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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge

SANDY LEE LOCKLEAR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000864

APPENDIX

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821, ll. 4-14. Ms. Hunt testified that she had met Applicant's husband at Applicant's house several times. Ms. Hunt testified that Applicant never wanted her husband to stay long – only long enough to drop off "food, cigarettes or beer." Tr. 823, ll. 12-23. She recalled one day that the victim gave Applicant some insurance policies to hold. She testified Applicant stated to her "it was a million dollar policy" and that if "that son of a bitch died today I'd be a rich bitch tomorrow." Tr. 833, ll. 3-4. She also advised investigators that Applicant had a small caliber pistol. Tr. 834., ll. 22-24. She further told investigators that Applicant had two black males at her home for lawn work. Applicant had given her lawnmower to one of the black males. Ms. Hunt testified she didn't understand why Applicant would give away such a valuable item. She also testified, though, that one of the two individuals went inside to take a shower. Tr. 835-36.

Clayton Hatfield, a brother to the victim, testified that, though he lived out of state, he stayed in touch with his brother and would visit "at least 2 or 3 times a year." Tr. 416-17. He testified that he was unaware that his brother had married Applicant and that he had never met Applicant. Tr. 418, ll. 1-16.

Further, the texts recovered from Applicant's phone records, in addition to showing a direct involvement with entry into the home, also showed Applicant's need for money. Tr. 445-50. A search of Applicant's home yielded an accidental death policy, issued in August 2011, that had a million dollar limit under limited circumstances only explained in "small print, buried in the middle of all that paperwork." Tr. 881-85.

Trial and Appeal

Ralph Wilson, Jr., Esq. represented Applicant at trial. Brad Richardson and Monica Wooten, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On May 28, 2014, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury

found Applicant guilty as indicted on June 12, 2014. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of life.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Edwin Thompson Kinney, Esq. Applicant raised three issues to the South Carolina Court of Appeals:

1. "Whether the court erred in ruling that [Applicant] was not in custody prior to being read her Miranda rights and in allowing the [Applicant's] pre-Miranda statement to be admitted into evidence?"
2. "Whether the court erred in ruling that the State did not violate the rule set forth in Missouri v. Seibert?"
3. "Whether the court erred, thereby violating the Fourth Amendment and the [Applicant's] right to privacy, when it upheld a search warrant on the home at [redacted]?"

The parties proceeded to oral arguments on May 3, 2016; Mr. Kinney argued on behalf of Applicant and Melody Jane Brown, of the South Carolina Attorney General's Office, represented Respondent. By unpublished opinion, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Locklear, Op. No. 2016-UP-313 (S.C. Ct. App. filed June 22, 2016). The Remittitur was issued on July 20, 2016.

II.

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

1. "State failed to prove mens rea or malice aforethought necessary to charge jury on murder charges."
    a. "There is nothing in the record to prove beyond a reasonable doubt that I had any knowledge of or part in murders beyond speculation"
2. "Lack of direct or substantial circumstantial evidence proving murder."
    a. "Not one scintilla of evidence direct or circumstantial"
    b. "Evidence is inconsistent with jury's findings, State's case is based on conjecture"
3. "State failed to meet burden of proof for 'hands of one, hands of all.'"
    a. "At no time did other co-defendants make any statement to implicate me in the murders in any way"

4. Ineffective Assistance of Appellate Counsel
    a. "Appellate Counsel, Edwin Thompson Kinney, appointed to me through Indigent Appellate Defense, provided ineffective assistance of counsel for [failing] to raise the issues listed in this brief during appeal. These issues were preserve din the record of trial by my defense attorney, Ralph Wilson, Jr. during the criminal proceedings."

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger

than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

To the extent that Applicant's first three allegations may be interpreted as independent and distinct from her allegation of ineffective assistance of appellate counsel, the first three allegations should be summarily dismissed.[2] An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant's allegations that the State failed to meet its burden of proof could have been raised at trial and thereafter on appeal.

Furthermore, claims by an Applicant that he or she is actually innocent, is not guilty, or that the evidence against him or her was insufficient to prove guilt are not cognizable grounds for post-conviction relief absent a claim of ineffective assistance of counsel or newly discovered evidence. S.C. Code Ann. § 17-27-20(a)(6) ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.");

[2] It appears to Respondent that Applicant only intended to set forth the issues for appeal she wished for appellate counsel to raise and does not intend them to be free-standing allegations, but Respondent submits this partial motion to dismiss all the same out of an abundance of caution.

Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (interpreting the statute as barring such claims as inappropriate for consideration under the act); Dickson v. State, 247 S.C. 153, 156, 146 S.E.2d 257, 258 (1966) ("The allegation that petitioner is not guilty does not raise a matter for consideration by habeas corpus.").

Therefore, Applicant's allegations that the evidence introduced at trial was insufficient to prove her guilt should be dismissed as not cognizable under the Uniform Post-Conviction Procedure Act.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP; Mangal v. State, Op. No. 27726 (S.C.Sup.Ct. refiled October 4, 2017) (Shearouse Adv.Sh. No. 38 at 12). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be

sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VI.

Respondent denies each allegation not expressly admitted, qualified, or explained.

VII.

WHEREFORE, Respondent respectfully requests that this Court dismiss Applicant's first three allegations that the evidence against her was not sufficient and thereafter convene an evidentiary hearing on the allegations of ineffective assistance of appellate counsel.

Respectfully submitted,

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Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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15 Dec., 2017

STATE OF SOUTH CAROLINA COUNTY OF HORRY SANDY LEE LOCKLEAR, #360304 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS 2017-CP-26-00147 AFFIDAVIT OF SERVICE BY MAIL

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 **Return and Partial Motion to Dismiss** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
Falk Law Firm, LLC
PO Box 1058
Charleston, SC 29402

DATED this 15th day of December, 2017.

Tamieka Russell-Brown, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	**2017-CP-26-00147**
SANDY LEE LOCKLEAR,	)	
	)	
Applicant,	)	**Transcript of Record**
	)	(Post-Conviction Relief)
vs.	)	
	)	November 28, 2018
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

B E F O R E:

Honorable Kristi F. Curtis
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

James K. Falk, Esquire
Attorney for Applicant

Johnny E. James, Jr., Esquire
Attorney for Respondent

REPORTED BY:

Dixie C. Eubank
Retired Circuit Court Reporter

PREPARED BY:

Kay H. Richardson
Circuit Court Reporter

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EXHIBITS

No.	ID	EV

(No exhibits were marked or admitted.)

NOVEMBER 28, 2019

MR. JAMES: If it may please the Court?

THE COURT: Yes, sir.

MR. JAMES: Your Honor, this is the matter of Sandy Lee Locklear versus the State of South Carolina, docket number 2017-CP-26-00147. Ms. Locklear is present here in the courtroom today and is represented by Mr. Jim Falk, Esquire.

Ms. Locklear was indicted at the January 2013 terms of the Horry County Grand Jury for two counts of murder. She was represented on that charge by Mr. Ralph Wilson, Jr. and proceeded to trial on May 28th, 2014 before the Honorable Benjamin H. Culbertson and a jury. The jury found applicant guilty as indicted on June 12th, 2014, and Judge Culbertson sentenced her to imprisonment for concurrent terms of life on each murder conviction. She was represented on appeal by Edwin Thompson Kinney, Esquire, who raised three issues to the Court as recited in the state's return to this matter. The parties proceeded to oral arguments on May 3rd, 2016. Mr. Kinney represented Applicant at those arguments. By unpublished opinion the South Carolina Court of Appeals confirmed her convictions on June 22nd, 2016, and the remittitur was issued on July 20th, 2016.

Your Honor, in the original application and up until this point, Ms. Locklear has only alleged ineffective assistance of appellate counsel. As you may have observed from the bench,

there's been a little bit of traffic going in and out of the courtroom this morning. My understanding is that she wishes to additionally proceed with a single allegation of ineffective assistance of trial counsel regarding a short portion of testimony in the trial transcript that I will defer -- get Mr. Falk to identify.

THE COURT: Yes, sir.

MR. FALK: Yes, sir, Your Honor. We're just objecting -- ineffective assistance of trial counsel in addition to the issues of appellate counsel as failure to object to damaging hearsay testimony. And I'll -- I'm gonna do the appellate counsel first when we get to that portion, but it's the testimony from Faye Hunt, which is 825 of the trial transcript starting at about Line 17.

THE COURT: Okay.

EDWIN THOMPSON KINNEY, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

CLERK: Please have a seat, state your name for the Court and spell your last name, please.

MR. KINNEY: Edwin Thompson Kinney, K-I-N-N-E-Y.

DIRECT EXAMINATION OF EDWIN THOMPSON KINNEY BY MR. FALK:

Q: Mr. Kinney, can you please tell us where you work?

A: I work at Mullikin Law Firm in Camden, South Carolina.

Q: Okay. And how did you come to be Ms. Locklear's attorney in this case?

A: I got appointed through the Commission of Indigent Defense, Appellate Division through the appellate project. It's a project where attorneys volunteer to take on appellate cases through Indigent Defense.

Q: And so how many appellate cases had you done before you prepared this appeal?

A: This was my first appellate case.

Q: So, what is the nature of your practice?

A: Criminal -- I do a lot of criminal defense. I'm a part-time public defender in Lee County. I do contract public defender work as well, and also do family law and some other things.

Q: Okay. So, go -- so walk me through the process of how you decided which issues to raise in this case?

A: First thing I did was read the very extensive transcript of the trial. It was a thousand and some pages, if I recall, and I read the entire thing. And I also consulted with Bob Dudek, Chief Appellate Defender, and we -- I worked with him and we sort of identified the main issues that we thought would be raised on appeal.

Q: What kind of input did you have from my client?

A: I didn't have much input from her. I pretty much, from what I understood, it was my decision to decide what issues to raise and that's the way I did it.

Q: Okay. And so just for the Court's benefit, generally

what was the factual setting in this case?
A: Factual setting of what actually happened?
Q: Yes.
A: It was alleged to have been a murder that Ms. Locklear got these two gentlemen to kill her husband and I believe it was her stepson. It was a case where she had called the police and said that she was raped by these two gentlemen and they took her to the hospital and then they took her to the police station. After they took her to hospital, they took her for questioning and they questioned her for a long period of time. And her statements were -- changed and then she eventually made somewhat of a confession to, you know, that it was supposed to be a robbery only and that they weren't supposed to kill the two gentlemen and that's kind of how -- where essentially she made incriminating statements when she was being interviewed by the police.
Q: What was her relationship with the two victims?
A: I believe one of the victims was her husband and then one of them was her stepson, I guess, her husband's son.
Q: Was there some discussion about they were trying to scare the stepson because he had some ---
A: I believe Ms. Locklear, during the interrogation said that they were -- the son had drug problems and other problems and they were trying to scare him straight and they weren't supposed to kill him.

Q: So, you said that -- so two people broke into the house?
A: That's my -- yes. I believe it was two individuals that came to their house. I believe it was in Aynor -- excuse me, not Aynor -- Loris/Tabor City area and they broke in and killed the two gentlemen.
Q: What evidence do you recall from the transcript that implicated by client in this murder by two other people?
A: My recollection is it was her story that didn't add up. Frankly, it was her interrogation that changed and it was -- from my view that hurt what she said during that interrogation before and after Miranda was really the main thing that -- the main evidence against her.
Q: But as far as whether or not she contemplated that somebody would get shot by this, as far as being able to prove malice, what evidence did you find?
A: My recollection is that it was the fact that she admitted that it was supposed to be a robbery, and that went to malice.
Q: Was the robbery for the purpose of -- it was a staged robbery for the purpose of trying to scare the son; is that not what her statement was?
A: I believe that is what her statement was, yes.
Q: So, that's what -- and that information became part of the record, did it not?
A: It did.
Q: And do you recall, Mr. Wilson made a directed verdict

motion at the end of the trial; did he not?
A: He did.
Q: And so did you consider raising the fact that the state was unable to prove malice as an issue raised on direct -- on -- for a directed verdict?
A: Yes, I did consider it but I ultimately decided that the issues that I chose to raise were better issues.
Q: Is there a problem with raising all of the issues that are present?
A: There's no problem with it, but ultimately it's somewhat of a strategic decision about which issues to raise at, you know, in a brief and then at oral argument.
Q: So, what goes into that strategic decision?
A: What you believe -- appellate believes is the strongest issues and that's what I felt that the interrogation of her, and the issues surrounding that, which were the two main issues I raised were -- and that was sort of key to her being convicted was the jury seeing her story change and that she didn't seem credible at all after the interrogation. That -- to me, there the big issue with her statements pre-Miranda that showed that she was lying, and then the statements after Miranda which she changed -- completely changed he story. And so the issue surrounding the interrogation was what I saw to be the most important issues.
Q: Was she aware of the issues that you were planning on

raising before you went and filed the final brief?
A: I don't know. I'm not sure.
Q: You have a criminal defendant who is on trial for the murder of her husband and she's trying to really assert her innocence and that would in part be by showing that the state was unable to prove malice; wouldn't that be important to the client to have that issue aired out as opposed to having the case brought back because there was a problem with the confession?
A: It may be, but ultimately I had read the record and I made the best decision I could on what the best issues were.
Q: How much input did Bob Dudek have on this?
A: A good bit. I talked to him several -- many times. I would say I got to know him pretty well during this process.
Q: Did he tell -- did he tell you how many issues to raise?
A: He didn't tell me how many issues to raise, but he imparted on me that it was ultimately my decision but he helped me, you know, decide what the best issues were.
Q: What evidence was there -- what evidence do you recall seeing in the trial that this was a hand-of-one-hand-of-all instruction would've been appropriate?
A: I don't recall off the top of my head, but I do -- I mean, I remember that her statement that this was supposed to be a robbery and that she was working with the gentlemen to plan that and that there was text messages from her to them

and that there was evidence that she got them to come there; that was the evidence that I recall.

Q: That that was planning possibly a robbery, not a murder?

A: That's right.

Q: Do you think that that issue was preserved? I mean, couldn't you have raised it had you thought it was meritorious?

A: I don't recall exactly. I don't recall. I'm not gonna even try to speculate whether or not -- I'm sure that it probably was preserved but I really don't necessarily recall.

Q: So, what is the appellate history of this, it was -- was there a cert to go to the Supreme Court?

A: After the opinion came down, I consulted with Bob Dudek again about whether or not I should try to get cert to the Supreme Court when he ultimately decided that it wasn't -- it wouldn't make it, but so we decided not to. It was an unpublished opinion that was pretty brief and it was pretty -- the Court of Appeals didn't buy my arguments, frankly, and they ruled that it was a factual issue and they -- they essentially -- it was a short opinion.

MR. FALK: No further questions.

THE COURT: Mr. James?

MR. FALK: Oh, maybe I do have a question.

No further questions.

CROSS EXAMINATION OF EDWIN THOMSPON KINNEY BY MR. JAMES:

Q: Mr. Kinney, would you agree that -- were you looking to present only the best issues that were available to your client?
A: Yes.
Q: Is there a possible detriment to your client by raising less than the best issues in addition to those issues?
A: Yes, I'd say there is a risk to doing that.
Q: All right. What's the risk of doing that?
A: I guess credibility with the Court, potentially. You fight ever issue, there's a limited amount of time and words that you can pursued the Appellate Court, so you really have to choose the best issues.
Q: Why did you identify the issues around the applicant's statements to law enforcement as the best issues to bring to trial?
A: Because in my view, the state -- her statements were most of the evidence against her. I really -- when her story unraveled, it was because of the statement before and after Miranda and I thought this case also fit into the *Missouri v. Seibert* issues of, you know, questioning pre-Miranda and then Mirandizing and then restating those same things.
Q: And did you identify those issues only because of the weight of the evidence at issue or also because of the strength of the potential arguments against that evidence?
A: I'd say both.

MR. JAMES: No further questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION OF EDWIN THOMPSON KINNEY BY MR. FALK:

Q: Had there been unpreserved hearsay issues, would that have been something to have raised?

A: If there were unpreserved hearsay issues? I don't think I could've raised them if they were unpreserved.

Q: If they were preserved, would you have been able to raise them?

A: Conceivably, yes.

MR. FALK: No further questions.

MR. JAMES: No further questions.

THE COURT: Thank you. You may step down.

MR. JAMES: Your Honor, may this witness be excused?

THE COURT: Mr. Kinney, you're excused.

MR. KINNEY: Thank you, Your Honor.

MR. FALK: I'd like to call Mr. Wilson to the stand.

RALPH WILSON, JR., HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

CLERK: Have a seat and state your name for the Court, please.

MR. WILSON: Thank you, ma'am.

Ralph Wilson, Jr.

DIRECT EXAMINATION OF RALPH WILSON, JR. BY MR. FALK:

Q: Mr. Wilson, how did you come to be -- how did you come to

represent Ms. Locklear in this trial?
A: I believe from my recollection, they consulted with my office before I was actually appointed, and I think that Orrie West contacted me and asked me about representing her and then I agreed to do the appointment.
Q: So, was there a conflict?
A: Conflict?
Q: I mean, were you appointed because you were conflict counsel in this case?
A: I believe so. It's just been a long time, but I believe so, yes, sir. There were other codefendants involved.
Q: I see, I see.
A: Olin Bryant and, I believe, James Evans in this case.
Q: Okay. So, now tell me, who was Faye Hunt, how was she involved in this case?
A: Faye Hunt was the cousin, I believe, of my client. And Faye Hunt gave statements that were absolutely inculpatory against my client.
Q: And what were those statements?
A: One statement was regarding -- well, it was one statement, but one part of the statement was regarding a gun. And in the record, I actually objected because what she was trying to get in were statements regarding whether or not -- what my client said about a gun but said it to another person. Another statement that she gave was -- I think the most

damaging -- what she said was that she had a conversation with my client where my client alleged to have said to her once he -- and I'm not -- it's not verbatim -- once, you know, he dies, I'm gonna be rich bitch. And that's something that came across as obviously incendiary.

Q: Were there not also conversations that she -- did she not talk about a telephone conversation that she had with her nephew?

A: I don't recall, to be honest with you. I don't recall.

Q: Do you have a transcript with you there?

A: I don't have the transcript. Actually, no, I do, I do have a transcript -- just got -- gave it to me.

Q: If you could look at Page 825.

A: Okay.

Q: And if you could just sort of look at that page and the next page just to sort of refresh your recollection of what was going on in the trial at this time.

(REPORTER'S NOTE: Mr. Wilson reviews portion of transcript.)

Q: She's talking about a conversation that she's had with her nephew; is that right?

A: That seems to be what she's talking about, yes. And I think that the prosecutor says, you know, we can't get into what was said -- what somebody else told you is what he said.

Q: But the nephew is -- what had the nephew said up to this point?

A: I am not certain. I don't recall to be honest with you.
Q: But is this not how -- so how did -- what led Faye Hunt to go to -- to call the Horry County Police Department?
A: Faye Hunt, if I'm not mistaken, I think she may have been at some point in time, a suspect or something to that effect. I'm not sure. I don't recall why he went or how they engaged -- I don't recall that at all, how they engaged her; I don't remember that.

I know there was some contention about whether or not her name was out there or not regarding this matter.
Q: Let me kind of back up a little bit. What did you do to investigate this case?
A: Oh, man. We hired a private investigator, we got funds from SCCID to hire a private investigator and they went around talking to witnesses. I personally went out and talked to witnesses. One at a gas station where I actually brought along my uncle and -- actually two of my uncles to watch my back because there were some issues about going to this particular gas station in Tabor City. And we were trying to get information regarding this young man, whether or not he saw my client earlier that day. He gave a statement. I can't remember his name, but he gave a statement saying he came in that day and that he saw her at that gas station in Tabor City buying beer and cigarettes and also said that he knew her from that gas station playing poker with Mr. Hatfield. There was

another individual -- I actually went also personally myself to James Evans' home to speak with his family about what they knew about when he came back home, when -- you know, if they saw any conversations take place between my client. We did exhaustive investigation into some of the facts, some of the statements that were given, yeah. And that's rare, because I rarely go out myself and do that kind of investigation, but we did in this case.

Q: And what did you -- what kind of discussions did you have with your client about the facts in this case or the evidence that the state would have?

A: My primary concern was obviously the statement. We spent a lot of time regarding the statement. It was long interrogation, it was the bulk of the evidence against her. There wasn't a lot of other evidence. I mean, there were some circumstantial evidence I thought in the case that was damaging. One of the things that I keyed in on was the pillow taken from the house that they alleged was used to cover up the victims before they killed. I was concerned about that piece of evidence.

I was also concerned about the 911 call. I expressed that to my client. And in trial, actually, the jury ended up coming back and asking about that 911 tape. The 911 tape really bothered me because there was a change in the inflection in the voice of my client during that call. And

the allegation was -- the story was, again, that she created in the interrogation was that basically there were two guys that came in that were supposed to do this, you know, mock robbery and stage it. Well, she knew they were black at the time, so the jury knew that. The issue was in the 911 call, she says they were white and she then changes her voice. Her voice clearly changes. And the jury, I believe, picked up on that as well. I mean, it was one reason I think that they asked for the tape. We discussed that as well and how to deal with that at trial.

You know, there were also other small issues about the rape kit, which was -- came back negative but my client had alleged that she had been raped. But the way we dealt with that at trial and I told her that our strategy is gonna be basically to say, look, there was a sexual assault. You can have a sexual assault without having penetration. And again, she fell asleep, that was the story, and that she was woken up by -- I don't recall if she woke up or if she left or came back or what the story was, but there was a story regarding her not being completely coherent when the police were called or arrived at the scene. So, there was a host of evidence to deal with. And regarding the rape kit, the issue regarding her statement which was really concerning to me, we did a *Jackson v. Denno*. I explained to her that that was gonna be really the case in my opinion, the *Jackson v. Denno* hearing.

Q: Did you -- did you think that there was -- that the state had sufficient evidence to show malice in this case as far as, you know, hand of all hand of all -- hand-of-one-hand-of-all instruction?

A: I'm biased; I'm her lawyer. I argued no, they didn't. And I stand by what I said, I meant that argument and I think it was a strong argument. My concern was that they failed -- in my opinion, they failed to show wickedness. Okay? I didn't see wickedness in this. I don't think they -- you know, even though she says that there was a mock robbery or that they were staging, you know, something to scare him, again, I don't know if that goes to -- if that's strong enough to hold up malice, which is an element of murder. So, you know, in my arguments, obviously, what I said was that I don't believe that the elements for murder were met and I still stand by that. I don't believe that they were. I think that they had circumstantial evidence. Again, her being at the house, there were no direct statements that she was involved other than her own statement. But again, her statement was so damaging, in my opinion, I think that that was -- that's what hurt her the most in trial. It was her statement that changed over a period -- we're not talking about two or three hours. This was, if I'm not mistaken, an interrogation that took 10 to 12 hours, if I'm not mistaken, I believe, where she was in custody.

Q: So, back to Faye Hunt, did you have any concerns that she was uttering hearsay when she was talking about this telephone phone conversation that she had with her nephew?

A: I was. I didn't find it to be honestly that, you know, damaging. The most damaging part of what she said was when she broke down crying on the stand and she was talking about the fact that she loved Mr. Hatfield and that she, you know, thought that, you know -- or she alleged she had this conversation with Sandy about being a rich bitch. Those are the things, you know, that strategically that I keyed in on. The conversation with the nephew really wasn't something that I was concerned about at the time to be honest with you.

Let me also say, in trial also, I mean there's, there's -- I know you know this, but I'm gonna say this for the record -- there is strategy, okay, you don't ever want to let the jury believe that you are afraid of a witness or you are concerned with a witness. So, trial strategy for me was basically to make certain that I wasn't trying to over object for a witness. We did actually object to certain parts of what she was trying to say, some of it was rank hearsay, again regarding the gun because that was so germane to our case, you know, whether or not she knew about that gun. The nephew wasn't really a major issue. So, again, not over objecting, objecting was definitely something that I was concerned about.

Q: No further questions.

A: Yes, sir.

THE COURT: Mr. James?

MR. JAMES: I have no questions for this witness.

THE COURT: Thank you, sir. You may step down.

MR. WILSON, JR.: Thank you, Your Honor.

MR. FALK: I'd call Sandy Locklear to the stand.

THE COURT: Okay.

SANDY LOCKLEAR, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

CLERK: Please have a seat, state your name for the Court and spell your last name, please.

MS. LOCKLEAR: Sandy Locklear, L-O-C-K-L-E-A-R.

DIRECT EXAMINATION OF SANDY LOCKLEAR BY MR. FALK:

Q: Ms. Locklear, how much conversation did you have with Mr. Kinney?

A: None, zero.

Q: Literally none, zero?

A: Yes.

Q: What kind of written communications did you have with him?

A: He sent me two letters. I wrote him back once. And I didn't never hear from him again until he sent me the results of the appeal.

Q: Did you talk to him about issues that you wanted to raise?

A: Yes, I did. I wrote him a letter. I did the paperwork. I wrote down what I thought was important and I sent them to him.

Q: Issues that you think were important?

A: There were several. I felt as though my Miranda rights were not read to me prior to my ---

Q: I ---

A: --- statement.

Q: I think he raised the Miranda questions on the appeal. But how about the ones that he didn't raise? For example, I was asking him about whether or not the state had proven malice in order to make a murder charge here. Did you discuss the ---

A: I don't believe I did. I'm really not -- you know, I don't know the law, I don't know, you know, those terms that y'all use as far as malice and what to look for. I've never been in trouble like this and I just didn't know what to look for. So, what I did see is what I -- and that was my Miranda, and also the -- the medication that I was -- that I was on, they knew it was in my paperwork that I was on Ambien and they questioned me. I hadn't been asleep that whole entire night until that next day, it was over a 24-hour period. And I kept blacking out and blacking out when they were questioning me. So, I don't remember hardly of what was said on that 911 call. I mentioned that to him, if I can remember correctly. I'm not

sure about the other ones, but I know it was at least three or four.

Q: Well, we -- I was asking your appellate counsel about the hand of one hand of all, were you involved in setting up this?

A: No, sir. I was not involved in setting up no murder for my husband. I loved him. He was good to me. All we -- Amos and I wanted to do was to scare his son because he kept using drugs, that's all we wanted to do. It was never planned for him to be murdered or him -- my husband to be murdered, no, sir; no, sir; no, sir.

Q: Do you recall the evidence the state tried to prove to show that you were involved in setting up this murder?

A: No. I cooperated, I did what I was -- I thought I was doing the right thing. Now, they didn't -- and I wasn't penetrated in the rape, but I was tied up. I had burn marks on my body, bruises in between my thighs, my busted lip on the inside. I was assaulted but I -- they -- I don't know -- I didn't know if they penetrated me or not because I passed out. When I woke up, my husband's dog was licking my face. And so I got up and I called 911. I don't know.

Q: Do you think that Mr. Kinney did a good job representing on this appeal?

A: No, sir; I do not.

Q: Do you think Mr. Wilson did a good job representing you at the trial?

A: Mr. Wilson is a good man. He fought for me, he did. He was honest with me. And I believe he believed in my innocence.

Q: Anything else you'd like to say?

A: To my husband's family, I just want to tell you, Sylvia, that my heart goes out for you. There's not a day go by that I don't think of you and how much you miss him. I know you miss him. I miss him, too. I know you don't believe that but it is true.

MR. JAMES: I respectfully object.

THE COURT: Sustained.

MR. FALK: No further questions.

THE COURT: Mr. James?

MR. JAMES: No questions for this witness.

THE COURT: You can step down.

MR. FALK: No further witnesses.

THE COURT: Mr. James?

MR. JAMES: There's no showing for the state, Your Honor.

THE COURT: I'm sorry?

MR. JAMES: No witnesses from the state.

THE COURT: Anything else that you want to tell me?

CLOSING ARGUMENT BY FALK:

MR. FALK: Well, I can appreciate that deference is supposed to be given to Appellate Defense on the issues that they want to raise. However, I think the issues that my

client wanted to raise are very strong. I think we have an experienced trail attorney in here who thought that the state had failed to make the burden of proof on murder. And the fact that the Court denied the motion for directed verdict we think is an issue that should've been brought up before the appellate court. I appreciate the fact that the Appellate Court did raise good issues, not saying that the issues that they raised were bad. However, we think this was -- especially, in the factual setting of this case, tried to show that she was involved in this murder. And, if the Court has an opportunity to review the proof in here, that they'll see that it was an issue that should've been brought before the Appellate Court.

THE COURT: Thank you.

Mr. James, anything you want to say, sir.

CLOSING ARGUMENT BY JAMES:

MR. JAMES: Your Honor, Appellate Counsel is entitled to deference in exercising his lawyerly judgment in identifying the best issues available to his client. He did so. It is in no way, shape, or form clear that the issues raised in the application for post-conviction relief are superior to those that were raised on appeal.

Additionally, as we've heard through the testimony, Ms. Locklear identified primarily the Miranda in the interrogation as the issues of the greatest import to her in her limited

communications to her appellate counsel, which appellate counsel then did focus on.

As to the limited allegations of ineffective assistance of trial counsel, the alleged hearsay at 825 and I suppose slightly over into 826 on the transcript does not appear to be hearsay, does not appear to be offered to prove the truth of the matter asserted, but rather merely explained why Faye Hunt went to the police.

For those reasons, Your Honor, Applicant has failed to show any deficiency of either trial or appellate counsel, has failed to show any prejudice from those alleged deficiencies, and we would respectfully request that the application for post-conviction relief be denied.

BY THE COURT:

THE COURT: It's a lengthy transcript, but I will read it, and I'll take it under advisement.

MR. FALK: Thank you, Your Honor.

ADJOURNED

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Sandy Locklear v. State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on November 28, 2018, as reported by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

August 2, 2019.

STATE OF SOUTH CAROLINA COUNTY OF HORRY Sandy Lee Locklear, S.C.D.C. No. 360304, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Case No.: 2017-CP-26-00147 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Sandy Lee Locklear ("Applicant") on January 12, 2017. Respondent made its return and partial motion to dismiss on or about December 15, 2017. The Court convened an evidentiary hearing into the matter on Wednesday, November 27, 2018, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on her own behalf at the evidentiary hearing. Applicant's trial counsel, Ralph Wilson, Jr., Esq. ("Counsel") testified, as well as appellate counsel, Edwin Thompson Kinney ("Appellate Counsel"). The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the January 2013 term of the

Horry County Grand Jury for two counts of murder (2013-GS-26-00302, -00304). Ralph Wilson, Jr., Esq. represented Applicant at trial. Brad Richardson and Monica Wooten, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On May 28, 2014, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Applicant guilty of both murders as indicted on June 12, 2014. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of life.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Edwin Thompson Kinney, Esq. Applicant raised three issues to the South Carolina Court of Appeals:

1. "Whether the court erred in ruling that [Applicant] was not in custody prior to being read her *Miranda* rights and in allowing the [Applicant's] pre-*Miranda* statement to be admitted into evidence?"
2. "Whether the court erred in ruling that the State did not violate the rule set forth in *Missouri v. Seibert*?"
3. "Whether the court erred, thereby violating the Fourth Amendment and the [Applicant's] right to privacy, when it upheld a search warrant on the home at [redacted]?"

The parties proceeded to oral arguments on May 3, 2016; Mr. Kinney argued on behalf of Applicant and Melody Jane Brown, of the South Carolina Attorney General's Office, represented Respondent. By unpublished opinion, the South Carolina Court of Appeals affirmed Applicant's convictions. *State v. Locklear*, Op. No. 2016-UP-313 (S.C. Ct. App. Filed June 22, 2016). The Remittitur was issued on July 20, 2016.

PRESENT APPLICATION

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

1. "State failed to prove *mens rea* or malice aforethought necessary to charge jury on murder charges."
    a. "There is nothing in the record to prove beyond a reasonable doubt that I had any knowledge of or part in murders beyond speculation"
2. "Lack of direct or substantial circumstantial evidence proving murder."
    a. "Not one scintilla of evidence direct or circumstantial"
    b. "Evidence is inconsistent with jury's findings, State's case is based on conjecture"
3. "State failed to meet burden of proof for 'hands of one, hands of all."
    a. "At no time did other co-defendants make any statement to implicate me in the murders in any way"
4. "Appellate Counsel, Edwin Thompson Kinney, appointed to me through Indigent Appellate Defense, provided ineffective assistance of counsel for [failing] to raise the issues listed in this brief during appeal. These issues were [preserved in] the record of trial by my defense attorney, Ralph Wilson, Jr. during the criminal proceedings."

APPLICABLE LAW

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 398 (1985). Appellate Counsel must be able to provide effective representation as to render the appellate proceedings fair, and "must play a role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of appellant's claim." *Id.*, *See also Anders v. California*, 386 U.S. 378 (1967).

In deciding a claim of ineffective assistance of counsel, courts must focus on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 685

(1984). First, the burden of proof is on Applicant to show that Appellate Counsel's performance was deficient under prevailing professional norms. Second, Applicant must prove they were prejudiced by counsel's deficiency and show with a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (citing *Strickland v. Washington, supra)*. The proper standard for evaluating an effective assistance of appellate counsel claim is that enunciated in *Strickland. Smith v. Robbins*, 528 U.S. 259, 263 (2000).

When an applicant contends Appellate Counsel rendered ineffective assistance for failing to argue a specific issue on appeal, she must show failure to raise that issue was objectively unreasonable and that, but for this failure, Applicant's conviction or sentence would have been reversed or remanded. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836. *See also Peoples v. Griffin*, 687 N.E.2d 820 (Ill. 1997). First, an applicant must show that a particular nonfrivolous issue was clearly stronger than issues presented by Appellate Counsel in a merits brief on appeal. If successful in such a showing, an applicant then has the burden of demonstrating prejudice. The applicant must show a reasonable probability that, but for counsel's failure to raise that particular claim in the merits brief, Applicant would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). An applicant must satisfy both prongs of the *Strickland* test to prevail, because prejudice is not presumed by this claim. *Id.* at 288-89 ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.").

Appellate Counsel who files a merits brief need not, and should not, raise every nonfrivolous issue presented by the record. *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). Appellant has no constitutional right to compel appointed counsel to press nonfrivolous points, if counsel, as a matter of professional judgment, decides not to present those points. *Id.* Great

deference is given to Counsel's experience and professional judgment in winnowing out weaker arguments and focusing on one, or at most a few, key issues in order to maximize the likelihood of success on appeal. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). A brief that raises every colorable issue runs the risk of burying good arguments, and may have the tendency to project a lack of confidence in any one. *Id.* "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . " *Id.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. This Court has also reviewed the records submitted by the parties and has heard the arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

I.

To the extent Applicant's first three allegations can be interpreted as independent and distinct from her allegation of ineffective assistance of appellate counsel, this Court finds them to be without merit. Each of these issues were raised by trial counsel and ruled on by the trial judge. An application for post-conviction relief cannot serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for post-conviction relief. S.C. Code Ann. § 17-27-20(b); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for post-conviction relief. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001); *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997). Claims by an Applicant that she is innocent, or that the evidence against her was insufficient to prove guilt are not cognizable grounds for post-conviction relief absent a claim of

ineffective assistance of counsel or newly discovered evidence. S.C. Code Ann. § 17-27-20(a)(6) ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."). Errors in an Applicant's trial which could have been reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction relief proceedings. *Simmons v. State*, 264 S.C. 417, 423 215 S.E.2d 883(1975) (barring such claims as inappropriate for consideration under the Act).

Applicant has failed to allege anything in her application for relief to warrant this Court evaluate trial counsel for ineffective representation. Accordingly, Applicant's allegations that the evidence introduced at trial was insufficient to prove her guilt are not cognizable under the Uniform Post-Conviction Procedure Act and any claims of ineffective assistance of trial counsel are **DENIED** and **DISMISSED.**

II.

Applicant contends Appellate Counsel was ineffective for failing to raise the denial of her directed verdict motion on direct appeal, arguing the State failed to produce "one scintilla of evidence direct or circumstantial" that Applicant had any knowledge, or otherwise took any part in the murders of the victims and the evidence presented was "inconsistent with [the] jury's findings, State's case is based on conjecture." This Court disagrees.

In reviewing the denial of a motion for directed verdict, the Court must view the evidence in the light most favorable to the State, and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *State v. Harry*, 420 S.C. 290, 298, 803 S.E.2d 272, 276 (2017); *See also State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016). The Court's review is limited to considering the existence or nonexistence of evidence, not its weight. *Id.* When the evidence submitted raises a mere

suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof. *Id.* at 236, 781 S.E.2d at 353. "Nevertheless," when reviewing the denial of a directed verdict, "a court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* at 236, 781 S.E.2d at 354.

It is well-established jurisprudence that "the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." *Bennett*, at 236 (citing *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955)). "Within the jury's inquiry, 'it is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt....'" *State v. Harry*, at 298, 803 S.E.2d at 276 (quoting *Littlejohn*, 228 S.C. at 328, 89 S.E.2d at 926). The court must apply an objective test to this analysis: "although the *jury* must consider alternate hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *Bennett*, at 237, 781 S.E.2d at 354. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Id.*

The evidence introduced by the State at Applicant's trial was sufficient to withstand her motion for directed verdict. Circumstantial evidence introduced by the state raised fact issues for the jury as to Applicant's guilt. On August 19, 2012, at 4:00am, officers were called to the victims' home after Applicant, on a 911 call originating from the home, reported the murders and that she had been raped. Responding officers noticed the back door was open and discovered a body face down in the living room and another body face down on the kitchen floor. The deceased victims were Applicant's husband and her husband's adult son.

Applicant told the officers two males entered the home, one with a long gun, struck her in the head with the gun, and raped her in the kitchen. Applicant was transported to the hospital, where she again maintained that she had been vaginally penetrated twice. After being cleared by the hospital, Applicant was transported to the detention center and interviewed. Applicant initially maintained that she had been raped by the two males who forced their way in to the home.

During the interview, Applicant gave permission for her cell phone records to be obtained. Her cell phone records revealed she had sent and received texts shortly before 3:00am on the day of the murders from Nehemiah James Evans[1]. In the text message, the recipient tells her to "unlock door," to which she replies, "the back is open." Cell tower records showed that both Applicant's cell phone and the cell phone she was communicating with regarding the back door, were "side by side" at 2:41 A.M., and then again at 5:27am. The 2:41am location records placed the phones within the generally vicinity of the Victims' home, and at 5:27am the phones were placed in the location where Applicant's burned rental vehicle was later found. A later search of Evan's home revealed a piece of paper on which Applicant's name and cell phone number were written.

After being confronted with the cell phone records, along with the fact that her physical exam revealed no bruising or evidence of vaginal penetration, Applicant repudiated her first statement and admitted complicity in the crime, but claimed "it was supposed to be a robbery." She admitted she unlocked the back door for the two men to enter, then allowed them to tie her up. Applicant later claimed that her stepson had a serious drug problem and that she and her husband concocted a plan to stage a robbery in order to "scare him straight." She then implicated "James" and Odom Bryant in the murders.

Applicant's first cousin, Faye Hunt, provided a written statement to police as soon as she learned of the double homicide to "clear her name." Hunt testified she was close with Applicant growing up, and

[1] Evans pled guilty to murder on February 25, 2015, for his involvement in the double homicide, and received a 30 year sentence.

had recently reconnected with her in 2011. Hunt visited Applicant at the North Carolina home that Applicant's husband had purchased for her, where she met Applicant's husband on numerous occasions. Hunt testified that Applicant would never allow her husband to stay for long periods of time – only long enough to drop off groceries or cigarettes. Hunt described one particular day when Victim came by the house and gave Applicant his life insurance policy for her to keep. After Victim left, Applicant allegedly stated "it was a million dollar policy" and "if that son of a bitch died today I'd be a rich bitch tomorrow." Hunt described in detail a small caliber, pearl handle pistol that Applicant owned, which was consistent with the type of firearm used to kill both victims. A later search of Applicant's home yielded an accidental death insurance policy, issued in August 2011, with a million dollar payout under limited circumstances. The limiting language, however, was only explained in "small print, buried in the middle of all that paperwork." The only two beneficiaries listed on the policy were Applicant and Victim's daughter.

In order for Applicant to prevail on this issue, she has the burden of showing the denied directed verdict issue was clearly stronger than the issues Appellate Counsel did present, and that the Court of Appeals would have reversed her conviction, but for Appellate Counsel's failure to raise this issue. It is undisputed that this case was tried primarily on circumstantial evidence implicating Applicant in the double homicide. However, the trial court correctly denied Applicant's motion for a directed verdict based, not on the *weight* of the evidence presented by the State, but on the existences of evidence from which a reasonable juror could find Applicant guilty beyond a reasonable doubt. Appellate Counsel was not unreasonable for failing to raise this issue in light of the other nonfrivolous issues presented on direct appeal, and Applicant was not prejudiced by Appellate Counsel's decision not to raise this issue as a matter of sound professional judgment. Therefore, Applicant's claim of ineffective assistance of Appellate Counsel by way of allegation 2.a and 2.b is **DENIED** and **DISMISSED**.

III.

Applicant contends the "State failed to prove *mens rea* or malice aforethought necessary to charge jury on murder charges," failed "to meet burden of proof for 'hands of one, hands of all," and Appellate Counsel was ineffective for failing to raise the trial judge's charge on direct appeal. This Court disagrees.

During his jury instructions, the trial judge charged in part:

> Now, if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose. ... If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all or, as it is sometimes said, the hand of one is the hand of all. [Tr. at 1450]
>
> .....
>
> Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the Defendant is present when the crime is committed, is not sufficient to convict the Defendant as a principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of a prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal. The State must also prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all. [Tr. at 1450-51]
>
> .....
>
> Mere presence at the scene is not sufficient to prove someone guilty of a crime. A Defendant's presence where a crime is being committed or mere association with a person who commits a crime does not make a Defendant an accomplice or an aider and abettor of the person committing the crime. The burden is on the State to prove every element of the crime charged. If you find, after reviewing all of the evidence, that the State has proved that the Defendant was only present at the scene of the crime, and that they have not proved, beyond a reasonable doubt, any other participation in the crime, then you must find the Defendant not guilty. The law is that proof of at the scene of the crime is not sufficient to find someone guilty. [Tr. at 1452-53]

. . . . . .

> The Defendant is charges with two counts of murder. To convict the Defendant of murder, the State must prove beyond a reasonable doubt that the Defendant killed another person with malice aforethought ... Malice aforethought may be shown either by direct evidence or by inference from the facts and circumstances which are proved. [Tr. at 1454-55]

. . . . . .

> Now, if you find that the State has failed to prove beyond a reasonable doubt that the Defendant committed murder, you may consider whether the State has proved beyond a reasonable doubt that the Defendant committed involuntary manslaughter. Included within the offense of murder is the lesser offense of involuntary manslaughter. To convict the Defendant of involuntary manslaughter, the State must prove beyond a reasonable doubt that the Defendant unintentionally killed the victim without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm ... [Tr. at 1456]

. . . . . .

> To convict the Defendant of involuntary manslaughter, the State must also prove beyond a reasonable doubt that the Defendant's acts was [sic] the proximate cause of death ... [Tr. at 1457]

During deliberations the jury requested the trial judge provide them "the definition of involuntary manslaughter officially by code of law." The trial judge recharged the jury on involuntary manslaughter without objection from either State or Defense Counsel.

In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. *Id.* at 318, 577 S.E.2d at 464. A jury charge that is substantially correct and covers the law does not require reversal. *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010).

It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002). Under accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999). In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct. *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987).

Mere presence at the scene is not sufficient to establish guilt as an aider or abettor. *Leonard*, 292 S.C. at 137, 355 S.E.2d at 272; *State v. Barroso*, 328 S.C. 268, 272, 493 S.E.2d 854, 856 (1997) (mere association with admitted members of a conspiracy is insufficient to tie other persons to the conspiracy). However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." *State v. Hill*, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977). "Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing." *State v. Zeigler*, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005).

Applicant has failed to show that this issue was clearly stronger those briefed by Appellate Counsel on direct appeal, based largely on the same law and facts as set forth in Section II above. The totality of the direct and circumstantial evidence presented by the State was enough for the trial judge to correctly charge the jury on murder and "hand of one, hand of all." The charge clearly explained to the jury that

the State had the burden of proving every element of the crime charged and that mere presence and mere knowledge was not enough to sustain a conviction. The trial judge gave a correct and thorough charge on the requisite criminal intent for murder, and additionally, for the lesser included offense of involuntary manslaughter.

The circumstantial evidence presented in this case, as detailed in Section II above, was sufficient to send the case to the jury under a theory of "hand of one, hand of all," and the trial judge gave a correct charge on the law. Appellate Counsel was not unreasonable for failing to raise this issue in light of the other nonfrivolous issues presented on direct appeal, and Applicant was not prejudiced by Appellate Counsel's decision not to raise this issue as a matter of sound professional judgment. Therefore, Applicant's claim of ineffective assistance of Appellate Counsel by way of allegation 1.a, 2.b, and 3.a is **DENIED** and **DISMISSED**.

[*Conclusion and signature on following page*]

CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 9th **day of** May **, 2019.**

Kristi Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina