. During his closing argument, Counsel provided argument regarding Applicant's inability to formulate intent as Applicant, "was not in his right mind." (Trial Tr. 250.)

This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient as Counsel articulated a valid trial strategy to show Applicant could not formulate intent, which would have been destroyed had Counsel presented the case through Dr. Maddox. Under Counsel's strategy, Applicant was convicted on all lesser included offenses -- except for the failure to stop for blue lights charge -- and received only nine years out of a possible twenty-four year sentence.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. Strickland, 466 U.S. 668, (1984). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

This Court finds Applicant has failed to show that the outcome of his trial would have been different had Counsel's trial strategy acknowledge Applicant's voluntary intoxication because he lied about it during his trial. Applicant was able to keep confirmation of his intoxication from

being considered by the jury or the trial judge and, based on the comments by the trial judge during sentencing, Applicant was clearly not prejudiced by Counsel's trial strategy. Based on the standard set forth in Strickland, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to object to inadmissible evidence during Applicant's trial.

Applicant failed to present any testimony regarding this claim at the evidentiary hearing, consequently abandoning this allegation. Therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.

During its closing argument, the solicitor argued, "[W]hen you use a deadly weapon, a four ton truck that is capable of traveling at great rates of speed and you intentionally ram somebody's car with it, the inference there is malice. The inference that you mean great harm." (Trial Tr. 279.) Counsel objected and a sidebar conference was held. The State went on to argue malice can be inferred from the use of a deadly weapon. The Court excused the jury at the end of the State's closing and Counsel was able to put on the record his objection to the State's comment regarding malice. Counsel cited the holding in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), to the trial court in support of his argument that the jury should not be able to infer malice because Counsel had presented evidence that would "reduce, mitigate or excuse, or justify an assault and battery with an intent to kill" (Trial Tr. 290.) In Belcher, the South Carolina Supreme Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged

that malice may be inferred from the use of a deadly weapon.” *Id.* at 612, 685 S.E.2d at 810. The Court’s ruling only pertains to the trial court’s instruction on implied malice to the jury, it does not limit the State’s ability to argue implied malice during their closing argument.

The trial court found, “[U]nder Belcher the mitigation offered would be sufficient enough to not charge inference of malice by use of a deadly weapon.” (Trial Tr. 294.) The trial court removed the inference language from the jury charge over the State’s objection. (Trial Tr. 294.) Counsel requested the trial court provide a curative instruction to the jury regarding the State’s closing argument on inferring malice. (Trial Tr. 295.) The trial court provided the jury with a charge that requires them to follow the law as the court charges, even if it contradicts what the lawyers have argued. (Trial Tr. 295.)

Applicant has alleged Counsel was deficient for failing to object to the trial court’s curative instruction to the jury and move for a mistrial. “A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial.” State v. Wilson, 3889 S.C. 579, 698 S.E.2d 862 (2010). “The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (2009) (citing State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (2005)).

Here, the trial court acknowledged the issue as to whether Belcher applied in this case was an “extremely close issue.” (Trial Tr. 294.) The trial court provided the remedy it believed to be appropriate in this case, which was similar to the remedy the trial court provided when Counsel moved for a mistrial during Corporal Lindler’s testimony regarding his injuries. (Trial Tr. 91-94.)

The trial court made it clear the issue of whether malice can be inferred in this case was an “extremely close issue” and, even if Counsel had moved for a mistrial, it would not have been

appropriate to grant such a motion because Belcher does not prevent the State from arguing implied malice in their closing argument. The trial court, even though it believed the issue to be close, followed the Court's ruling in Belcher and appropriately instructed the jury. This Court finds Applicant has failed to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

Counsel objected twice during the State's closing argument. Counsel objected when the State started talking about affirmative defenses in South Carolina. (Trial Tr. 275.) In his objection, Counsel argued the State's comments were not a true statement of law and it was not relevant to the case. (Trial Tr. 275.) The trial court overruled the objection and urged the solicitor to move on with his argument. (Trial Tr. 275.) Counsel again objected when the State argued implied malice to the jury. (Trial Tr. 279.) Counsel stated the solicitor's argument was "a complete misstatement" and then noted there were Supreme Court cases. (Trial Tr. 279-280.) The trial court held a sidebar conference and allowed the State to proceed with their argument. (Trial Tr. 280.)

Applicant has alleged he should have objected more based on the content of the State's closing argument. During the PCR hearing, Counsel testified he did not continue to object to the State's closing because it was not hurting their case. He elaborated the jury was not paying a bit of attention to the Solicitor and he did not feel any additional objections were necessary.

Applicant alleges the State made inappropriate comments regarding Applicant's drug use during his closing argument and Counsel was deficient for failing to object. "A solicitor has a

right to state his version of the testimony and to comment on the weight to be given such testimony." Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (citing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998)). The State had two law enforcement officers testify during their case-in-chief that they believed Applicant was impaired during the incident. Corporal Lindler testified Applicant exhibited, "normal behavior for an impaired driver." (Trial Tr. 76.) Corporal Lindler also testified intended to conduct a field sobriety test on Applicant after pulling him over, but Applicant was too violent. (Trial Tr. 89.) Officer Scott Peay with Clinton Public Safety testified in his opinion Applicant was "definitely impaired." (Trial Tr. 146.) This Court finds the State's comments regarding Applicant's alleged drug use were reasonable inferences that could be drawn from the testimony of the officers at trial. As such, Counsel was not deficient in failing to object because the solicitor's comments were not objectionable.

This Court finds Applicant has failed to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.

Applicant alleges Counsel did not preserve his motion for a mistrial after Corporal Lindler testified regarding medical injuries he suffered. During the trial, Counsel moved for a mistrial following testimony by Corporal Lindler that he suffered herniated discs as a result of the collision caused by Applicant. (Trial Tr. 93.) The trial court denied Counsel's motion, but, following an in-camera examination of Corporal Lindler, issued a curative instruction to the jury to disregard Corporal Lindler's testimony regarding his injury. (Trial Tr. 98.) Counsel objected stating the instruction was not sufficient and again moved for a mistrial. (Trial Tr. 98.) The trial court did

not address Counsel again regarding the mistrial. Applicant alleges Counsel's failure to have the trial court address his follow-up motion prevented him from preserving the issue for appeal.

The South Carolina Supreme Court held in State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), that a defendant adequately preserved for appeal his claim that admission of testimony concerning proposed polygraph test required a mistrial where defendant immediately objected, moved for a mistrial after the jury was removed, and renewed his motion for a mistrial following the court's curative instructions.

Here, directly after Corporal Lindler's testimony, Counsel requested a sidebar conference after which the judge excused the jury. (Trial Tr. 91.) Counsel provided a thorough argument regarding his motion for a mistrial and the trial court allowed Counsel to engage in an in-camera examination of Corporal Lindler regarding his injury and "depending on what he testifies to, it may justify the Court issuing some curative instruction to disregard his testimony." (Trial Tr. 94.) At the conclusion of the in-camera examination, the trial court explained it would instruct the jury to disregard the testimony of Corporal Lindler as it related to the existence of his herniated discs. (Trial Tr. 98.) Once again, Counsel objected to the instruction as it was not sufficient and requested a mistrial. (Trial Tr. 98.)

This Court finds Applicant has failed to establish how Counsel was deficient as Counsel made the proper objections at the appropriate times and this issue is clearly preserved for appeal. Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Therefore, Applicant has failed to meet his burden to show how Counsel is deficient or how he was prejudiced by Counsel's representation. Therefore, this allegation must be denied and dismissed with prejudice.

Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.

This allegation was expressly waived by Applicant on the record during the evidentiary hearing. Therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.

Applicant alleges Counsel should have filed a Motion for Reconsideration in order to provide the trial court with mitigation evidence that was not presented during sentencing regarding Applicant's PTSD. Counsel testified he did present mitigation during the sentencing phase of Applicant's trial. Counsel testified he presented a statement from Steven Johnson with the Department of Veteran Affairs and a letter from Major Schofield on Applicant's behalf. Counsel also testified the trial court was aware of Applicant's PTSD diagnosis and the record shows the trial judge took that into account during the sentencing. (Trial Tr. 331.) The record also shows the trial court was bothered by the force of the collision Applicant caused when he rammed Corporal Lindler's vehicle. (Trial Tr. 332.)

During the PCR hearing, Applicant presented testimony from Dr. Maddox to show Counsel should have provided additional mitigation to the trial court during sentencing, however, Counsel testified Dr. Maddox's report would not have been useful in Applicant's case. Counsel testified he could not have used Dr. Maddox for mitigation because Applicant testified during the trial he was not intoxicated during the incident. Dr. Maddox's report clearly states the PTSD was secondary to the voluntary intoxication. Counsel would not have been able to present an expert witness to provide mitigation regarding Applicant's PTSD without conceding the voluntary intoxication, which, as Counsel testified, would have completely changed their trial strategy.

This Court finds credible Counsel's testimony with respect to this allegation. This Court finds Applicant has failed to show how the trial court would have imposed a more favorable sentence on Applicant had Counsel filed a Motion for Reconsideration and presented an expert on PTSD. During the sentencing, Applicant received the benefit of the trial court taking his PTSD into account while being able to maintain he was not under the influence at the time of the incident. Counsel would not have been able to present an expert during mitigation on Applicant's PTSD alone because, as Dr. Maddox's report clearly states, the PTSD was secondary to Applicant's voluntary intoxication. Therefore, Applicant has failed to meet his burden on this issue as he has failed to show how Counsel was deficient or how he was prejudiced by Counsel's failure to file a Motion for Reconsideration. Therefore, this allegation must be denied and dismissed with prejudice.

Trial Counsel failed to have an expert review Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or call an expert to rebut the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Lindler's injuries did not meet the definition of "Great Bodily Injury."

Applicant argues Counsel was deficient for failing to have an expert review Corporal Lindler's medical records or testify that his injuries did not meet the definition of "great bodily injury." Applicant maintains he could not have been convicted of ABHAN if Counsel had presented an expert on "great bodily injury."

Assault and battery of a high and aggravated nature is defined as:

A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and:

- (a) great bodily injury to another person results; or
- (b) the act is accomplished by means likely to produce death or great bodily injury.

S.C. Code Ann. §16-3-600 (B)(1) (1976) (emphasis added).

During the hearing, Dr. Nicholas Batalis was admitted as an expert in forensic pathology. Dr. Batalis provided testimony regarding the medical report on Corporal Lindler's herniated discs and whether the collision between Applicant's truck and Corporal Lindler's vehicle was likely to produce "great bodily injury." The State objected to Dr. Batalis' testimony regarding the collision as he does not have the training and experience necessary to provide an expert opinion regarding vehicle collisions.

Counsel testified he does not believe the trial court would have allowed Dr. Batalis' testimony. Counsel testified Dr. Batalis would not have been helpful at trial because the report was speculative and would have infringed on the province of the jury. Counsel testified the trial judge submitted all lesser included offenses with definitions, so there was no need for an expert on great bodily injury because the jury had already been provided all of the necessary information. Counsel also testified he would not have used Dr. Batalis at trial because Dr. Batalis cannot say anything regarding moderate bodily injury and Counsel believed the facts of this case supported the jury's verdict. Counsel testified the jury was properly instructed on assault and battery of a high and aggravated nature.

During sentencing, the trial court stated,

What I felt like was significant as it relates to Corporal Lindler, the impact involved caused the in car video camera to come off the mount. And I've always understood that those things are mounted pretty good just to prevent people that they arrest [from] jerking the thing off. And the impact was such that I knocked that camera off the mount. That's pretty strong. That's pretty strong.

(Trial Tr. 332.) The trial court evaluated the force of the impact to be severe based on the video of the collision. Dr. Batalis testified on cross-examination he did not know how fast the Applicant's vehicle was going at the time of the collision and he did not know how much force it would take to knock the camera off the mount in Corporal Lindler's vehicle.

This Court finds credible Counsel's testimony with respect to this allegation. This Court also finds Dr. Batalis' opinion on whether the collision could have caused great bodily injury is outside the scope of his expertise as he testified he did not have any training or experience in estimating the speed of a vehicle, accident reconstruction, or how much force would be necessary to cause great bodily injury. This Court finds Applicant has failed to meet his burden to show Counsel was deficient for failing to call an expert on great bodily injury because, as Counsel testified, Dr. Batalis' report was speculative and would not have been admissible at trial. Therefore, this allegation must be denied and dismissed with prejudice.

Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

Applicant argues Counsel should have presented an expert to testify at the sentencing phase of the trial regarding Applicant's PTSD and other mental health issues. Applicant presented testimony from Dr. Maddox who testified about Applicant's military deployments, gender identity issue, and substance abuse issues. Dr. Maddox testified she found Applicant to be criminally responsible for the incident and found his PTSD to be secondary to his voluntary intoxication.

Counsel testified he would not have used Dr. Maddox's report at trial because it would have destroyed their trial strategy of negating intent. Additionally, Dr. Maddox's report contradicts Applicant's trial testimony that he was not under the influence at the time of the incident. Applicant insinuated during cross-examination at the PCR hearing that Counsel should have obtained an expert solely on the issue of PTSD as if the substance abuse aspect of Dr. Maddox's report could somehow be isolated from her overall opinion. As Dr. Maddox's report shows, Applicant's PTSD is *secondary* to his substance abuse and any qualified expert who examines Applicant regarding his mental health would not be able to separate PTSD from Applicant's drug abuse.

Counsel testified the judge was aware of Applicant's PTSD and Counsel testified he also provided a information from the Department of Veteran Affairs and letter from a U.S. Army Major Schofield on Applicant's behalf. During sentencing, the trial judge stated, "I am taking into account to some extent the fact that you are currently being treated for PTSD." (Trial Tr. 331.)

Later, the trial judge stated,

You know, if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, which is 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case.

(Trial Tr. 332.)

This Court finds Applicant was afforded mitigation from the information Counsel presented. This Court also finds credible Counsel's testimony that he would not have been able to use Dr. Maddox's report for mitigation as it would have destroyed their trial strategy in negating Applicant's intent. Applicant has failed to show this court how Counsel was deficient for failing to present expert mitigation because, as Dr. Maddox's report shows, expert mitigation would have shown Applicant was voluntarily intoxicated during the incident. Applicant, who admitted during the post-conviction relief hearing that he lied under oath at his trial, would not have benefited from an expert because, just like Dr. Maddox's report indicates, Applicant is criminal liable and the PTSD was secondary to Applicant's voluntary intoxication. The trial judge was clearly disturbed by Applicant's actions towards Corporal Lindler, and, had mitigation been provided showing Applicant was voluntarily intoxicated during the incident, the trial court likely would have increased Applicant's sentence. Applicant was able to receive the benefit of mitigation for his PTSD while denying his intoxication during sentencing.

This Court finds Applicant has failed to meet his burden to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. Therefore, this allegation must be denied and dismissed with prejudice.

VI. CONCLUSION

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

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

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

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

BRIAN M. GIBBONS
Presiding Judge
Eighth Judicial Circuit

_____, South Carolina



Dayne Phillips <dayne@pricebenowitz.com>

Robert Harbuck Proposed Order of Dismissal

Gibbons, Brian Law Clerk (Ryan Swaney) <bglbbonslo@sccourts.org>

Fri, May 17, 2019 at 11:53 AM

To: Dayne Phillips <dayne@pricebenowitz.com>

Cc: Janell Gregory <JGregory@scag.gov>, Courtney Powers <courtney@pricebenowitz.com>

Good afternoon Counsel,

Judge Gibbons signed the order this past week with no changes and mailed to the clerk for filing.

Thanks,

Ryan S. Swaney
Law Clerk to Judge Brian M. Gibbons

On May 17, 2019, at 11:05 AM, Dayne Phillips <dayne@pricebenowitz.com<mailto:dayne@pricebenowitz.com>> wrote:

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Good Morning, Mr. Swaney:

I hope you are doing well. I am following up to confirm whether the Order of Dismissal in Robert Harbuck's PCR case has been signed by Judge Gibbons and whether there were any changes to the proposed Order by Judge Gibbons.

Thank you,

[width=]<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.pricebenowitz.com_&d=DwMFaQ&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=SjCrfo21lDfepoYWWaXtzUBioltSecOCmhra3yjWW2b4&m=SF02Cf_DsHBLTKiOvXm76GXnSd76Gonk0BAXZGbsN4&s=cVAcbTS8lfSWo8lkbzR7oRffEDHrLqA4Haw4Jl5AJg&e=>
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JUN 28 2019

S.C. SUPREME COURT

*OF COUNSEL

110 NORTH WASHINGTON STREET, SUITE 303
ROCKVILLE MD 20850

10505 JUDICIAL DRIVE, SUITE 101
FAIRFAX, VA 22030

June 25, 2019

The Honorable Daniel E. Shearhouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Robert Harbuck v. State of South Carolina
ORDER OF DISMISSAL
Appellate Case No.: 2019-000948

Dear Mr. Shearhouse:

I have enclosed a copy of the signed Order of Dismissal that Assistant Attorney General Janell Gregory re-sent to Judge Gibbons to sign and file with the Laurens County Clerk of Court since the original Order was not on file with the Clerk's Office.

Thank you for your assistance in this matter. If you have any questions or concerns, please notify my office.

Sincerely,

Enclosure (noted)

cc: Janell Gregory, Esq.
Robert Harbuck


Dayne C. Phillips, Esq.

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WWW.PRICEBENOWITZ.COM

STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

ROBERT CLINTON HARBUCK, #369560

Plaintiff,

vs.

STATE OF SOUTH CAROLINA

Defendant.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-30-648

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney: Dayne C. Phillips, Bar No. _____ Address: 1614 Taylor Street, Suite D Columbia, South Carolina 29201 Phone: _____ Fax: _____ E-mail: _____ Other: _____	Defendant's Attorney: Janell H. Gregory, Bar No. _____ Address: Post Office Box 11549 Columbia, South Carolina 29211 Phone: _____ Fax: _____ E-mail: _____ Other: _____
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☒ NO	
SECTION II: Motion/Order Type	
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
SECTION III: Motion Fee	
☐ PAID - AMOUNT: \$ _____ ☐ EXEMPT: (check reason)	
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

Robert Clinton Harbuck, #369560,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

2017-CP-30-648

Order of Dismissal

RECEIVED

JUN 28 2019

S.C. SUPREME COURT

This matter comes before the Court by way of an application for post-conviction relief filed on August 7, 2017, by Robert Harbuck (Applicant) and amended on June 14, 2018. The State (Respondent) filed a Return on December 18, 2017, requesting an evidentiary hearing. Respondent filed an Amended Return responding to Applicant's amended allegations on September 25, 2018. An evidentiary hearing into the matter was convened on March 1, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Dayne Phillips, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf and presented testimony from two expert witnesses: Dr. Donna Schwartz Maddox, forensic psychiatrist and Dr. Nicholas Batalis, forensic pathologist. Thomas Quinn (Counsel), also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

I. PROCEDURAL HISTORY

Robert Harbuck (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Laurens County Clerk of Court. During the October 2015 term, the Laurens County Grand Jury indicted Applicant for assault on an officer



while resisting arrest (2015-GS-30-1622); four counts of attempted murder (2015-GS-30-1618, -1619, -1620, -1621); and failure to stop for a blue light (2015-GS-30-1710). Thomas Quinn, Esquire, represented him. Assistant Solicitors Dale Scott and Jim Todd of the Eighth Circuit Solicitor's Office prosecuted the case. On August 24-26, 2016, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, circuit court judge.

The jury convicted Applicant of resisting arrest as a lesser-included offense of assault on an officer while resisting arrest (2015-GS-30-1622), three counts of third-degree assault and battery as a lesser-included offense of attempted murder (2015-GS-30-1618, -1619, -1620), assault and battery of a high and aggravated nature as a lesser-included offense of attempted murder (2015-GS-30-1621), and failure to stop for blue lights (2015-GS-30-1710). Applicant was sentenced to one year imprisonment for resisting arrest, thirty days imprisonment for each third-degree battery conviction, nine years imprisonment for assault and battery of a high and aggravated nature, and three years imprisonment for failure to stop for blue lights. All sentences were to run concurrently. Applicant did not file a notice of appeal.

II. SUMMARY OF FACTS

On September 6, 2015, Applicant was driving down I-26 in his gold Chevrolet Silverado "like a NASCAR driver, cutting through traffic, using the emergency lane as a speed lane." (Trial Tr. 35.) A group of co-workers (witnesses) who were travelling on I-26 the same morning, observed Applicant's driving and made a frantic call to 911. (Trial Tr. 35.) Trooper Lindler caught up to Applicant and attempted to pull Applicant over. (Trial Tr. 50.) The witnesses got in front of Applicant and exited the Interstate. (Trial Tr. 49.) At that point, Applicant was behind them and began to follow them. (Trial Tr. 50.) The witnesses noticed Applicant and pulled over on the Interstate ramp to let him pass as they believed he was fleeing from Trooper Lindler. (Trial Tr.

50.) Instead of passing the witnesses, Applicant pulled up behind them and rammed their vehicle. (Trial Tr. 50.) Trooper Lindler pulled in behind Applicant and, after ramming the witnesses' car, put his truck in reverse and sped towards Trooper Lindler's police cruiser. (Trial Tr. 50-51.) Applicant then drives his truck and pulls it in front of the witnesses' vehicle. (Trial Tr. 51.) Trooper Lindler then positioned his police cruiser between the witnesses' vehicle and Applicant's vehicle. (Trial Tr. 51.) Trooper Lindler ordered Applicant out of the vehicle at gunpoint and Applicant complied. (Trial Tr. 87.) Applicant complied with Trooper Lindler's commands until Applicant was put in handcuffs and he began fighting. (Trial Tr. 88.) Another Trooper showed up at that time, and shortly thereafter, officers from the Clinton Police Department arrived on the scene. (Trial Tr. 88.) Applicant remained combative and officers had to wait for a caged vehicle to transport Applicant from the scene. (Trial Tr. 88.) Once the caged vehicle arrived, multiple officers had to be used to put Applicant in the vehicle as he continued to fight. (Trial Tr. 90.) Officers "drive stunned" Applicant two times during the arrest in order to get him to comply with their commands. (Trial Tr. 140.) Applicant would stop fighting temporarily, but would eventually become combative again. (Trial Tr. 140-142.)

While being transported, Applicant attempted to shimmy out of his handcuffs back of the caged unit and officers had to pull over and radio for assistance. (Trial Tr. 36, 143.) Officers spoke to Applicant, attempted to calm him down, and Applicant appeared to be cooperative. (Trial Tr. 144.) Once officers opened the car door, Applicant became combative again. (Trial Tr. 144.) Applicant was eventually transported to the hospital for an exam. (Trial Tr. 146-147.) Applicant would not consent to an exam and told the doctors, "You're not touching me." (Trial Tr. 147.) Due to Applicant's non-compliance, no blood was drawn at the hospital. (Trial Tr. 148.) Applicant was then taken to jail without further incident. (Trial Tr. 148)



At trial, Applicant testified on his own behalf. During cross-examination, Applicant testified he was not intoxicated at the time of the incident and had only ingested a Red Bull and cigarettes prior to the incident. (Trial Tr. 205.) Applicant testified regarding his military service, which included details of his two tours overseas, a truck accident he was involved in, and coming under indirect fire. (Trial Tr. 179-189.) Applicant also testified he had been treated for mental health issues while in the military. (Trial Tr. 201.)

In mitigation, Counsel submitted a statement from Steven Johnson from the Department of Veterans Affairs and a letter from Major Clinton Schofield. (Trial Tr. 328.) Counsel also explained to the court Applicant had been diagnosed with PTSD and was currently in treatment. (Trial Tr. 328.) Counsel also highlighted Applicant's military service and distinctions. (Trial Tr. 329.)

During sentencing, Judge Hocker stated he was taking into account, to some extent, the fact that Applicant is currently being treated for PTSD. (Trial Tr. 331.) Judge Hocker also noted the significance of the impact involved with Corporal Lindler's patrol vehicle. Judge Hocker stated, "... the impact involved caused the in car video camera to come off the mount. And I've always understood that those things are mounted pretty good just to prevent people that they arrest [from] jerking the thing off. And the impact was such that it knocked that camera off the mount. That's pretty strong. That's pretty strong." (Trial Tr. 332.) Judge Hocker went on to say, "... if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case." (Trial Tr. 332.) Applicant received concurrent sentences of nine years for ABHIAN, thirty days for each of the assault and battery (3rd degree) charges, three years for the failure to stop, and one year for



the resisting arrest. (Trial Tr. 333.)

III. ALLEGATIONS RAISED

During the evidentiary hearing, Applicant proceeded on the following allegations:

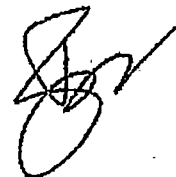
1. Ineffective Assistance of Counsel:

- a. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- b. Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-410 and 430.
- c. Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f), SCRCrIMP; see also S.C. Code § 17-24-10.
- d. Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.
- e. Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronk, 466 U.S. 648 (1984).
- f. Trial Counsel failed to object to inadmissible evidence during Applicant's trial.
- g. Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.
- h. Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction

and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

- i. Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.
- j. Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.
- k. Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.
- l. Trial Counsel failed to hire an expert witness to conduct an independent review of Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or whether the act that caused those injuries was likely to produce "Great Bodily Injury" to satisfy that element of Assault and Battery of a High and Aggravated Nature when it was reasonable and necessary in requesting a lesser-included offense.
- m. Trial Counsel failed to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this evidence.
- n. Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

An evidentiary hearing was held on March 1, 2019. Prior to the hearing, Applicant expressly waived the allegation pertaining to the Blair hearing and Counsel's failure to request jury instructions on the affirmative defense of insanity or guilty but mentally ill. As such, those allegations should be denied and dismissed. During the hearing, Applicant abandoned the allegation pertaining to Counsel's failure to object to inadmissible evidence during Applicant's



trial as Applicant failed to provide any testimony regarding this claim. As such, that allegation should be denied and dismissed. At the conclusion of the hearing, counsel for each side was allowed time to provide a brief in support of their case. This brief follows.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application, Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

V. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Cl. App. 2015).

Applicant presented an expert witness in forensic psychiatry, Dr. Donna Schwartz Maddox, who testified Applicant was competent to stand trial and criminally responsible for his actions on the date of the incident. Dr. Maddox's report also indicates Applicant was voluntarily intoxicated at the time of the incident, which contradicts his trial testimony. Her report was entered as Applicant's Exhibit #6. Dr. Maddox also testified she would not have been helpful for Applicant at trial as there is no question regarding Applicant's criminal responsibility or capacity in this case.

Counsel testified there was no question Applicant was competent to stand trial. Counsel testified he did not consider using insanity as a defense in this case.

Counsel was not deficient in failing to have Applicant evaluated for competency as Applicant's own expert indicates Applicant was competent to stand trial and criminally responsible

for his actions. Counsel did not pursue an insanity defense because Applicant did not qualify for such a defense. Applicant has not provided this Court with any information showing he was not competent to stand trial or would have been successful pursuing an insanity defense,

Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-410 and 430.

This allegation was expressly waived by Applicant on the record during the evidentiary hearing. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f), SCRCrimP; see also S.C. Code §17-24-10.

Although Applicant maintained that he was not intoxicated at the time of the incident, Dr. Maddox testified Applicant admitted to her that he was under the influence of methamphetamine and had been up for three days at the time of the incident. In Dr. Maddox's opinion, she found Applicant was criminally responsible for his actions.

This Court finds Dr. Maddox's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to pursue the affirmative defense of insanity as Applicant was not entitled to such defense.

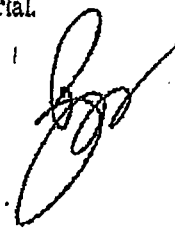
Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.



Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

At the hearing, Dr. Maddox testified Applicant suffers from PTSD as a result of his service in the U.S. Army. Dr. Maddox testified Applicant told her about his two tours in Afghanistan and his exposure to trauma overseas. Dr. Maddox testified Applicant told her about seeing a suicide bomber blow himself up, and an incident where his camp was blown in half. Dr. Maddox testified Applicant had pre-existing trauma and gender identity issues. Dr. Maddox testified it is common for someone with those issues to join the military to try to overcome the gender identity issues. Dr. Maddox testified Applicant was an alcoholic and had issues with his wife when he was married. Dr. Maddox testified Applicant was using three grams of methamphetamine a day at the time of the accident. Dr. Maddox testified Applicant believed he was being followed on the day of the incident and Applicant had not slept in three days. Dr. Maddox testified she did not believe there is a capacity issue or criminal responsibility issue, but she would have presented this during mitigation at Applicant's sentencing.

Counsel testified he could not have used Dr. Maddox's report at trial because Applicant admitted to Dr. Maddox that he was intoxicated and had been up for three days prior to the incident, which was a drastically different story than what Applicant testified to at his trial. At trial, Applicant testified he had only ingested a Red Bull and cigarettes on the date of the incident and denied any drug use despite the law enforcement witnesses testifying that he appeared to be "on something." (Trial Tr. 205.) Applicant also testified that he had been treated for mental health issues in the military. (Trial Tr. 201.) Counsel testified Dr. Maddox's report would have completely changed their trial strategy and would not have been helpful at trial. Dr. Maddox's testimony seemed to concede this point as she testified she did not think there was a criminal responsibility or capacity issue that she could have assisted with at trial.



This Court finds Dr. Maddox's testimony and Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient or any resulting prejudice from the alleged deficiency as Counsel testified Dr. Maddox would not have been helpful at trial because he told her a completely different story than what he testified to at trial. Additionally, Dr. Maddox's own testimony also indicates she would not have been helpful for Applicant at trial.

Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to subject the prosecutor's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronk, 466 U.S. 648 (1984).

Applicant argues Counsel should have presented an expert during trial to show Applicant suffers from PTSD. Applicant also argues Counsel should have presented an expert at trial to show the impact of the collision with Corporal Lindler's vehicle did not cause and could not have caused great bodily injury to Corporal Lindler and, therefore, Applicant could not be found guilty of ABHAN.

Counsel testified his trial strategy was to show Applicant could not have formulated the intent necessary to be convicted of the charges. Based on what Applicant told Counsel, this was a reasonable trial strategy since Counsel was unaware of Applicant's intoxication at the time of the incident. Counsel had Applicant testify regarding his military experience and symptoms he experienced on the date of the incident. During his closing argument, Counsel provided argument regarding Applicant's inability to formulate intent as Applicant, "was not in his right mind." (Trial Tr. 250.)



This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Counsel was deficient as Counsel articulated a valid trial strategy to show Applicant could not formulate intent, which would have been destroyed had Counsel presented the case through Dr. Maddox. Under Counsel's strategy, Applicant was convicted on all lesser included offenses -- except for the failure to stop for blue lights charge -- and received only nine years out of a possible twenty-four year sentence.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. Strickland, 466 U.S. 668, (1984). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

This Court finds Applicant has failed to show that the outcome of his trial would have been different had Counsel's trial strategy acknowledge Applicant's voluntary intoxication because he lied about it during his trial. Applicant was able to keep confirmation of his intoxication from



being considered by the jury or the trial judge and, based on the comments by the trial judge during sentencing, Applicant was clearly not prejudiced by Counsel's trial strategy. Based on the standard set forth in Strickland, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to object to inadmissible evidence during Applicant's trial.

Applicant failed to present any testimony regarding this claim at the evidentiary hearing, consequently abandoning this allegation. Therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.

During its closing argument, the solicitor argued, "[W]hen you use a deadly weapon, a four ton truck that is capable of traveling at great rates of speed and you intentionally ram somebody's car with it, the inference there is malice. The inference that you mean great harm." (Trial Tr. 279.) Counsel objected and a sidebar conference was held. The State went on to argue malice can be inferred from the use of a deadly weapon. The Court excused the jury at the end of the State's closing and Counsel was able to put on the record his objection to the State's comment regarding malice. Counsel cited the holding in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), to the trial court in support of his argument that the jury should not be able to infer malice because Counsel had presented evidence that would "reduce, mitigate or exouse, or justify an assault and battery with an intent to kill." (Trial Tr. 290.) In Belcher, the South Carolina Supreme Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged



that malice may be inferred from the use of a deadly weapon." *Id.* at 612, 685 S.E.2d at 810. The Court's ruling only pertains to the trial court's instruction on implied malice to the jury, it does not limit the State's ability to argue implied malice during their closing argument.

The trial court found, "[U]nder Belcher the mitigation offered would be sufficient enough to not charge inference of malice by use of a deadly weapon." (Trial Tr. 294.) The trial court removed the inference language from the jury charge over the State's objection. (Trial Tr. 294.) Counsel requested the trial court provide a curative instruction to the jury regarding the State's closing argument on inferring malice. (Trial Tr. 295.) The trial court provided the jury with a charge that requires them to follow the law as the court charges, even if it contradicts what the lawyers have argued. (Trial Tr. 295.)

Applicant has alleged Counsel was deficient for failing to object to the trial court's curative instruction to the jury and move for a mistrial. "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." State v. Wilson, 3889 S.C. 579, 698 S.E.2d 862 (2010). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (2009) (citing State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (2005)).

Here, the trial court acknowledged the issue as to whether Belcher applied in this case was an "extremely close issue." (Trial Tr. 294.) The trial court provided the remedy it believed to be appropriate in this case, which was similar to the remedy the trial court provided when Counsel moved for a mistrial during Corporal Lindler's testimony regarding his injuries. (Trial Tr. 91-94.)

The trial court made it clear the issue of whether malice can be inferred in this case was an "extremely close issue" and, even if Counsel had moved for a mistrial, it would not have been

appropriate to grant such a motion because Belcher does not prevent the State from arguing implied malice in their closing argument. The trial court, even though it believed the issue to be close, followed the Court's ruling in Belcher and appropriately instructed the jury. This Court finds Applicant has failed to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.

Counsel objected twice during the State's closing argument. Counsel objected when the State started talking about affirmative defenses in South Carolina. (Trial Tr. 275.) In his objection, Counsel argued the State's comments were not a true statement of law and it was not relevant to the case. (Trial Tr. 275.) The trial court overruled the objection and urged the solicitor to move on with his argument. (Trial Tr. 275.) Counsel again objected when the State argued implied malice to the jury. (Trial Tr. 279.) Counsel stated the solicitor's argument was "a complete misstatement" and then noted there were Supreme Court cases. (Trial Tr. 279-280.) The trial court held a sidebar conference and allowed the State to proceed with their argument. (Trial Tr. 280.)

Applicant has alleged he should have objected more based on the content of the State's closing argument. During the PCR hearing, Counsel testified he did not continue to object to the State's closing because it was not hurting their case. He elaborated the jury was not paying a bit of attention to the Solicitor and he did not feel any additional objections were necessary.

Applicant alleges the State made inappropriate comments regarding Applicant's drug use during his closing argument and Counsel was deficient for failing to object. "A solicitor has a

right to state his version of the testimony and to comment on the weight to be given such testimony." Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (citing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998)). The State had two law enforcement officers testify during their case-in-chief that they believed Applicant was impaired during the incident. Corporal Lindler testified Applicant exhibited, "normal behavior for an impaired driver." (Trial Tr. 76.) Corporal Lindler also testified intended to conduct a field sobriety test on Applicant after pulling him over, but Applicant was too violent. (Trial Tr. 89.) Officer Scott Peay with Clinton Public Safety testified in his opinion Applicant was "definitely impaired." (Trial Tr. 146.) This Court finds the State's comments regarding Applicant's alleged drug use were reasonable inferences that could be drawn from the testimony of the officers at trial. As such, Counsel was not deficient in failing to object because the solicitor's comments were not objectionable.

This Court finds Applicant has failed to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. As such, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.

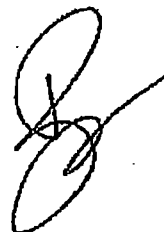
Applicant alleges Counsel did not preserve his motion for a mistrial after Corporal Lindler testified regarding medical injuries he suffered. During the trial, Counsel moved for a mistrial following testimony by Corporal Lindler that he suffered herniated discs as a result of the collision caused by Applicant. (Trial Tr. 93.) The trial court denied Counsel's motion, but, following an in-camera examination of Corporal Lindler, issued a curative instruction to the jury to disregard Corporal Lindler's testimony regarding his injury. (Trial Tr. 98.) Counsel objected stating the instruction was not sufficient and again moved for a mistrial. (Trial Tr. 98.) The trial court did

not address Counsel again regarding the mistrial. Applicant alleges Counsel's failure to have the trial court address his follow-up motion prevented him from preserving the issue for appeal.

The South Carolina Supreme Court held in State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), that a defendant adequately preserved for appeal his claim that admission of testimony concerning proposed polygraph test required a mistrial where defendant immediately objected, moved for a mistrial after the jury was removed, and renewed his motion for a mistrial following the court's curative instructions.

Here, directly after Corporal Lindler's testimony, Counsel requested a sidebar conference after which the judge excused the jury. (Trial Tr. 91.) Counsel provided a thorough argument regarding his motion for a mistrial and the trial court allowed Counsel to engage in an in-camera examination of Corporal Lindler regarding his injury and "depending on what he testifies to, it may justify the Court issuing some curative instruction to disregard his testimony." (Trial Tr. 94.) At the conclusion of the in-camera examination, the trial court explained it would instruct the jury to disregard the testimony of Corporal Lindler as it related to the existence of his herniated discs. (Trial Tr. 98.) Once again, Counsel objected to the instruction as it was not sufficient and requested a mistrial. (Trial Tr. 98.)

This Court finds Applicant has failed to establish how Counsel was deficient as Counsel made the proper objections at the appropriate times and this issue is clearly preserved for appeal. Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Therefore, Applicant has failed to meet his burden to show how Counsel is deficient or how he was prejudiced by Counsel's representation. Therefore, this allegation must be denied and dismissed with prejudice.



Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.

This allegation was expressly waived by Applicant on the record during the evidentiary hearing. Therefore, this allegation is denied and dismissed with prejudice.

Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.

Applicant alleges Counsel should have filed a Motion for Reconsideration in order to provide the trial court with mitigation evidence that was not presented during sentencing regarding Applicant's PTSD. Counsel testified he did present mitigation during the sentencing phase of Applicant's trial. Counsel testified he presented a statement from Steven Johnson with the Department of Veteran Affairs and a letter from Major Schofield on Applicant's behalf. Counsel also testified the trial court was aware of Applicant's PTSD diagnosis and the record shows the trial judge took that into account during the sentencing. (Trial Tr. 331.) The record also shows the trial court was bothered by the force of the collision Applicant caused when he rammed Corporal Lindler's vehicle. (Trial Tr. 332.)

During the PCR hearing, Applicant presented testimony from Dr. Maddox to show Counsel should have provided additional mitigation to the trial court during sentencing, however, Counsel testified Dr. Maddox's report would not have been useful in Applicant's case. Counsel testified he could not have used Dr. Maddox for mitigation because Applicant testified during the trial he was not intoxicated during the incident. Dr. Maddox's report clearly states the PTSD was secondary to the voluntary intoxication. Counsel would not have been able to present an expert witness to provide mitigation regarding Applicant's PTSD without conceding the voluntary intoxication, which, as Counsel testified, would have completely changed their trial strategy.



This Court finds credible Counsel's testimony with respect to this allegation. This Court finds Applicant has failed to show how the trial court would have imposed a more favorable sentence on Applicant had Counsel filed a Motion for Reconsideration and presented an expert on PTSD. During the sentencing, Applicant received the benefit of the trial court taking his PTSD into account while being able to maintain he was not under the influence at the time of the incident. Counsel would not have been able to present an expert during mitigation on Applicant's PTSD alone because, as Dr. Maddox's report clearly states, the PTSD was secondary to Applicant's voluntary intoxication. Therefore, Applicant has failed to meet his burden on this issue as he has failed to show how Counsel was deficient or how he was prejudiced by Counsel's failure to file a Motion for Reconsideration. Therefore, this allegation must be denied and dismissed with prejudice.

Trial Counsel failed to have an expert review Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or call an expert to rebut the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Lindler's injuries did not meet the definition of "Great Bodily Injury."

Applicant argues Counsel was deficient for failing to have an expert review Corporal Lindler's medical records or testify that his injuries did not meet the definition of "great bodily injury." Applicant maintains he could not have convicted of ABHAN if Counsel had presented an expert on "great bodily injury."

Assault and battery of a high and aggravated nature is defined as:

A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and:

- (a) great bodily injury to another person results; or
- (b) the act is accomplished by means likely to produce death or great bodily injury.

S.C. Code Ann. §16-3-600 (B)(1) (1976) (emphasis added).

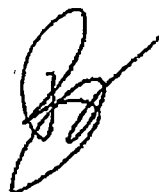
During the hearing, Dr. Nicholas Batalis was admitted as an expert in forensic pathology. Dr. Batalis provided testimony regarding the medical report on Corporal Lindler's herniated discs and whether the collision between Applicant's truck and Corporal Lindler's vehicle was likely to produce "great bodily injury." The State objected to Dr. Batalis' testimony regarding the collision as he does not have the training and experience necessary to provide an expert opinion regarding vehicle collisions.

Counsel testified he does not believe the trial court would have allowed Dr. Batalis' testimony. Counsel testified Dr. Batalis would not have been helpful at trial because the report was speculative and would have infringed on the province of the jury. Counsel testified the trial judge submitted all lesser included offenses with definitions, so there was no need for an expert on great bodily injury because the jury had already been provided all of the necessary information. Counsel also testified he would not have used Dr. Batalis at trial because Dr. Batalis cannot say anything regarding moderate bodily injury and Counsel believed the facts of this case supported the jury's verdict. Counsel testified the jury was properly instructed on assault and battery of a high and aggravated nature.

During sentencing, the trial court stated,

What I felt like was significant as it relates to Corporal Lindler, the impact involved caused the in car video camera to come off the mount. And I've always understood that those things are mounted pretty good just to prevent people that they arrest [from] jerking the thing off. And the impact was such that I knocked that camera off the mount. That's pretty strong. That's pretty strong.

(Trial Tr. 332.) The trial court evaluated the force of the impact to be severe based on the video of the collision. Dr. Batalis testified on cross-examination he did not know how fast the Applicant's vehicle was going at the time of the collision and he did not know how much force it would take to knock the camera off the mount in Corporal Lindler's vehicle.



This Court finds credible Counsel's testimony with respect to this allegation. This Court also finds Dr. Batalis' opinion on whether the collision could have caused great bodily injury is outside the scope of his expertise as he testified he did not have any training or experience in estimating the speed of a vehicle, accident reconstruction, or how much force would be necessary to cause great bodily injury. This Court finds Applicant has failed to meet his burden to show Counsel was deficient for failing to call an expert on great bodily injury because, as Counsel testified, Dr. Batalis' report was speculative and would not have been admissible at trial. Therefore, this allegation must be denied and dismissed with prejudice.

Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

Applicant argues Counsel should have presented an expert to testify at the sentencing phase of the trial regarding Applicant's PTSD and other mental health issues. Applicant presented testimony from Dr. Maddox who testified about Applicant's military deployments, gender identity issue, and substance abuse issues. Dr. Maddox testified she found Applicant to be criminally responsible for the incident and found his PTSD to be secondary to his voluntary intoxication.

Counsel testified he would not have used Dr. Maddox's report at trial because it would have destroyed their trial strategy of negating intent. Additionally, Dr. Maddox's report contradicts Applicant's trial testimony that he was not under the influence at the time of the incident. Applicant insinuated during cross-examination at the PCR hearing that Counsel should have obtained an expert solely on the issue of PTSD as if the substance abuse aspect of Dr. Maddox's report could somehow be isolated from her overall opinion. As Dr. Maddox's report shows, Applicant's PTSD is *secondary* to his substance abuse and any qualified expert who examines Applicant regarding his mental health would not be able to separate PTSD from Applicant's drug abuse.

Counsel testified the judge was aware of Applicant's PTSD and Counsel testified he also provided a information from the Department of Veteran Affairs and letter from a U.S. Army Major Schofield on Applicant's behalf. During sentencing, the trial judge stated, "I am taking into account to some extent the fact that you are currently being treated for PTSD." (Trial Tr. 331.) Later, the trial judge stated,

You know, if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, which is 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case.

(Trial Tr. 332.)

This Court finds Applicant was afforded mitigation from the information Counsel presented. This Court also finds credible Counsel's testimony that he would not have been able to use Dr. Maddox's report for mitigation as it would have destroyed their trial strategy in negating Applicant's intent. Apploant has failed to show this court how Counsel was deficient for failing to present expert mitigation because, as Dr. Maddox's report shows, expert mitigation would have shown Applicant was voluntarily intoxicated during the incident. Applicant, who admitted during the post-conviction relief hearing that he lied under oath at his trial, would not have benefited from an expert because, just like Dr. Maddox's report indicates, Applicant is criminal liable and the PTSD was secondary to Applicant's voluntary intoxication. The trial judge was clearly disturbed by Applicant's actions towards Corporal Lindler, and, had mitigation been provided showing Applicant was voluntarily intoxicated during the incident, the trial court likely would have increased Applicant's sentence. Applicant was able to receive the benefit of mitigation for his PTSD while denying his intoxication during sentencing.

This Court finds Applicant has failed to meet his burden to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. Therefore, this allegation must be denied and dismissed with prejudice.

VI. CONCLUSION

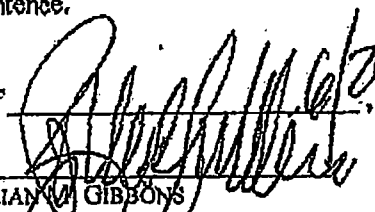
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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.J(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

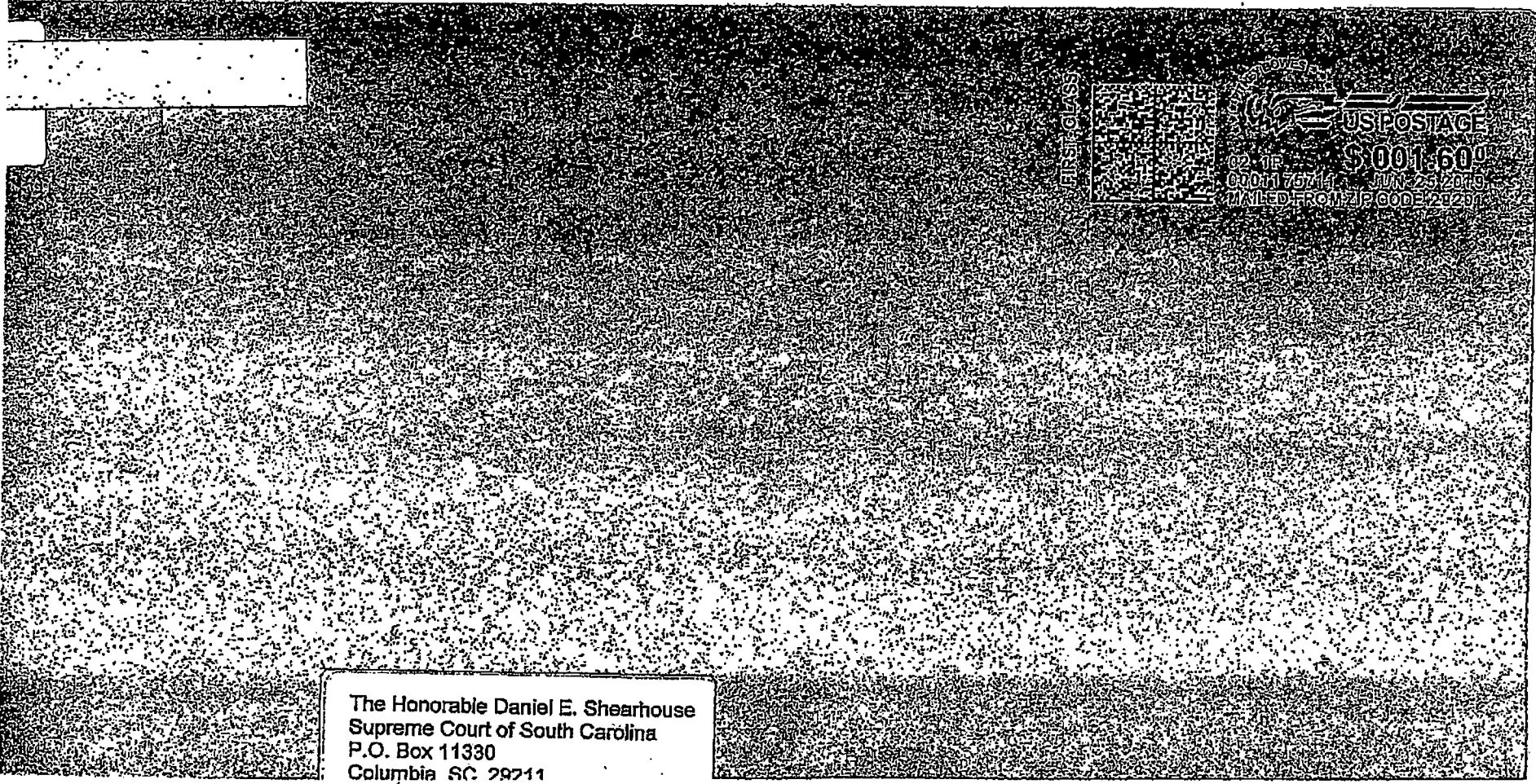
IT IS THEREFORE ORDERED THAT:

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

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

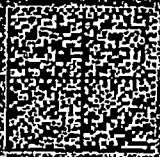

 BRIAN W. GIBBONS
 Presiding Judge
 Eighth Judicial Circuit

 _____, South Carolina



The Honorable Daniel E. Shearhouse
 Supreme Court of South Carolina
 P.O. Box 11330
 Columbia SC 29211

FIRST CLASS



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THE STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

Robert Clinton Harbuck,
Applicant)

v.)

State of South Carolina,
Respondent.)

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

Case No.: 2017-CP-30-648

MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(E), SCRPCTO: The Honorable Brian M. Gibbons
Assistant Attorney General Janell H. Gregory

The Applicant, by and through the undersigned Counsel, moves this Court to alter or amend the "Order Denying Application for Post-Conviction Relief" pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. See *Reese v. State*, (S.C. Sup. Ct. Order filed October 24, 2018) (Shearouse Adv. Sh. No. 42 at 9). Specifically, the Applicant objects to the Order of Dismissal to the extent that it contains factual and legal errors based on the evidence presented at the evidentiary hearing and in Applicant's Memorandum in Support of Post-Conviction Relief (filed on March 18, 2019).

ARGUMENTS

In support of this motion to alter or amend judgment, Applicant submits the following arguments and does not abandon or waive any previous arguments or issues raised in the prior pleadings and evidentiary hearing in this PCR action:

- (1) Applicant incorporates by reference the Applicant's Memorandum in Support of Post-Conviction Relief (filed on March 18, 2019) as if fully set forth verbatim into this motion. Notably, the facts and arguments contained in that memorandum necessitate the granting of post-conviction relief.

- (2) The procedure followed by this Court denied Applicant an opportunity to have his PCR claims adjudicated by an independent judicial officer in violation of the separation of powers doctrine. See S.C. Art. I, § 8. Specifically, the Court did not provide the State with any basis for denying Applicant's claims other than delegating the responsibility of drafting a proposed order of dismissal. Respectfully, the Court impermissibly adopted a slightly modified version of the State's adversarial proposed Order Denying Post-Conviction Relief because this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for omitting findings of fact and/or denying each claim. See *Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, "Pursuant to S.C. Code Ann. § 17-27-80... , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").
- (3) In favor of the State, the Order Denying Post-Conviction Relief omits relevant testimony presented by the Applicant's expert witnesses. Therefore, fundamental fairness highlights the need to ensure the Court's Order contains all relevant findings of fact and conclusions of law for the Court to conduct an objective and independent review and to preserve all issues for appellate review.
- (4) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Trial Counsel provided ineffective assistance of counsel by failing to consult independent expert witnesses and present expert opinion testimony regarding Applicant's medical and mental health records and Officer Stephen Lindler's injuries based on the definitions provided in Section 16-3-600 of the South

Carolina Code of Laws (see the expert witness testimony of Dr. Donna Schwartz-Maddox and Dr. Nicholas Batalis at the evidentiary hearing).

- a. Trial Counsel's alleged strategy (i.e., "no intent") is objectively unreasonable given the evidence presented by the State, the elements of assault and battery of a high and aggravated nature, the critical mitigation evidence known to Counsel, and Counsel's lack of preparation and investigation for Applicant's trial.
- b. Trial Counsel admitted that he did not obtain or review all of Applicant's medical and mental health records in preparation for trial.
- c. Trial Counsel further admitted that he did not obtain or review Officer Lindler's medical records in preparation for trial despite acknowledging Officer Lindler's injuries in his opening statement to the jury:

You're going to hear, thankfully, that the only person injured at all was Officer Lindler and you'll hear the extent of his injuries, because Mr. Harbuck is charged with attempted murder. So listen and see what the injuries are and the manner in which this happened . . . The question I want you to hold in your minds is why. Why did this happen . . . I want you to listen and see why he would have done all of these things if he was intending in his right mind to kill people.

Tr. 40, ll. 2-25.

- d. Trial Counsel testified at the evidentiary hearing that his failure to consult with expert witnesses was not a strategic decision. See *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360 (finding "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.").

- e. The State notes that Dr. Maddox's report and testimony conflicts with Trial Counsel's alleged "strategy" and would not have been relevant or helpful to the Defense. Trial Counsel and the State should not benefit from an unreasonable trial strategy simply because Counsel failed to conduct an adequate investigation in preparation for trial. In other words, Trial Counsel's alleged strategy would have been different had he consulted with expert witnesses in preparation for trial and presented this evidence to the jury and the Trial Court. See *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness").
- f. The prejudice of Trial Counsel's unreasonable strategy is evident by not being able to rebut or adequately address multiple references by the law enforcement officers who testified at trial and the Solicitor during the State's closing argument that Applicant was impaired (e.g., "on something").
- g. Trial Counsel's failure to consult with an expert witness to review and present critical mitigation evidence to the Trial Court during sentencing was not reasonable based on the information known to Trial Counsel. See *Van Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) ("Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder."); see also *McKnight*, 378 S.C. 33, 46, 661 S.E.2d 354,

360 (2008).

- h. It is objectively unreasonable for Trial Counsel not to have obtained and reviewed this necessary evidence in preparation for trial or consulted with expert witnesses regardless of his trial strategy. See *Lounds*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding that it "was not objectively reasonable given the defense theory of the case" for counsel not to call witnesses that were critical to his client's defense).
- (5) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Trial Counsel provided ineffective assistance of counsel by failing to call an expert witness during the sentencing phase to testify in depth as to the critical mitigation evidence referenced by Dr. Maddox at the evidentiary hearing.
- a. The PCR Court also qualified Dr. Donna Schwartz Maddox as an expert in forensic psychology at the hearing.
 - b. Dr. Maddox testified that she reviewed Applicant's medical and mental health records. Specifically, Dr. Maddox reviewed the following documents according to her report: "PCR Application 7/7/17; Certificate of release or Discharge from Active Duty 3/6/14; Order Setting Bond Laurens County; Letter from Steven Johnson; LCSW-PIP, confirming treatment 5/11/16, 8/22/16; Letter from Cpt. Ryan Kenny undated; Letter Major Schofield 2/16/15; Letter Staff Sgt Marvin Howard undated; Confidential; Questionnaire for Criminal Cases; ASAP Outpatient Treatment Plan and Review; Sentence Sheets-8/26/16; Indictments Attempted Murder X 4; Indictment Assault on an; Officer While Resisting Arrest; Indictment for

Failure to Stop; Arrest Warrants (3010200167-71, 3010101356); Mental health Discharge Instructions 1/18/14-1/21/14; Transcript of record 8/24-/8/26/16; Transcript 911 call; Laurens County Hospital Records, Steven Lindler; MAIT Report; VA Records Birmingham; Medical record military; Document Archive Forms; Womac Family Practice Records Cape Fear, NC".

- c. Dr. Maddox testified that, in her expert opinion, Applicant's PTSD diagnosis contributed to predisposing him to substance abuse and that he had significant mitigation evidence which should have been presented to the Trial Court during the sentencing phase. Specifically, Dr. Maddox could have testified as to Applicant's prior mental health history and treatment, and his poor adjustment after combat service.
- d. Furthermore, Dr. Maddox testified that Applicant suffers from PTSD as a result of his combat service in the United States Army. Dr. Maddox also testified to specific traumatic events that Applicant witnessed during combat. Dr. Maddox further testified to Applicant's pre-existing trauma, gender identity issues, family history of substance abuse, marital problems due to his PTSD, and Applicant's own struggle with substance abuse. Notably, the Court admitted Dr. Maddox's CV and report into evidence at the hearing.

- (6) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Trial Counsel provided ineffective assistance of counsel by failing to file a Motion for Reconsideration. The unreasonable strategy alleged by Trial Counsel

should not be used as both a shield and sword to deny Applicant Post-Conviction Relief.

- (7) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Trial Counsel provided ineffective assistance of counsel by failing to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this critical evidence to the jury. See *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding it "was not objectively reasonable given the defense theory of the case" for trial counsel not to call witnesses who would have "added significantly to the credibility of petitioner's case").

- a. Trial Counsel admitted that, if an expert witness would have testified that Officer Lindler's injuries did not satisfy the definition of "Great Bodily Injury", the jury could have convicted Applicant of one of the lesser-included offenses that does not include the definition of "Great Bodily Injury" (i.e., Assault and Battery, Second or Third Degree). See *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360 (finding "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State").

- (8) The Order Denying Post-Conviction Relief erred in finding "Dr. Batalis's opinion on whether the collision could have caused great bodily injury is outside the scope of

his expertise." The undersigned Counsel remembers the State's objection but does not remember this finding by the PCR Court at the evidentiary hearing.

- a. The PCR Court qualified Dr. Nicholas Batalis as an expert in forensic pathology at the hearing and admitted Dr. Batalis's CV and report into evidence at the hearing.
 - b. Dr. Batalis testified that he reviewed Officer Steven Lindler's medical records from September 6, 2015; the relevant portions of Applicant's trial transcript; and Officer Lindler's dashboard camera video recording from September 6, 2016.
 - c. Dr. Batalis testified that, in his expert opinion and to a reasonable degree of medical certainty, the injuries sustained by Officer Lindler did not meet the definition of "Great Bodily Injury" as provided by the South Carolina General Assembly in Section 16-3-600 of the South Carolina Code of Laws ("Assault and battery; definitions; degrees of offenses").
 - d. Dr. Batalis also testified that, in his expert opinion and to a reasonable degree of medical certainty, the collision viewed on the dashboard camera video recording was unlikely to have caused death or great bodily injury.
 - e. Dr. Batalis's expert opinion on assessing injuries and determining cause of death is a basic component of his occupation as a pathologist. In other words, he is in the best position to determine what injuries are likely to produce great bodily injury or death.
- (9) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Trial Counsel provided ineffective assistance of counsel by failing to

subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See *United States v. Cronin*, 466 U.S. 648 (1984); See *Nance v. Ozmint*, 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (holding that "pre-se prejudice occurs if there has been a constructive denial of counsel," which arises when defense counsel's deficient performance constitutes "a classic example of a complete breakdown in the adversarial process").

a. Trial Counsel "abandoned his role as defense counsel" and "failed to act as an adversary to the prosecution". Specifically, Trial Counsel did not, at a minimum, even attempt to investigate or interview reasonable and necessary expert witnesses in preparation for Applicant's trial. See *Cronin*, 466 U.S. at 659.

- (10) Therefore, this Court should reconsider its Order Denying Post-Conviction Relief, withdraw that order, enter an order granting Applicant post-conviction relief, and remand this case to the Court of General Sessions for a new trial.

NOTABLE PAGES IN THE TRIAL TRANSCRIPT

The relevant portion of Trial Counsel's opening statement. Tr. 40, ll. 2-7; Tr. 40, ll. 23-25. Officer Steven Linder's testimony is contained on pages 71 through 117 in the trial transcript. See also Tr. 83 – 98 (Tr. 90, ll. 15-21; Tr. 93– 94; Tr. 95, l. 3 – 97, l. 22). The testimony related to Trial Counsel's motion for a mistrial is contained on pages 91 through 94 and 164 through 176 in the trial transcript. Trial Counsel's closing argument is contained on pages 249 through 270, and the State's closing argument is contained on pages 270 through 289 in the trial transcript. See also Tr. 263, ll. 12-24; Tr. 272; Tr. 275;

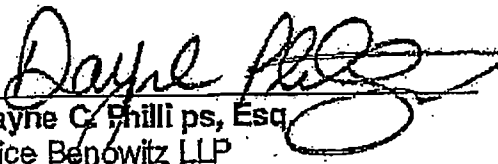
Tr. 279–283; Tr. 286; Tr. 288 –291; Tr. 293. The relevant jury instructions are contained on pages 305 through 308 in the trial transcript. See also Tr. 296 –314. The jury sent a note requesting to watch the dashcam video recording. Tr. 315 – 317. Trial Counsel's mitigation presented during the sentencing phase is contained on pages 327 through 331 in the trial transcript.

CONCLUSION

Based on the foregoing reasons, the undersigned Counsel respectfully requests that this Court reconsider the Order Denying Post-Conviction Relief by conducting an objective review of the facts and law based on the arguments presented by the parties, and independently entering an Order Granting Post-Conviction Relief. Rule 59(e), SCRCP; See *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; See S.C. Code § 17-27-20(A)(1), (4), and (6).

IT IS SO MOVED.

Respectfully submitted,


 Dayne C. Phillips, Esq.
 Price Benowitz LLP
 1614 Taylor Street, Suite D.
 Columbia, SC 29201
 O: 803-272-4503
 C: 803-807-0234
 F: 803-380-8035
 dayne@pricebenowitz.com

ATTORNEY FOR THE APPLICANT

May 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Motion to Alter or Amend pursuant to Rule 59(e), SCRPC, by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

The Honorable Brian M. Gibbons
140 Main St.
P.O. Drawer 580
Chester, SC 29706

Janell H. Gregory, Assistant Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

The Honorable Lynn W. Lancaster
Laurens County Clerk of Court
PO Box 287
Laurens, SC 29360-0287

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201

May 17, 2019

LAURENS COUNTY
CLERK OF COURT
2019 MAY 29 AM 11:29
LYNN W. LANCASTER
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

Robert Harbuck,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

Civil Action No.: 2017-CP-30-648

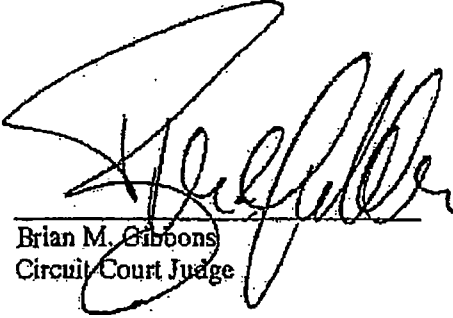
ORDER DENYING APPLICANT'S
MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e)

After having considered Applicant's Motion to Alter or Amend pursuant to Rule 59(e) in this case and after reviewing all of the submissions, applicable statutory law, case law and evidence presented, I respectfully deny Applicant's motion.

AND IT IS SO ORDERED.

Chester, SC

May 28, 2019

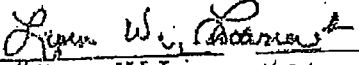

 Brian M. Gibbons
 Circuit Court Judge

LYNN W. LANCASTER

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LAURENS COUNTY
CLERK OF COURT

A TRUE COPY OF ORIGINAL


 Lynn W. Lancaster
 Laurens County CCCP & GS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-30-648

Robert Harbuck,

Petitioner,

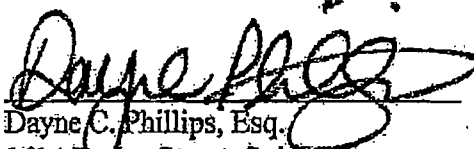
v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Robert Harbuck appeals the Honorable Brian M. Gibbons's Order Denying Application for Post-Conviction relief, and the Court's Order Denying Applicant's Motion for Reconsideration (Rule 59(e), SCRPC) filed on June 3, 2019.


Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

June 5, 2019

ATTORNEY FOR PETITIONER

Other Counsel of Record:

Janell H. Gregory, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

cc:

Lynn W. Lancaster, Laurens County Clerk of Court
Robert Harbuck (SCDC)

LAURENS COUNTY
CLERK OF COURT
2019 JUN 10 AM 10:41
LYNN W. LANCASTER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-30-648

Robert Harbuck,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

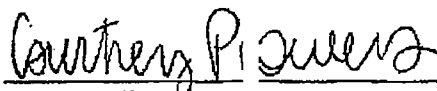
LAURENS COUNTY
CLERK OF COURT
2019 JUN 10 AM 10:41
LYNN W. LANCASTER

I certify that I have served the Notice of Appeal on Janell H. Gregory, Esq., the Honorable Lynn W. Lancaster, and Robert Harbuck, by depositing a copy in the United States Mail, postage prepaid, on June 5, 2019, addressed to the following parties:

Janell H. Gregory, Esquire, South Carolina Attorney General's Office
1000 Assembly Street, Room 519, Columbia, SC 29201

The Honorable Lynn W. Lancaster, Laurens County Clerk of Court
PO Box 287, Laurens, SC 29360

Robert Harbuck, Allendale Correctional Institution,
1057 Revolutionary Trail, Fairfax, SC 29827


Courtney Powers
Paralegal for Dayne Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

June 5, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Laurens

VS.

Robert Clinton Harbuck

INDICTMENT/CASE#: 15GS30-1618

A/V#: 2015A3010200167

Date of Offense: 9/6/2015

S.C. Code §: 16-03-0029

CDR Code #: 3410

AKA:

Race: CAUCASIAN Sex Age 28

DOB: [REDACTED] SSN: [REDACTED]

Address: [REDACTED]

City/State: [REDACTED]

DL#: [REDACTED]

SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Assault & Battery, 3rd degree

☒ CONVICTED OF or ☐ PLEADS

SENTENCE SHEET 0-30 days

In violation of § 16-03-0600

of the S.C. Code of Laws, bearing CDR Code# 3414

☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GS (CSC
w/within 1st or Lowd Act)☐ §17-25-45The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentation to Grand Jury.

(Defendant's Initials)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Scott, C. Dale

SC Bar# 73081

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☒ County Detention Center,
for a determinate term of 30 days or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____ plus costs and assessments as applicable; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Credit 30 days

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135,
Pursuant to 18 USC Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic
Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:☐ Deferred☐ Def. Waives Hearing☐ Ordered

PTUP

Total: \$ _____ plus 30% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms:

Obtain GED ☐☐ Set by SCDPPS

Attend Voc. Rehab. or Job Corp. _____

Recipient:

May serve WVE beginning _____

*Fine:

§ 14-1-205 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Court Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 61.6 (Public Def. Probation)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114 (DUI Breath Test Fee)

§ 56-5-2942(1) (Vehicle Assessment)

3% to County (If paid in installments)

TOTAL

\$128.75

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (07/2016)

Presiding Judge

Judge Code:

Sentence Date:

2/16/16

8/26/16

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Laurens

VS.

Robert Clinton Harbuck

AKA:

Race:

Sex: M

Age:

28

DOB:

SSN:

Address:

City, State:

DL#:

*CDL Yes ☐ No ☐ LMY Yes ☐ No ☐ Hazmat Yes ☐ No ☐
 In disposition of the said indictment comes now the Defendant who was
 TO: Assault & Battery, 2nd degree

In violation of § 16-03-0600 of the S.C. Code of Laws, bearing CDR Code # 3414

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC) ☐ §17-25-45
 w/minor 1st or 2nd Act)

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant's Initials)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Scott, C. Dale

73081
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☒ County Detention Center,
 for a determinate term of 30 days/months/years or ☐ Under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____ plus costs and assessments as applicable; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. Credit 30 Days T.S.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
 Pursuant to 18 USC Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic
 Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCOPPS

Receipts:

*Fines:
 §14-1-206 (Assessment) \$7.50 \$
 §14-1-211(A)(1) (Conf. Surcharge) \$100 \$ 100
 §14-1-211(A)(2) (DUI Surcharge) \$100 \$
 §14-1-211(A)(3) (DUI Assessment) \$12 \$
 §14-1-211(A)(4) (DUI Breath Test) \$25 \$
 Proviso 61.6 (Public Def. Probation) \$500 \$
 §14-1-212 (Law Enforcement Funding) \$25 \$ 25
 §14-1-213 (Drug Court Surcharge) \$150 \$
 §14-1-214 (DUI Breath Test Fee) \$50 \$
 §16-6-2942(1) (Vehicle Assessment) \$400 \$
 3% Co County (if paid in installments) \$ 3.75

TOTAL

\$ 128.75

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (87/2046)

Lynne W. Leucasta
Tara Scott

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 15GS10-1619

A/W#: 2015A3010200168

Date of Offense: 9/6/2015

S.C. Code §: 16-03-0029

CDR Code #: 3410

SENTENCE SHEET

0-30 days

☒ CONVICTED OF or ☐ PLEADS

PTUP _____
 _____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ p a i d to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
 Proviso 61.6 requires \$500 to be paid to Clerk
 during probation and shall be collected before
 any other fines.

Presiding Judge

Judge Code:

Sentence Date:

2/16/16
8/26/16

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Laurens

VS.

Robert Clinton Harbuck

INDICTMENT/CASE#: 15GS10-1620

AAV#: 2015A3010200169

Date of Offense: 9/6/2015

S.C. Code §: 16-03-0029

CDR Code #: 3410

AKA:

Race: CAUCASIAN Sex: M Age: 28

DOB: [REDACTED] SSN: [REDACTED]

Address: [REDACTED]

City/State: [REDACTED]

DL#: [REDACTED]

CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Assault & Battery, 3rd degree

SENTENCE SHEET 0-30 days

☒ CONVICTED OF or ☐ PLEADSIn violation of § 16-03-0600 of the S.C. Code of Laws, bearing CDR Code# 3414
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory CPS (CSC w/minor 1st or 2nd Act) ☐ §17-25-45The charge is ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Prosecution to Grand Jury, (defendant's initials)
The plea is ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Scott, C. Day

7:3081
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☒ County Detention Center,
for a determinate term of 300 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____ provided that upon the service of _____ days/months/years and/or payment
of \$ _____ plus costs and assessments as applicable; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 7-15-30-1621 DAN
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Credit 30 Days T.S.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
Pursuant to 18 USC Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic
Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____
Total \$ _____ plus 20% fee \$ _____ days/hours Public Service Employment

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fees:

§14-I-206 (Assessment) 107.5 %

§14-I-211(A)(1) (Conv. Surcharges) \$100 \$ 100

§14-I-211(A)(2) (DUI Surcharges) \$100 \$

§ 36-5-2995 (DUI Assessment) \$12 \$

§ 36-4-286 (DUI Breath Test) \$25 \$

Proviso 61.6 (Public Def. Probation) \$300 \$

§ 14-I-212 (Law Enforcement Funding) \$25 \$ 25

§ 14-I-213 (Drug Court Surcharges) \$150 \$

§ 50-21-114(B)(1) (Breath Test Fee) \$50 \$

§56-5-2943(1) (Vehicle Assessment) \$40/m \$

3% to County (if paid in installments) \$ 3.75

TOTAL

\$ 128.75

Clerk of Court/ Deputy Clerk

Court Reporter

SCCA/287 (07/2016)

Presiding Judge

Judge Code:

Sentence Date:

☐ Appointed PD or appointed other counsel,
Proviso 61.6 requires \$500 be paid to Clerk
during probation and shall be collected before
my other fees.

Presiding Judge

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Laurens

Robert Clinton Harbuck

AKA:

Race: CAUCASIAN Sex: M Age: 28

DOB:

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Assault / Assault & Battery of a High and Aggravated Nature

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 15GS30-1621

A/V#: 2015A3010200170

Date of Offense: 9/6/2015

S.C. Code §: 16-03-0029

CDR Code #: 341D

SENTENCE SHEET

0-20yrs

☒ CONVICTED OF or ☐ PLEADSIn violation of § 16-03-0600 of the S.C. Code of Laws, bearing CDR Code # 3411
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS/CSC ☐ §17-25-45
w/minor 1st or 2nd ActThe charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Scott, C. Dale

73081

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 9 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____ plus costs and assessments as applicable; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Credit 168 Days.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic
Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fines:

§14-1-206 (Assessment 107.5 %)

§14-1-210(A)(1) (Conf. Surcharge)

§14-1-211(A)(2) (DUI Surcharge)

§16-5-2905 (DUI Assessment)

§16-1-286 (DUI Breath Test)

Proviso 61.6 (Public Def. Probation)

§14-1-212 (Law Enforc. Funding)

§14-1-213 (Drug Court Surcharge)

§10-21-114 (BUII Breath Test Fee)

§16-5-2942(j) (Vehicle Assessment)

3% County (if paid in installments)

TOTAL

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (07/2016)

Presiding Judge

Judge Code:

Sentence D

nt

☐ Appointed PD or appointed other counsel,
Proviso 61.6 requires \$500 be paid to Clerk
during probation and shall be collected before
any other fees.

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
payments of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
Proviso 61.6 requires \$500 be paid to Clerk
during probation and shall be collected before
any other fees.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Laurens

VS.

Robert Clinton Harbuck

AKA:

Race:

N Sex

Age:

28

DOB:

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Resisting/Resisting Arrest, Oppose, Resist, or Assault Law Enforcement Officer

INDICTMENT/CASE#: 15GS30-1622

A/V#: 2015A3010200171

Date of Offense: 9/6/2015

S.C. Code §: 16-09-0320

CDR Code #: 0256

SENTENCE SHEET

0-1 yr

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-09-0320

of the S.C. Code of Laws, bearing CDR Code#

0326

☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS(CSC☐ §17-25-45

w/ minor 1st or 2nd Act)

The charge is ☐ As Indicted, ☒ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury,

(defendant's initials)

The plea is: ☒ With out Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

Scott, C. Dale

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 1 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and assessments as applicable, the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on

15GS30-1621

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied, by the State Department of Corrections.

Credit 68 days

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waiver/earlog ☐ Ordered

PTUP

Total \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms

Obtain GED ☐☐ Set by SCDPPS

Attend Voc. Rehab. or Job Corp.

Recipient:

May serve WE beginning

Substance Abuse Counseling ☐

*Fine:

Random Drug/Alcohol testing ☐

§ 14-1-206 (Assessments 107.5%)

\$

§ 14-1-211(A)(1) (Conv. Surcharge)

\$100

\$

§ 14-1-211(A)(2) (DUI Surcharge)

\$100

\$

§ 56-5-299(S)(DUI Assessment)

\$12

\$

§ 56-1-286 (DUI Breath Test)

\$25

\$

Proviso 61.6 (Public Def/Probation)

\$200

\$

§ 14-1-212 (Law Enforce. Funding)

\$25

\$

§ 14-1-213 (Drug Court Surcharge)

\$150

\$

§ 50-21-14(DUI) Breath Test Fee

\$50

\$

§ 56-5-2942(1) (Vehicle Assessment)

\$40/ea

\$

3% to County (if paid in installments)

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Clerk of Court/Deputy Clerk:

Court Reporter:

SCCA/217 (07/2016)

Presiding Judge

Judge Code:

Sentence Date:

[REDACTED]
[REDACTED]
[REDACTED]

WITNESSES

Jaworski Shelton
Laurens County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

October Term, 2015
Indictment # 15GS30-1618

WARRANT NUMBER

2015A3010200167

THE STATE

vs.

Robert Clinton Herbuck

true bill

Maritta Thompson
Foreman of the Grand Jury

Date: 10-30-15

INDICTMENT FOR

Attempted Murder
§16-03-0029

CDR: 3410

VERDICT

Guilty of AFD 3rd
Lesser Included

Foreman: J. L. Smith 8-26-16

THE STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

INDICTMENT FOR
Attempted Murder
§16-03-0029

At a Court of General Sessions, convened on the 30th day of October, 2015, the Grand Jurors of Laurens County present upon their oath:

That Robert Clinton Herbuck did, on or about September 6, 2015, in Laurens County, willfully and unlawfully, with the intent to kill and with malice aforethought, attempted to kill Denise Hamby, in violation of Section 16-03-29 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Deputy Solicitor

WITNESSES

Jaworski Shelton
Laurens County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

October Term, 2015.

Indictment # 15GS30- 1619

WARRANT NUMBER

2015A3010200168

THE STATE

vs.

Robert Clinton Harbuck

TUNE - 611

Marvin Thompson

Foreman of the Grand Jury

Date: 10-30-15

INDICTMENT FOR

Attempted Murder

§16-03-0029

CDR: 3410

VERDICT

Guilty of A/B 3rd
Lesser Included

Foreman

Bill Smith 2.26.16

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

INDICTMENT FOR

Attempted Murder
§16-93-0029

At a Court of General Sessions, convened on the 30th day of October, 2015, the Grand Jurors of Laurens County present upon their oath:

That Robert Clinton Harbuck did, on or about September 6, 2015, in Laurens County, willfully and unlawfully, with the intent to kill and with malice aforethought, attempted to kill Darrell Duain Raines, Jr., in violation of Section 16-3-29 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Deputy Solicitor

WITNESSES

Jaworski Shelton
Laurens County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

October Term, 2015

Indictment # 15GS30- /620

WARRANT NUMBER

2015A3010208169

THE STATE

vs.

Robert Clinton Harbuck

TRUC billMaritta Thompson

Foreman of the Grand Jury

Date: 10-30-15

INDICTMENT FOR

Attempted Murder

§16-03-0029

CDR: 3410

VERDICT

guilty of A/B 2nd
cases included

Foreman

Bill Ray David 2-26-16

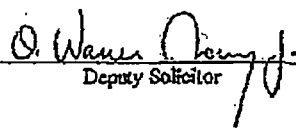
THE STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

INDICTMENT FOR
Attempted Murder
§16-03-0029

At a Court of General Sessions, convened on the 30th day of October, 2015, the Grand Jurors of Laurens County present upon their oath:

That Robert Clinton Harbuck did, on or about September 6, 2015, in Laurens County, willfully and unlawfully, with the intent to kill and with malice aforethought, attempted to kill Jason Dewayne Stephenson, in violation of Section 16-3-29 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Deputy Solicitor

WITNESSES

Jawarski Shelton
Laurens County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

October Term, 2015

Indictment # 15GS30-1621

WARRANT NUMBER

2015A3010200170

THE STATE

vs.

Robert Clinton Harbuck

True billMaurice Thompson

Foreman of the Grand Jury

Date: 10-30-15

INDICTMENT FOR

Attempted Murder

§16-03-0029

CDR: 3410

VERDICT

Guilty of A.P.H.A.W
ce > ssa involved

Foreman

Billy Ray Smith

THE STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

INDICTMENT FOR

Attempted Murder
§16-03-0029

At a Court of General Sessions, convened on the 30th day of October, 2015, the Grand Jurors of Laurens County present upon their oath:

That Robert Clinton Harbuck did, on or about September 6, 2015, in Laurens County, willfully and unlawfully, with the intent to kill and with malice aforethought, attempted to kill SChP Trooper S. Lindler, in violation of Section 16-3-29 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Deputy Solicitor

WITNESSES

Jawarski Shelton
Laurens County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

October Term, 2015
Indictment # 15GS30- 1622

WARRANT NUMBER

2015A3010200171

THE STATE

vs.
Robert Clinton Harbuck

True Bill

Marvita Thompson
Foreman of the Grand Jury

Date: 10-30-15

INDICTMENT FOR

Assault on an Officer While Resisting Arrest
§16-09-0320

CDR: 0256

VERDICT

GUILTY of Resisting
Arrest (Lesser Included)

Foreman: Full, Ray Smith 8-26-16

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

COUNTY OF LAURENS

Assault on an Officer While Resisting Arrest
§16-9-320

At a Court of General Sessions, convened on the 30th day of October, 2015, the Grand Jurors of Laurens County present upon their oath:

That Robert Clinton Harbuck did, on or about September 6, 2015, in Laurens County, willfully, unlawfully and knowingly assault, beat, or wound a law enforcement officer, to wit: Robert Clinton Harbuck did kick Lt. Casey Jones multiple times, while resisting an arrest being made by one whom the person knew or reasonably should have known was a law enforcement officer, whether under process or not, in violation of Section 16-9-320(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

Q. Warren Oney Jr.
Deputy Solicitor

WITNESSES

C. M. Edwards
S C Highway Patrol

WARRANT NUMBER

2015A3010101356

True Bill

Margaret Thompson
Foreman of the Grand Jury

Date: 10-30-15

VERDICT

Guilty 8/26/16

Bill Ray Smith 5-26-16
Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

October Term, 2015

Indictment # 15GS30-1710

THE STATE

vs.

Robert Clinton Harbuck

INDICTMENT FOR

Traffic / Failure to Stop For a Blue Light, no injury or

death - 1st offense

§56-05-0750

CDR: 0065

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

COUNTY OF LAURENS

Traffic / Failure to Stop For a Blue Light, no injury
or death- 1st offense
§56-05-0750

A la Court of General Sessions, convened on the 30th day of October, 2015, the Grand Jurors of Laurens County present upon their oath:

That Robert Clinton Harbuck did, on or about September 6, 2015, in Laurens County, willfully and unlawfully while driving a motor vehicle on a public highway of South Carolina, in the county aforesaid, fail to stop when signaled to do so by a law enforcement vehicle by means of a siren or flashing light, in violation of Section 56-05-0750 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Deputy Solicitor

ARREST WARRANT

2015A3010200167

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

THE STATE
against

Robert Clinton Harbuck

Address:

Phone: SSN:
 Sex: M Race: W Height: 5 11 Weight: 165DL State: DL#:
 DOB: Agency ORI#: SC0300000Prosecuting Agency: Laurens County Sheriff's OfficeProsecuting Officer: J Shelton - 2058Offense: Murder / Attempted MurderOffense Code: 3410Code/Ordinance Sec: 16-03-0029This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant, Robert Clinton Harbuck
on Sept 11, 2015J. Champagne
Signature of Court Clerk

RETURN WARRANT TO:

General Sessions
100 Hillcrest Square
P.O. Box 287
Laurens, SC 29360

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Personally appeared before me the affiant J Shelton whobeing duly sworn, deposes and says that defendant Robert Clinton Harbuckdid within this county and state on or about 9/6/2015 violate the criminal laws of theState of South Carolina for ordinance of ☒ County/ ☐ Municipality of Laurens

In the following particulars:

DESCRIPTION OF OFFENSE: Murder / Attempted MurderI further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That in the county of Laurens on the 6th day of September, Robert Clinton Harbuck, did attempt to murder the victim by ramming
his truck into the victim's car on I-26.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Affiant's Address 216 West Main StreetLaurens, SC 29360-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 9/6/2015 defendant Robert Clinton Harbuck

did violate the criminal laws of the State of South Carolina for ordinance of

☒ County/ ☐ Municipality of Laurens as set forth below:DESCRIPTION OF OFFENSE: Murder / Attempted MurderHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of his execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me.on 9/7/2015Paul D. Lyles (L.S.)
Signature of Issuing Judge

Paul Dean Lyles Magistrate

Judge Code: 5787Judge's Address P.O. Box 925
Laurens, SC 29360Judge's Telephone (864) 683-4485Issuing Court ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by
SC Attorney General
April 21, 2013
SCA 216

AFFIDAVIT

LYNN W. LARSEN
2015 SEP -9 A 9:29
LAURENS COUNTY SHERIFF'S OFFICE

ARREST WARRANT

2015A3010200168

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

THE STATE

against

Robert Clinton Harbuck

Address:

Phone: _____
Sex: M Race: W Height: 5 11 Weight: 165

DL State: AI. DL#: _____

DOB: _____ Agency ORI#: SC0300000

Prosecuting Agency: Laurens County Sheriff's Office

Prosecuting Officer: J Shelton - 2038

Offense: Murder / Attempted Murder

Offense Code: 3410

Code/Ordinance Sec: 16-03-0029

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThis accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant on Sept 7, 2015J. Chang
Signature of Constable/Clerk of Court

RETURN WARRANT TO:

General Sessions
100 Hillcrest Square
P.O. Box 287
Laurens, SC 29360

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

AFFIDAVIT

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA516Personally appeared before me the affiant J Shelton whobeing duly sworn deposes and says that defendant Robert Clinton Harbuckdid within this county and state on or about 9/6/2015 violate the criminal laws of theState of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Laurens)

in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That in the county of Laurens on the 6th day of September, Robert Clinton Harbuck, did attempt to murder the victim by ramming
his truck into the victim's car on I-26.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Affiant's Address 216 West Main Street
Laurens, SC 29360-

Affiant's Telephone _____

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 9/6/2015defendant Robert Clinton Harbuck

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Laurens

) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable.Sworn to and subscribed before me
on 9/7/2015Paul Dean Lykes (L.S.)
Signature of Issuing Judge

Paul Dean Lykes Magistrate

Judge Code: 5787Judge's Address P.O. Box 925
Laurens, SC 29360Judge's Telephone (864)683-4485Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

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ARREST WARRANT

2015A3010200169

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

THE STATE

against

Robert Clinton Harbuck

Address:

Phone:

SSN:

Sex: M Race: W Height: 5 11 165

DL State:

DL #:

DOB:

Agency:

SC0300000

Prosecuting Agency:

Laurens County Sheriff's Office

Prosecuting Officer:

J. Shelton - 2058

Offense: Murder / Attempted Murder

Offense Code:

3410

Code/Ordinance Sec:

16-03-0029

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant on

Robert Clinton Harbuck

Sept. 7, 2015

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions

100 Hillcrest Square

P.O. Box 287

Laurens, SC 29360

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STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Personally appeared before me the affiant J. Shelton

being duly sworn deposes and says that defendant Robert Clinton Harbuck

did within this county and state on or about 9/6/2015

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Laurens)

in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That in the county of Laurens on the 6th day of September, Robert Clinton Harbuck, did attempt to murder the victim by ramming his truck into the victim's car on I-26.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Affiant's Address 216 West Main Street

Laurens, SC 29360

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 9/6/2015

defendant Robert Clinton Harbuck

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Laurens

) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before the court to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 9/7/2015

Signature of Issuing Judge

Paul Dean Lyles Magistrate

Judge Code: 5787

Judge's Address P.O. Box 925

Laurens, SC 29360

Judge's Telephone (864)683-4485

Issuing Court: ☒ Magistrate☐ Municipal☐ Circuit

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Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 616

AFFIDAVIT

who

violates the criminal laws of the

ARREST WARRANT

2015A3010200170

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

THE STATE
against

Robert Clinton Harbuck

Address:

Phone:

SSN:

Sex: M Race: W Height: 5 11 Weight: 165

DL State: AL DL #:

DOB: Agency ORI #: SC0300000

Prosecuting Agency: Laurens County Sheriff's Office

Prosecuting Officer: J Shelton - 2058

Offense: Murder / Attempted Murder

Offense Code: 3410

Code/Ordinance Sec: 16-03-0029

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Robert Clinton Harbuck
on September 9, 2015H. Champagne
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
100 Hillcrest Square
P.O. Box 287
Laurens, SC 29360

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Personally appeared before me the affiant J Shelton

being duly sworn deposes and says that defendant Robert Clinton Harbuck

did within this county and state on or about 9/6/2015

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Laurens
in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That in the county of Laurens on the 6th day of September, Robert Clinton Harbuck, did attempt to murder the victim by running
his truck into the victim patrol car on I-26.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Affiant's Address 216 West Main Street

Laurens, SC 29360-

Affiant's Telephone:

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 9/6/2015

defendant Robert Clinton Harbuck

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Laurens

) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable.

Sworn to and subscribed before me

on 9/7/2015

Paul D. Lyles (L.S.)
Signature of Issuing Judge

Paul Dean Lyles Magistrate

Judge Code: 5787

Judge's Address P.O. Box 925

Laurens, SC 29360

Judge's Telephone: (864)683-4485

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

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Form Approved by
S.C. Attorney General
April 21, 2003
SCCA-210

AFFIDAVIT

ARREST WARRANT

2015A3010200171

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

THE STATE

against

Robert Clinton Harbuck

Address: [REDACTED]

Phone: [REDACTED] SSN: [REDACTED]
Sex: M Race: W Height: 5 11 Weight: 165

DL State: AL DL #: [REDACTED]

DOB: [REDACTED] Agency ORI #: SC0300000

Prosecuting Agency: Laurens County Sheriff's Office

Prosecuting Officer: J Shelton - 2058

Offense: Resisting / Assault, police officer while resisting arrest

Offense Code: 0256

Code/Ordinance Sec: 16-09-0320(B)

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Robert Clinton Harbuck
on Sept 7, 2015

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
100 Hillcrest Square
P.O. Box 287
Laurens, SC 29360

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Personally appeared before me the affiant J Shelton

who

being duly sworn deposes and says that defendant Robert Clinton Harbuck

did within this county and state on or about 9/6/2015

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Laurens)

in the following particulars:

DESCRIPTION OF OFFENSE: Resisting / Assault, police officer while resisting arrest

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That on September 6, 2015, in the county of Laurens, one Robert Clinton Harbuck did knowingly and willfully assault a law
enforcement officer while resisting arrest injuring the officer's knee.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Affiant's Address 216 West Main Street

Laurens, SC 29360

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

(I appearing from the above affidavit that there are reasonable grounds to believe that

on or about 9/6/2015

defendant Robert Clinton Harbuck

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Laurens

) as set forth below:

DESCRIPTION OF OFFENSE: Resisting / Assault, police officer while resisting arrest

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me

on 9/7/2015

Paul Dean Lyles Magistrate
Judge Code: 5787

Judge's Address P.O. Box 925

Laurens, SC 29360

Judge's Telephone (864)683-4485

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

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Form Approved by
S.C. Attorney General
April 21, 2003
SCCA518

ARREST WARRANT

2015A3010101356

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

THE STATE
against

Robert Clinton Harbuck

Address: [REDACTED]

Phone: [REDACTED] SSN: [REDACTED]
Sex: M Race: W Height: 5 11 Weight: 165

OL State: AL OL #: [REDACTED]

DOB: [REDACTED] Agency ORI #: SCSHP0000

Prosecuting Agency: SC Highway Patrol

Prosecuting Officer: C Edwards - 1167

Offense: Traffic / Failure to stop for a blue light, no injury or death - 1st offense

Offense Code: 0065

Code/Ordinance Sec: 56-05-0750(B)(1)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date: [REDACTED]

RETURN

A copy of this arrest warrant was delivered to

defendant Robert Clinton Harbuck
on 9-9-15Put 3, 2015
Signature of Constable or Enforcement Officer

RETURN WARRANT TO:

General Sessions
100 Hillcrest Square
P.O. Box 287
Laurens, SC 29360

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STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Personally appeared before me the affiant C Edwards whobeing duly sworn deposes and says that defendant Robert Clinton Harbuckdid within this county and state on or about 9/6/2015State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Laurens)

in the following particulars:

DESCRIPTION OF OFFENSE: Traffic / Failure to stop for a blue light, no injury or death - 1st offense

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:C. Edwards states under oath upon investigation by S. Lindler that on September 6, 2015 in the County of Laurens, one Robert
Clinton Harbuck, while driving a motor vehicle, did fail to stop when signaled by means of siren and/or flashing light on a law
enforcement vehicle.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Laurens

Affiant's Address 1801 Bypass 25 S E
Greenwood, SC 29646-

Affiant's Telephone [REDACTED]

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 9/6/2015 defendant Robert Clinton Harbuck

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Laurens) as set forth below.

DESCRIPTION OF OFFENSE: Traffic / Failure to stop for a blue light, no injury or death - 1st offense

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before meon 9/9/2015Paul Dean Lyons
Signature of Issuing Judge

Paul Dean Lyons, Magistrate

Judge Code: 5787

(L.S.)

Judge's Address P.O. Box 925
Laurens, SC 29360Judge's Telephone (864) 683-4485Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

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Form 1000-2015 by
S.C. Attorney General
April 21, 2003
SCCA 518

AFFIDAVIT