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Timothy L. Griffith Attorney at Law
360 West Wesmark Blvd, 2nd Floor, Sumter, SC 29150

Phone: (803) 607-9087 Fax: (803) 728-3375

November 26, 2019

Clerk of Court, South Carolina Supreme Court
Case # 2019-CP-14-534

Justin Jermaine Johnson v State of South Carolina

Please see the included Notice of Appeal. I have also forwarded by separate mail copies to:

The Clarendon County Clerk of Court
The Office of the Attorney General of South Carolina
SC Office of Indigent Defense / Commission of Indigent Defense
The Honorable Kristi F. Curtis

Please file the included NOTICE OF APPEAL for the case captioned.

Attorney Timothy L. Griffith was appointed as PCR Council and not retained and will not be handling the Appeal.

Thank You,



Timothy L. Griffith, Esquire

RECEIVED

DEC 05 2019

S.C. SUPREME COURT

**NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF
COMMON PLEAS**

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Kristi F. Curtis , Circuit Court Judge

Case # 2019-CP-14-534

The State,

Respondent,

v.

Justin Jermaine Johnson

Appellant.

RECEIVED

DEC 05 2019

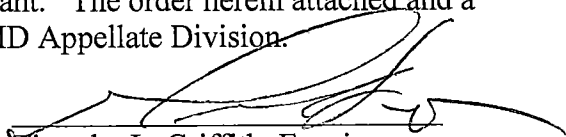
S.C. SUPREME COURT

NOTICE OF APPEAL

Justin Jermaine Johnson appeals the decision of the Court, on March 27, 2019, where Mr. Johnson was denied his request for Post Conviction Relief. Mr. Johnson was represented at the hearing by Timothy L. Griffith, Attorney at Law who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated

11/26/19


Timothy L. Griffith, Esquire
360 W. Wesmark Blvd,
Sumter, South Carolina 29150
Telephone: (803)607-9087
Attorney for Appellant (relieved)
Will not be representing on appeal

Other Counsel of Record:
Janell H. Gregory, Esquire
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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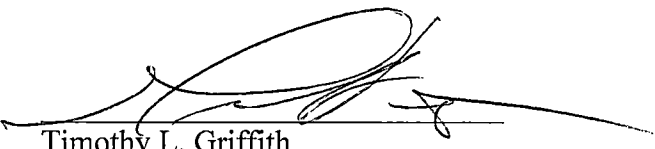
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Office of the Attorney General of South Carolina, PCR Division, by U.S. Postal Service, postage prepaid, to P.O. Box 11549, Columbia, S.C. 29211, on November 26, 2019

Date 11/26/19

I received a copy of the Notice of Appeal
on this ____ day of _____, 20__

Office of the Attorney General
PCR Division



Timothy L. Griffith
360 West Wesmark Blvd
Sumter, SC 29150
Telephone: (803) 607-9087
Attorney for Appellant

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Justin Jermaine Johnson, #359323,)

2018-CP-14-0534

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed on December 19, 2018, by Justin Jermaine Johnson (Applicant). The State (Respondent) filed a Return and Partial Motion to Dismiss on March 26, 2019, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on March 27, 2019, at the Sumter County Courthouse. Applicant was present at the hearing and represented by Timothy Griffith, 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. Scott L. Robinson, Esquire (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

The records before this Court establish Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Clarendon County Clerk of Court's order of commitment. During its July 2011 term, the Clarendon County Grand Jury indicted Applicant for two counts of murder, attempted murder, first-degree burglary, kidnapping, and possession of a weapon during the commission of a violent crime (2011-GS-14-0294). Counsel represented

Applicant. Third Circuit Solicitor Ernest A. Finney, III, and Assistant Solicitor Christopher R. DuRant prosecuted the case.

On March 6-7, 2014, the Honorable W. Jeffrey Young held a pretrial Jackson v. Denno, 378 U.S. 368 (1964), hearing. Then, on March 10-14 and 18-20, 2014, Applicant proceeded to a jury trial before Judge Young. The jury convicted Applicant of both murders, first-degree burglary, kidnapping, and the weapon charge, but found him not guilty of attempted murder. Judge Young sentenced Applicant to three consecutive terms of life imprisonment for the two murders and the first-degree burglary, imposed a consecutive thirty-year sentence for kidnapping, and a concurrent five year sentence for the weapon charge.

Applicant timely filed a notice of appeal. He was represented on appeal by Appellate Defender Laura R. Baer of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. In his brief to the South Carolina Court of Appeals, Applicant raised the following issues:

- I. Whether the trial court erred in admitting the irrelevant pre-death photographs of each of the victims where their sole purpose was to arouse the sympathy and prejudice of the jury?
- II. Whether the trial court erred in allowing one of the State's witnesses, Mason Moore, to testify via Skype in violation of Appellant's right under the Confrontation Clause of the Sixth Amendment and pursuant to S.C. Code Ann. § 17-23-60, where the State failed to show any important public policy necessitating the use of video testimony and the trial court improperly required Appellant to show prejudice?
- III. Whether the trial court erred in finding that Appellant's statement was voluntary where it was coerced by the investigators continuous lies regarding the evidence, threat of the death penalty if he did not change his "story," and emotional appeals and threats related to Appellant's two-year old daughter?
- IV. Whether the trial court erred in denying Appellant's motion for mistrial and request to empanel a new jury where Appellant was led into the courthouse wearing orange handcuffs and accompanied by three to four armed guards prior to voir dire of the jury in violation of his right to due process?

V. Whether the trial court erred in denying Appellant's motion for mistrial and request to empanel a new jury where two of the State's witnesses discussed the facts and merits of the case in the hallway within arms-length of jurors in violation of Appellant's Sixth Amendment right to a fair and impartial jury?

VI. Whether the trial court erred in sentencing Appellant to five-years incarceration for possession of a weapon during the commission of a violent crime where (1) Appellant was sentenced to life for murder and first degree burglary and S.C. Code Ann. § 16-23-490 expressly provides that the "five year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime" and (2) the evidence did not show a sufficient nexus between possession of the firearm and the offense of kidnapping?

Following briefing, the South Carolina Court of Appeals issued a published opinion affirming Applicant's convictions. State v. Johnson, Op. No. 5533 (Ct. App. filed Jan. 31, 2018). Applicant filed a Petition for Rehearing on February 15, 2018. Thereafter, on March 28, 2018, the Court of Appeals withdrew its previous opinion and substituted it with a refiled opinion. State v. Johnson, 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018). Applicant filed a second petition for rehearing, which was denied by the Court of Appeals on April 26, 2018.

Applicant then sought certiorari to the South Carolina Supreme Court. On August 3, 2018, the Supreme Court denied certiorari. The Remittitur was issued October 30, 2018.

SUMMARY OF FACTS

In its published opinion, the South Carolina Court of Appeals gave the following factual summary:

Johnson had two minor children with Kaisha Caraway, a nine-month-old son (Son) and a two-year-old daughter (Daughter). Kaisha and the children lived with her grandparents, John and Maxine Caraway. Son and Maxine Caraway were shot and killed on April 6, 2011. Johnson was arrested and indicted for the crimes.

At Johnson's trial, Kaisha testified that prior to the morning of the murders, she and Johnson had not been romantically involved for nine months. However, the two stayed in contact, and Johnson had his G.I. Bill check deposited into her bank account, on which he was a secondary cardholder, to help support the children. Kaisha and Johnson argued the night before the murders regarding Kaisha's having changed the personal identification number (PIN) on this account.

According to Kaisha, Johnson arrived at the Caraway residence on the morning of April 6, 2011, to take Son and Daughter to a doctor's appointment. Although he and Kaisha had discussed this, Kaisha was not expecting Johnson as he had last indicated he would not take the children. The two argued about the PIN over their cell phones for approximately twenty minutes until Johnson's phone battery died. He then left with Son and Daughter to go to the doctor. Kaisha testified that after Johnson had been gone about thirty minutes, she remembered something she needed to tell the doctor and phoned the doctor's office. According to the office, Johnson never arrived. Johnson returned to the Caraway residence with the children. He took Daughter out of her carseat and she walked into the house. Johnson brought Son onto the porch or into the house in his carseat. Kaisha and Johnson continued arguing. According to Kaisha, Johnson got in his car to leave but as she was shutting the door to the house, he got out of the car, ran back to the house, pushed through the front door, and began punching her. Son was sitting in his high chair at this point, and Daughter was sitting in a chair in the same room. Maxine came out to see what was going on, and Johnson attacked her. When Kaisha went to get her phone, Johnson "came behind [her] and began dragging [her] out of the house."

According to Kaisha, Maxine had scratches and an injured nose and ran past Kaisha and Johnson who were now on the front porch. As she did, Johnson loosened his grip on Kaisha enough for her to slip out of her shirt and away from him into the house. Daughter was also outside the house.

Kaisha testified she located Maxine's cell phone and ran toward the hall when she realized Son was still in his high chair. Johnson entered the house with a shotgun in his hand and pointed it at her saying "you made me do this." She closed her eyes and heard a gunshot. She then realized Son had been shot. Kaisha ran down the hallway, locked herself in the bathroom, and pushed a cabinet in front of the door. She called 911 using the cell phone, and then Johnson shot through the door. Kaisha told Johnson emergency services were on the way.

Kaisha testified she left the bathroom and she and Johnson moved into the living room. When 911 called back, Johnson told Kaisha to tell the operator the call was a mistake, to pretend to be her grandmother, and to give them the name "Robert." After a few minutes, she heard Daughter crying and Johnson went to get her. As Kaisha went to the door, she saw that Maxine had been shot. Kaisha, Johnson, and Daughter got into his car to go to the police station. Though Johnson had the shotgun with him at first, he removed the remaining shells and left the gun in the yard at Kaisha's suggestion.

According to Kaisha, as they were driving to the police station, she and Johnson discussed the details of the story they would tell the police. Before they arrived, they encountered a police officer and led the officer back to the Caraway residence. Other police officers eventually arrived, and once Kaisha was separated from Johnson, she wrote "he did it" on a piece of paper, referring to Johnson.

Johnson's statement to police was initially in sharp contrast to Kaisha's testimony. After being read his Miranda rights, he told police he arrived at the Caraway residence to find Kaisha and her boyfriend "Robert" arguing and the only shot he fired was at Robert in defense of himself and the others present at the house. However, after a lengthy interrogation, Johnson admitted Robert did not exist and he had fired the gun—although the gun "just went off" and it was an accident.

Prior to the selection of the jury, Johnson moved for a mistrial based on having been brought into the courthouse handcuffed and accompanied by jail personnel. He argued jurors may have seen him and been prejudiced by the indicia of guilt. The circuit court denied the motion.

Johnson made an additional mistrial motion based on his attorney having overheard two witnesses for the State discussing evidence in the case within proximity of potential jurors in the courthouse hallway. The circuit court asked the jury pool whether they had heard anything that would influence their ability to be impartial and followed that with the question whether they had heard anything "today." All jurors responded in the negative. The circuit court denied the mistrial motion.

Also prior to trial, the circuit court held a Jackson v. Denno hearing to determine the voluntariness of Johnson's statement to police. Investigator Mason Moore, testifying via Skype, and Investigator Kippton Coker stated they advised Johnson of his Miranda rights and they did not threaten Johnson in order to coerce a confession from him. Investigator Moore further testified Johnson requested to speak with him again the following day and he was again read his Miranda rights. Moore stated Johnson did not recant his testimony or reassert his claim that the crimes were committed by a third party. After viewing the video recording that captured the majority of the interrogation, the circuit court found the statement was voluntary.

[T]he statement made by Mr. Johnson was given freely, voluntarily, knowingly, and intelligently. Although it was over an eleven-hour period, he was—he was Mirandized twice during that. He was very talkative.

He was offered ample times to take breaks. He was offered food. He was offered drink. He certainly did not appear to be under excessive I guess oppression in the giving of the confession, and I am going to allow the confession to come into evidence.

Although Johnson had not objected to Investigator Moore, who had moved to Montana, testifying via Skype for the Jackson v. Denno hearing, Johnson did object to the video testimony at trial. In anticipation of such an objection, the court made a preliminary ruling to admit the video testimony because the witness was 2,500 miles away, was an "ancillary" witness, "everything that was going on with him is available on videotape," and another officer was in the room for the majority of the interrogation.

Johnson argued the Skype testimony violated the Confrontation Clause of the Sixth Amendment and mere convenience of the witness should not trump the defendant's right to face-to-face confrontation. The State countered by reiterating the statements of the court and adding "a compelling or a substantial need exists to avoid costs, to avoid inconvenience to the witness, and to pretty much put on the record something that is not substantive but is a matter of tying the chain together." The circuit court concluded the Skype testimony was admissible.

The circuit court also held a preliminary hearing to address the admission of photographs at trial. Johnson objected to the admission of a predeath photograph of Maxine, arguing it was irrelevant and served only to arouse the sympathy of the jury. He further argued the photograph was more prejudicial than probative. Additionally, Johnson objected to the admission of a predeath picture of Son. The circuit court admitted the photographs saying, "I think who the person was is a part of this case." Johnson renewed his objections when the photographs were introduced, and the circuit court denied the objections.

The jury convicted Johnson for two counts of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. The circuit court sentenced him to life in prison without parole plus five years for the possession of a weapon during the commission of a violent crime.

State v. Johnson, 422 S.C. 439, 443–47, 812 S.E.2d 739, 741–43 (Ct. App. 2018), reh'g denied (Apr. 26, 2018), cert. denied (Aug. 3, 2018).

III. ALLEGATIONS RAISED

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

1. Due Process Violation:

A) "Petitioner's right to due process of law as guaranteed by the fifth and fourteenth amendment was violated by the State when the petitioner was led into the courtroom by armed guards and wearing orange handcuffs during the petitioner's voir dire. App of this was done in front of all the potential jurors."

B) "Also two investigators were talking about the case in front of all the potential jurors. This tainted the jury pool."

2. Ineffective Assistance of Counsel:

A) "Petitioner's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment was violated by counsel when petitioner's trial lawyer did not challenge the statement that investigators deemed a confession. The trial lawyer argued the statement was forced out

of petitioner rather than the statement was taken out of context. The phrase in which investigators deemed a confession was, "How can I live with myself if I did this[?]" Rather, it was a mistake or not how could I live with myself." Tr[ia]l lawyer did not argue the statement was a question instead of a confession."

B) "Trial lawyer also failed to argue the physical evidence presented by the State did not coincide with what the State deemed a confession in that none of the evidence linked the petitioner to the crime the prints and DNA that were on the murder weapon did not belong to the petitioner. There was also a shoe print in blood that did not match anyone at the scene. In arguing that statement was forced out of the petition, the trial lawyer misled jurors into thinking it was still a confession. Petitioner's trial lawyer did not argue the physical evidence did more to exonerate the petitioner than convict."

On March 27, 2019, an evidentiary hearing was convened. Respondent renewed the motion to dismiss Applicant's due process allegations under the doctrine of *res judicata* and S.C. Code Ann. § 17-27-20(b) (2018). Applicant proceeded with the hearing on the two remaining allegations in his application for ineffective assistance of counsel.

II. TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant's Testimony

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he has met with his post-conviction relief attorney and discussed what post-conviction relief is and understands that he would get a new trial if his application is granted. Applicant testified he was represented by Counsel at trial. Applicant testified Counsel was ineffective because he did not get the confession thrown out. Applicant testified Counsel could have used case law to get the confession thrown out. Applicant testified his statement was "how can I live with myself" and that was taken as a confession. Applicant testified Counsel should have objected to the State presenting his statement as a confession. Applicant testified Counsel did not make any statements during his closing argument about the confession. Applicant testified the outcome of the case would have been different had Counsel objected to the confession.

Applicant testified Counsel was also ineffective for not challenging the State's evidence against him. Applicant testified there were three fingerprints in blood that were not his and Counsel did not say anything about that. Applicant testified all of the evidence the State presented at trial was not enough to convict him. Applicant testified the only thing Counsel touched on was that his fingerprints were not found on his ring. Applicant testified Counsel did not object when the State presented evidence. Applicant testified the State had SLED agents testify at trial and they could not connect Applicant to the crime. Applicant testified the evidence the State submitted did not connect him to the crime. Applicant testified Counsel questioned the investigator and did present character witnesses on Applicant's behalf.

Counsel's Testimony

Counsel also testified at the post-conviction relief hearing. Counsel testified he has been practicing law for over twenty years. Counsel testified he was appointed to represent Applicant, and met with him over twelve times prior to trial. Counsel testified he discussed Applicant's version of the facts, but Applicant suffered from memory issues after the incident. Applicant provided his version of the facts during the videotaped statement he provided to law enforcement. In the first few hours of the video, Applicant is talking about "Robert" and a "white Crown Vic." Counsel testified Applicant did not remember a lot. Counsel testified his theory of the case was an unidentified third party was responsible for the incident. Counsel testified the surviving victim, Kaisha Caraway, provided an initial statement to law enforcement at the scene, also stating "Robert" was the shooter.

Counsel testified that during the videotaped statement, Applicant made a lot of statements. Counsel testified toward the end of the day, Applicant broke down and provided a confession to law enforcement that was thirty to forty-five minutes long. Counsel testified Applicant made more than just one statement in his confession.

Counsel testified the State's evidence against Applicant included testimony from the surviving victim implicating Applicant, testimony from a gunshot residue (GSR) expert indicating Applicant had GSR on his hands, evidence that Applicant owned the shotgun used in the homicides, witness testimony that Applicant purchased the shotgun used in the homicides, as well as witness testimony that Applicant retrieved the shotgun and ammunition from his residence on the date of the incident.

Counsel testified he requested a Denno hearing to challenge the admissibility of Applicant's lengthy statement to law enforcement. Counsel testified the trial court found the statement to be admissible. Counsel testified Applicant later recanted his confession and that was also recorded and shown to the jury. Counsel testified he challenged the confession during cross-examination of both law enforcement officers who conducted the interview. Counsel testified the jury requested to see the confession during deliberations.

Counsel testified he recalled Vicki Hallman (Hallman) testifying as an expert in fingerprint and footprint analysis. Counsel testified he cross examined her and was able to get her to state she did not recover Applicant's fingerprints from the shotgun or the shotgun shells that were collected at the scene. Counsel testified on cross-examination he was able to get Hallman to testify there was a shoe print found at the scene that did not match any known person's shoes at the scene that morning. Counsel testified this supported his theory of the case.

Counsel testified he recalled Catherine Leisy (Leisy) testifying as an expert in DNA and Serology at trial. Counsel testified he did cross-examine her during the trial. Counsel testified Leisy testified that Applicant's DNA was not found on the shotgun or his own ring. Counsel testified Leisy also testified DNA was located that did not match any of the known subjects at the residence that morning. Counsel testified that during his cross-examination of Leisy, she agreed some of her findings could indicate a third party was involved.

Counsel testified he called character witnesses on Applicant's behalf. Counsel testified during his closing argument he highlighted the evidence that indicated a potential third party committed the crimes. Counsel testified, he specifically stated:

My client was telling me last night - he said, "Two and two don't make six." Third-party DNA, third-party footprint, not analyzing potential evidence doesn't make him guilty. All you got was excuses of why we didn't have his DNA on the gun or why their DNA wasn't on the ring. Not why we didn't look at the other evidence, because I agree. There may be good reasons why DNA wasn't on the gun. But somebody's DNA was on the gun, and it wasn't Justin Johnson's, it wasn't Kaisha Caraway, and it wasn't Maxine Caraway. I don't know whose it was. Are y'all firmly convinced that that DNA didn't come from the killer? That that footprint didn't come from the killer? That Ms. Maxine's fingernails didn't have somebody else's DNA under it? That the truck of the car didn't have somebody else's prints on it?

(Trial Tr. 920-921) Counsel testified he also challenged Applicant's confession during his closing argument. Counsel testified he took snippets of the lies law enforcement told Applicant and made a video out of it to play during his closing argument. Counsel testified he highlighted how Applicant was misled by law enforcement during his closing to show the statement was coerced and not freely or voluntarily given. Counsel testified the interrogation was thirteen hours non-stop and he believes Applicant would have said anything to get the interrogation to stop, but the judge disagreed.

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. 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.

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

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency on the part of Counsel and any prejudice therefrom.

Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment was violated by counsel when Counsel did not challenge the statement that investigators deemed a confession.

Applicant alleges Counsel was ineffective for failing to challenge his statement, "How can I live with myself if I did this?" Applicant alleges law enforcement misconstrued that statement as a confession and it was used against him at trial. Applicant testified he believes Counsel should have used case law to get the statement thrown out and should have objected when the State called his statement a confession.

However, Counsel testified Applicant made more than just that one statement during his confession. Counsel testified a Denno hearing was held to determine the voluntariness of Applicant's confession, and following the hearing the trial court found Applicant's confession admissible. Counsel testified the jury was able to see the entire video, including Applicant's statement the following day recanting his confession. Counsel testified he challenged Applicant's confession during the trial by thoroughly cross-examining the law enforcement officers involved in Applicant's interrogation. Counsel testified he further challenged Applicant's statement during his closing argument by showing a compilation video to the jury of the misleading statements officers told Applicant during the lengthy interrogation, which led to Applicant's nearly forty-five minute confession.

This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Applicant has failed to establish how Counsel was deficient as Counsel attempted to suppress Applicant's confession during a pretrial Denno¹ hearing and, when that was unsuccessful, Counsel continued to challenge the voluntariness of the confession through cross examination of law enforcement and in closing argument.

¹ 378 U.S. 368, 377 (1964).

Further, Applicant has failed to establish any resulting prejudice from the alleged deficiency. Although Applicant testified he believes the outcome of his trial would have been different had Counsel objected to the confession at trial, it is clear from the record that his statement was voluntary and properly admitted by the trial court. The voluntariness of Applicant's statement was raised on appeal and the South Carolina Court of Appeals upheld the trial court's ruling that the statement was voluntary. State v. Johnson, 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018). Based on the forgoing, Applicant has failed to meet his burden and this allegation must be denied and dismissed with prejudice.

Counsel failed to argue the physical evidence presented by the State did not link Applicant to the crime. Counsel failed to argue the physical evidence did more to exonerate Applicant than convict him.

Applicant alleges Counsel failed to argue the physical evidence presented by the State did not link Applicant to the crime. Applicant testified the only item Counsel talked about at trial was that his fingerprints were not found on his ring. However, Counsel testified his theory of the case was an unidentified third party committed the crimes. Counsel also testified he was able to get two expert witnesses to testify unidentified DNA and shoe prints were found at the crime scene that could have indicated an unidentified third party was involved. Additionally, Counsel provided a detailed closing argument regarding the lack of physical evidence against Applicant and highlighted the unidentified DNA and shoe prints to support his theory of the case. The record also refutes Applicant's allegation as Counsel thoroughly cross-examined all of the State's witnesses and elicited favorable testimony regarding a potential third party being involved in the incident.

Counsel also testified the State was able to present evidence from the surviving witness, GSR expert, witnesses that established Applicant bought and owned the murder weapon, and witnesses who testified Applicant retrieved the weapon on the date of the incident. Although

Counsel was able to elicit some favorable testimony regarding the physical evidence, the State's case against Applicant did not hinge solely on the physical evidence.

Applicant has failed to establish how Counsel was deficient as Counsel elicited favorable testimony from numerous expert witnesses that supported the defense's theory of the case. Additionally, Counsel's closing argument summarized the physical evidence presented at trial and highlighted the lack of physical evidence connecting Applicant to the crime scene. Counsel also highlighted numerous areas of the crime scene law enforcement failed to process for physical evidence. Counsel further pointed out that several items of evidence were collected but never sent by law enforcement for testing. (Trial Tr. 898-921.)

Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency. Applicant has failed to show this Court what more Counsel could have or should have done to challenge the physical evidence 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.

Due Process Allegations

This Court finds the doctrine of *res judicata* bars Applicant's due process allegations. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992.) A final judgement on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993.) *Res judicata* also bars any issues that could have been raised in the former action. Id. Additionally, Applicant's due process claims are also barred by S.C. Code Ann. § 17-27-20(b) (2018), which states, "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of directed review of the sentence or conviction."

As both of the due process allegations raised by Applicant were already addressed and denied by the Court of Appeals during Applicant's direct appeal, he is barred from raising them during his post-conviction relief proceedings. As such, Applicant's due process allegations are denied and dismissed with prejudice.

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 15th day of April, 2019.

Kristi Curtis
KRISTI F. CURTIS
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina

Timothy L. Griffith, Attorney at Law
360 West Westmark Blvd, 2nd Floor
Sumter, SC 29150

Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

