

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 10 2020

Certiorari to Florence County

S.C. SUPREME COURT

Honorable George M. McFaddin, Circuit Court Judge

DAVID G. JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000813

APPENDIX

VICTOR R SEEGER
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

LINDSEY MCCALLISTER
Assistant Attorney General
Rembert Dennis Bldg, Room 519
1000 Assembly Street
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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Ineffective Assistance of Counsel, Jury Presented A Significant Obstacle that was inherently prejudicial.

Jury
violations

- (a) Failure to subject the case to a meaningful
Ineffective Assistance of Counsel, Adversarial testing
Ineffective Assistance of Counsel
- (b) Failure at sentencing stage, Burden shifting
Ineffective Assistance of Counsel
- (c) Violations of Constitutional rights, Malicious prosecuti
suffered prejudice, suppress of evidence.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Petitioner reserves his rights to amend his answer
- (b) and to provide additional, more specific grounds on
- (c) which he bases his allegations that he are being held in custody
unlawfully.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Yes
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Petition for rehearing
- ii. Petition for Writ of Certiorari
- iii. On oral Argument
- iv. Petition of Argue Against Precedent
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. South Carolina Supreme Court
- iv. South Carolina Supreme Court
- (c) the disposition thereof:
- i. June 13, 2014
- ii. February 20, 2015
- iii. July 10, 2015

- iv. N/A
- (d) the date of each such disposition:
- i. Same
- ii. Same
- iii. December 2, 2015
- iv. July 17, 2014
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Affirmed Petitioner's Convictions
- ii. Granted the petition
- iii. Dismissed AS Improvidently Granted
- iv. Unpublished Opinion
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO
N/A
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
- ii. N/A
- iii. N/A
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. N/A
- iii. N/A
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) N/A
- (b) N/A
- (c) N/A
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? Attorney, James Hoffmeyer
- (c) your sentencing? Attorney, James Hoffmeyer
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Attorney, Susan B. Hackett
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Attorney, James Hoffmeyer, County of Florence
 - ii. Same
 - iii. South Carolina Commission on indigent Defense
- (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Trial + Sentence
 - iii. Appeal + Certiorari

Vacating of the conviction and sentences, dismiss indictments with prejudice, and in the alternative a new trial.

19. State clearly the relief you seek in filing this application:

prejudice, and in the alternative a new trial.

20. Are you now under sentence from any other court that you have not challenged? NO

N/A

20 16 CP 21 2545

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

I, DJ, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

David Emerson

SWORN to and subscribed before me this 17th
day of October, 2016.

Luduan Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

2016 OCT 19 PM 3:39
CORRE REG-SHEANIN
CLP & OS
CLERK OF COURT, SC

FILED

20.16 CP 21 2545

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, DT, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

David Mson

Applicant

SWORN or affirmed to and subscribed before me this
14th day of October, 2016.

Leahann Bryant
Notary Public

My Commission Expires: May 26, 2020

2016 OCT 19 PM 3:39
CORRECTOR GENERAL
SOUTH CAROLINA
CLERK OF COURT, SC

FILED

Dear Clerk of Court,

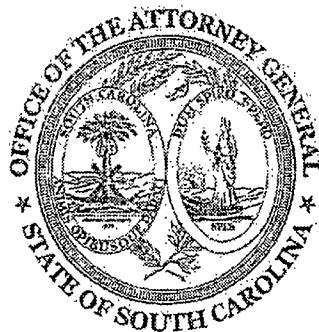
Enclosed is my PCR application, could you please Date, stamp, clock, and send me a copy please. Thank you for your help in this very important.

2016 OCT 19 PM 3:39
CORRECTIONAL INSTITUTE
DOCP 2.25
41 GREENE COUNTY, SC

FILED

David G. Johnson

10-14-16



ALAN WILSON
ATTORNEY GENERAL

June 30, 2017

The Honorable Doris Poulos O'Hara
Clerk of Court, Florence County
180 N Irby St MSC-E Rm B11
Florence, SC 29501-3456

Re: David G. Johnson, #312138 v. State of South Carolina
2016-CP-21-2545

Dear Ms. O'Hara:

Enclosed please find the original **Return and Motion for a More Definite Statement** of the Respondent, in the above-captioned case, for filing in your office.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General

LAM/dgr
Enclosure

cc: Jonathan D. Waller, Esquire

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

DAVID G. JOHNSON, #312138)

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

CASE NO: 2016-CP-21-2545

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET****Plaintiff's Attorney:**

Jonathan D. Waller, Bar No.

Address:1315 Blanding Street
Columbia, SC 29201

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

Lindsey A. McCallister, Bar No.

Address:PO Box 11549
Columbia, SC 29211

Phone: 803.734.3737 Fax 803.734.4113

E-mail: _____ Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☒ NO**SECTION II: Motion/Order Type**

- ☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant

June 30, 2017

Date submitted

SECTION III: Motion Fee

- ☐ PAID - AMOUNT: \$ _____
☒ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

David G. Johnson, #312138,
Applicant,)

v.)

State of South Carolina,
Respondent.)IN THE COURT OF COMMON PLEAS
IN THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2016-CP-21-2545

**RETURN AND MOTION FOR A
MORE DEFINITE STATEMENT**

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on October 19, 2016¹, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the September 2009 term of the Florence County Grand Jury for murder, first degree burglary, armed robbery, possession of weapon during the commission of a violent crime, and conspiracy (2009-GS-21-1564). W. James Hoffmeyer, Esquire, represented Applicant. Solicitor E. L. Clements, III, Esquire, and John C. Jepertinger, Esquire, prosecuted the case. On February 13, 2012, Applicant proceeded to trial before the Honorable Thomas A. Russo. On February 17, 2012, the jury found Applicant guilty as indicted on all five counts. Judge Russo sentenced Applicant to imprisonment for consecutive terms of life without the possibility of parole for murder and first degree burglary. Judge Russo also sentenced Applicant to thirty years for armed robbery and five years for conspiracy to run concurrent with the murder and first degree burglary sentences. Judge Russo did not impose a sentence for possession of a weapon during the commission of a violent crime because Applicant had

¹ Respondent did not receive a copy of the application until January 4, 2017.

been sentenced to life without the possibility of parole.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on April 9, 2014. State v. Johnson, Op. No. 2014-UP-167 (S.C. Ct. App. filed April 9, 2014). Applicant filed a petition for rehearing with the South Carolina Court of Appeals on April 24, 2014. The Court of Appeals denied the petition by order filed on June 13, 2014.

Applicant then filed a petition for writ of certiorari to the South Carolina Supreme Court on July 17, 2014. By order dated February 20, 2015, the Supreme Court partially granted certiorari. The Supreme Court dismissed the writ as improvidently granted on December 2, 2015. State v. Johnson, Op. No. 2015-MO-067 (S.C. Sup. Ct. filed December 2, 2015). The remittitur was returned to the circuit court on December 2, 2015.

Applicant filed a petition for writ of certiorari to the United States Supreme Court on March 1, 2016. The United States Supreme Court denied the petition on April 18, 2016.

Attached to this Return and incorporated herein by reference are the records of the Florence 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 application.

II.

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

1. "Ineffective Assistance of Counsel," regarding:
 - a. "Failure to subject the case to a meaningful adversarial testing;"
 - b. "Failure at sentencing stage;"
 - c. "Burden shifting;"
 - d. "Violations of Constitutional Rights;"

- e. "Malicious prosecution;"
- f. The defendant "suffered prejudice;"
- g. "Suppression of evidence."

III.

Respondent submits 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." Id., 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.

Respondent submits 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 requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

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. 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.

V.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent

requests Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

LINDSEY MCCALLISTER
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

4/30, 2017

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

DAVID G. JOHNSON, #312138

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

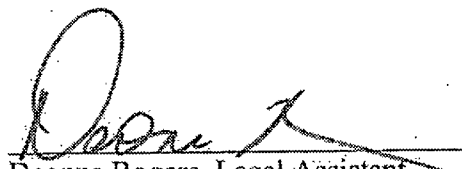
IN THE COURT OF COMMON PLEAS

2016-CP-21-2545

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 Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jonathan D. Waller, Esquire
Giese Law Firm
1315 Blanding Street
Columbia, SC 29201

DATED this the 30th day of June, 2017.
Deonna Rogers, Legal Assistant
For Respondent

State of South Carolina	)	Court of Common Pleas
	)	Twelfth Judicial Circuit
County of Florence	)	Case No. 2016-CP-21-02545
	)	
David G. Johnson,	)	
	)	
Applicant,	)	
	)	
-vs-	)	Transcript of Record
	)	
The State of South Carolina,	)	
	)	
Respondent.	)	
	)	

April 3, 2018
Florence, South Carolina

B E F O R E:

The Honorable George M. McFaddin, Jr., Judge

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

Jonathan Waller, Esquire
Attorney for the Applicant

Lindsey McCallister, Esquire
Attorney for the Respondent

Krystal J. Smith
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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(No Exhibits Presented)

COURT REPORTER LEGEND

dashes	--	intentional or purposeful interruption
		or change in thought
ellipses	. . .	trailing off
[ph]		phonetically written
[sic]		written as said

1 APRIL 3, 2018

2 (WHEREUPON, the proceedings began at 10:39 a.m. The
3 applicant was present, along with his counsel of
4 record.)

5 THE COURT: All right. Ms. McCallister?

6 MS. MCCALLISTER: Thank you, Your Honor. This is David
7 Johnson versus the State of South Carolina, 2016-CP-21-2545.
8 Your Honor, Mr. Johnson was indicted in September of
9 2009 by the Florence County Grand Jury for murder, first-
10 degree burglary, armed robbery, possession of a weapon during
11 the commission of a violent crime, and conspiracy. He was
12 represented on those charges by James Hoffmeyer. Solicitor
13 Clements and Deputy Solicitor Jeperfinger prosecuted the case
14 for the State.

15 On February 13th, 2012, Mr. Johnson proceeded to trial
16 before the Hon. Thomas A. Russo and a jury. On February 17th,
17 2012, the jury found Mr. Johnson guilty as indicted on all
18 four counts. Judge Russo sentenced him to a term of
19 imprisonment of consecutive terms of life without the
20 possibility of parole for murder and first-degree burglary
21 and concurrent terms of 30 years for armed robbery and five
22 years for conspiracy. He did not impose a sentence on the
23 possession of a weapon count.

24 Your Honor, Mr. Johnson filed a timely notice of appeal,
25 which was perfected by Susan B. Hackett of the Office of

1 Appellate Defense. The South Carolina Court of Appeals
2 affirmed his conviction on April 9th, 2014. He filed a
3 petition for a rehearing, which was denied by order filed
4 June 13th, 2014.

5 He then filed a petition for writ of certiorari to the
6 South Carolina Supreme Court on July 17th, 2014. That
7 petition was partially granted on February 20th, 2015, and
8 then was dismissed. The writ was dismissed as improvidently
9 granted on December 2nd, 2015. The remittitur was returned to
10 the Circuit Court on the same day, Your Honor. He then filed
11 a petition for writ of certiorari to the United States
12 Supreme Court on March 1st, 2016 and that petition was denied
13 on April 18th, 2016.

14 Your Honor, he then filed this application for post-
15 conviction relief timely on October 19th, 2016. He has been
16 -- Mr. Waller has been appointed to represent him in this
17 matter, and both Mr. Waller and Mr. Johnson are here this
18 morning.

19 THE COURT: All right. Mr. Waller?

20 MR. WALLER: Thank you, Your Honor.

21 Just to clarify, the State had a motion to -- for a more
22 definite statement they filed in their return to clarify the
23 issues that Mr. Johnson will be proceeding forward with
24 today.

25 Your Honor, generally, it's claims of ineffective

1 assistance of counsel, the first being that there were
2 members of the jury pool that Mr. -- that knew Mr. Johnson or
3 who Mr. Johnson knew.

4 That counsel was ineffective for failing to object to
5 closing -- portions of the closing argument. The solicitor
6 argued facts not in evidence.

7 Counsel was ineffective for failing to object to the
8 testimony about fingerprinting and buccal swabs
9 contemporaneously and to preserve that issue for appeal.

10 Counsel was ineffective for failure to renew its
11 objections at both the close of the State's case and at the
12 close of the defense's case.

13 Counsel was ineffective for failure to introduce
14 evidence of intellectual disability to the jury.

15 And finally, that counsel was ineffective for failing to
16 make a motion for mistrial based on improper questions by the
17 solicitor.

18 THE COURT: All right, sir.

19 MR. WALLER: Your Honor, to give you a little bit more
20 background -- I know Ms. McCallister provided the Court with
21 the procedural history. This was originally a death penalty
22 case.

23 THE COURT: Uh-huh.

24 MR. WALLER: There was a motion made both by the defense
25 and by the State for an evaluation to be done of Mr. Johnson.

1 Those reports came back and they are in your packet as
2 Court's Exhibit 1, I believe. That Mr. Johnson has an IQ in
3 the 50s and so the death penalty was precluded based on his
4 intellectual disability.

5 Your Honor, there was extensive pretrial matters taken
6 up by the Court. There are motions aplenty in your packet up
7 there. So just a little bit more background information for
8 the Court.

9 THE COURT: Uh-huh.

10 MR. WALLER: Your Honor, at this time, the applicant
11 would call David Johnson.

12 THE COURT: Yes, sir.

13 THE CLERK: Mr. Johnson, place your left hand on the
14 Bible and raise your right hand as much as you can. Do you
15 swear or affirm that the testimony you give will be the
16 truth, the whole truth, and nothing but the truth, so help
17 you God?

18 THE APPLICANT: Yes, ma'am.

19 THE COURT: Proceed, sir.

20 MR. WALLER: Thank you, Your Honor. May it please the
21 Court.

22 DAVID JOHNSON, being first duly
23 sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. WALLER:

1 Q: Good morning, Mr. Johnson. How are you today?

2 A: I'm doing all right, sir.

3 Q: All right. Mr. Johnson, if I could just get you to make

4 sure you speak up?

5 A: Uh-huh.

6 Q: So the Court and also the court reporter can hear

7 everything you have to say. If I ask a question, you need to

8 answer either yes or no or some sort of, you know, verbal

9 word response, not huh-uh or uh-huh or things like that. You

10 can't shake your head, that kind of stuff, just so it's all

11 on the record. Okay?

12 A: Okay.

13 Q: Mr. Johnson, I want to take you back to when you were

14 originally arrested. Do you remember that?

15 A: Yes, sir.

16 Q: Okay. What were you arrested for?

17 A: The charges?

18 Q: Yes, sir.

19 A: Armed robbery, possession of a deadly weapon during the

20 commission of a violent crime, burglary -- a burglary first

21 charge.

22 Q: Okay. And a murder charge?

23 A: Uh-huh. Yeah.

24 Q: And prior to your arrest, you had given two statements

25 to law enforcement; is that right?

1 A: Yes, sir.

2 Q: Okay. Well, two, but kind of in the same day or in the
3 same night; is that right?

4 A: Yes, sir.

5 Q: Okay. You had also given law enforcement some -- your
6 fingerprints; is that correct?

7 A: Yes, sir.

8 Q: As well as they ran a swab inside your mouth --

9 A: Yes, sir.

10 Q: -- for DNA?

11 A: Yes, sir.

12 Q: After you were arrested, did you get appointed a lawyer?
13 Did you get a lawyer?

14 A: No, not that I know of.

15 Q: Okay. Did you hire a lawyer?

16 A: No, sir.

17 Q: At some point, you got a lawyer?

18 A: Yes, sir.

19 Q: Okay.

20 A: Down the line.

21 Q: All right. How did you get that lawyer? Do you know?

22 A: No, sir.

23 Q: Okay. Who was your first lawyer?

24 A: Hoffmeyer, Mr. Hoffmeyer.

25 Q: James Hoffmeyer?

1 A: Yes, sir.

2 Q: Okay. At some point, you had Mr. Hoffmeyer, as well as
3 other lawyers; is that right?

4 A: Yes, sir.

5 Q: Okay. Do you remember who you had with Mr. Hoffmeyer
6 first?

7 A: I think it was Robert -- Robert --

8 Q: Robert Lee?

9 A: Robert Lee.

10 Q: Okay. And after Mr. Lee, did you have someone else that
11 was helping Mr. Hoffmeyer?

12 A: Ms. Kathy.

13 Q: Okay. Ms. Elmore?

14 A: Yes.

15 Q: Okay. But Mr. Hoffmeyer was your main attorney; is that
16 right?

17 A: Yes, sir.

18 Q: Okay. What did you and Mr. Hoffmeyer talk about?

19 A: Basically, pertaining of the case. You know, we talked
20 about -- about the part that where he failed to talk to the
21 -- the jury, what you had mentioned earlier about talking to
22 the jury. I told him that I knew the jurors that was on the
23 stand and he failed to, you know, object to that.

24 Q: Okay. I want to back you up a little bit. Before --
25 I'm talking way before your trial started. Okay?

1 A: Uh-huh.

2 Q: From the time you were arrested until the time your
3 trial started, do you remember how long you were in the
4 detention center?

5 A: Four years.

6 Q: Okay. So during that four years, what were the issues
7 that you and Mr. Hoffmeyer discussed about your case?

8 A: He came with a -- with a -- he say he was going to try
9 to work a plea deal out, but it didn't -- it didn't went out.

10 Q: Okay.

11 A: That's basically it. He didn't talk about much.

12 Q: Let me -- let me back up a little bit. You had several
13 co-defendants in this case; is that right?

14 A: Yes, sir.

15 Q: Okay. Some, if not all, of those co-defendants gave
16 statements. Do you remember that?

17 A: Yes, sir.

18 Q: Did you and Mr. Hoffmeyer talk about their statements?

19 A: No, sir.

20 Q: Okay. Did y'all talk about Mr. Wilson, that is Amp, his
21 statement?

22 A: No, sir.

23 Q: Okay. Did y'all talk about this Rakeem [ph] person?
24 Did y'all talk about him?

25 A: No, sir.

1 Q: Okay. Did y'all talk about the fingerprint testing that
2 had been done?

3 A: No, sir, not really.

4 Q: Okay. Did y'all talk about the DNA testing that had
5 been done?

6 A: No, sir.

7 Q: Okay. Did y'all talk about your statement that you had
8 given to law enforcement?

9 A: Yes, sir.

10 Q: Okay. The first statement that you gave was not
11 recorded or anything like that; is that right?

12 A: Yes, sir.

13 Q: Okay.

14 MS. MCCALLISTER: You asked him if he talked about the
15 statements. What was the answer to that question? I missed
16 it.

17 MR. WALLER: It was yes.

18 MS. MCCALLISTER: Okay.

19 BY MR. WALLER:

20 Q: The first statement was not recorded; is that right?

21 A: Yes, sir.

22 Q: Okay. And you did not fill out a waiver of your Miranda
23 rights in that first statement; is that correct?

24 A: Yes, sir. I didn't.

25 Q: Okay. I need you to speak up just a little bit, Mr.

1 Johnson.

2 A: Yes, sir.

3 Q: But your second statement was recorded; is that right?

4 A: Yes, sir.

5 Q: Okay. And the law enforcement had you sign a waiver of

6 those rights. Do you remember that?

7 A: Yes, sir.

8 Q: Okay. Did you and Mr. Hoffmeyer talk about that?

9 A: About -- not -- I mean we did, but, you know, it wasn't

10 -- like, he wouldn't explain it, telling me much about it,

11 you know, because the investigator -- they just told me to

12 sign it. They didn't read it to me. I told them I didn't

13 understand it. They just told me to sign it.

14 Q: Okay. Did you and Mr. Hoffmeyer have a chance to talk

15 about your -- your educational background?

16 A: No. No, sir.

17 Q: All right. Did y'all have a chance to talk about any

18 sort of evaluations, mental evaluations being done?

19 A: Yes, sir.

20 Q: Okay. Did you tell him that you had been in special

21 needs classes growing up?

22 A: Yes, sir.

23 Q: Okay. So y'all did talk about some of those issues;

24 right?

25 A: Yes, sir. I just can't remember.

1 Q: At some point, you were evaluated?

2 A: Yes, sir.

3 Q: Okay. Did y'all talk about the evaluation?

4 A: Not after.

5 Q: Okay. Not afterwards? All right. Mr. Johnson, I cut

6 you off earlier. You were talking about a plea. What did --

7 what did you and Mr. Hoffmeyer discuss about the evidence in

8 your case?

9 A: He said he was going to work out -- he was going to see

10 could he talk to the -- the victim's family and the solicitor

11 and see can he work out a deal, a 30-year plea, but then he

12 came back to me, like, a couple weeks later and said that

13 they -- they wasn't going for it. They were just going for a

14 plea of life sentence.

15 Q: Okay. And at some point, you were noticed with an

16 intent to seek the death penalty; is that right?

17 A: Yes, sir.

18 Q: Okay. Did you and Mr. Hoffmeyer have a chance to

19 discuss that?

20 A: About the death penalty?

21 Q: Yes, sir.

22 A: A little bit, but it wasn't much.

23 Q: Okay. Did you understand all your conversations with

24 Mr. Hoffmeyer?

25 A: Not -- not a lot of it.

1 Q: Okay.

2 A: You know, I didn't understand, you know, half of what he
3 was talking about.

4 Q: Okay. If he was asking you questions about your case,
5 would you have been able to help him and provide him with
6 information?

7 A: No, sir.

8 Q: Okay. You mentioned earlier that there were some
9 members of the jury pool that knew you?

10 A: Yes, sir.

11 Q: Is that right? Did you tell Mr. Hoffmeyer that there
12 were some jury members that knew you?

13 A: Yes, sir.

14 Q: Okay. Was that the big jury pool or after they picked
15 the twelve people?

16 A: It was -- it was before we, like, was getting ready to
17 pick them.

18 Q: Okay. Do you know if any of those members actually
19 ended up on the jury of twelve?

20 A: It was.

21 Q: Okay. And you made Mr. Hoffmeyer aware of that?

22 A: Yes, sir, I did.

23 Q: Okay. Mr. Johnson, I don't have any further questions
24 for you. Is there anything you think I've left out that the
25 judge needs to be aware of of Mr. Hoffmeyer's representation

1 of you?

2 A: No, sir.

3 Q: Okay.

4 MR. WALLER: Please answer any questions Ms. McCallister
5 has.

6 THE APPLICANT: Okay.

7 THE COURT: Ma'am?

8 MS. MCCALLISTER: Your Honor, I don't have any questions
9 for Mr. Johnson.

10 THE COURT: All right. Anything else of this witness?

11 MR. WALLER: Nothing further, Your Honor.

12 THE COURT: You may return to your seat, Mr. Johnson.

13 THE APPLICANT: Yes, sir.

14 MR. WALLER: Your Honor, the applicant would call Jim
15 Hoffmeyer.

16 THE COURT: Okay.

17 THE CLERK: Mr. Hoffmeyer, if you'll put your left hand
18 on the Bible and raise your right hand. Do you swear or
19 affirm that the testimony you give will be the truth, the
20 whole truth, and nothing but the truth, so help you God?

21 THE WITNESS: Yes, ma'am, I do.

22 THE COURT: Proceed, sir.

23 MR. WALLER: Thank you, Your Honor. May it please the
24 Court.

25 THE COURT: Yes, sir.

1 JAMES HOFFMEYER, being first
2 duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. WALLER:

5 Q: Good morning, Mr. Hoffmeyer. How are you today?

6 A: Good morning, Mr. Waller. I'm good. I hope you are.

7 Q: I am. Thank you for asking. Mr. Hoffmeyer, how did you
8 come to represent Mr. Johnson?

9 A: I was appointed by the Circuit Court to represent him.
10 At one point, it was a death penalty case. So I was one of
11 the two lawyers he had and, eventually, it was no longer a
12 death penalty case, but I remained on as his attorney.

13 Q: Okay. And you are, I'm guessing, certified to be first
14 chair in a death penalty case?

15 A: Yes, sir, I am.

16 Q: Okay. If you could, for the record so the Court is
17 aware, what additional -- what's the certification process
18 like?

19 A: My understanding, if I recall correctly, is you have to
20 be a criminal practitioner, be actively involved in felony
21 criminal trials for a period of time. You fill out the
22 application to be certified and then you become certified,
23 and that's pretty much the process as I recall it.

24 Q: Okay. Have you tried a death penalty case before?

25 A: Yes, I have.

1 Q: Okay. As first chair or --

2 A: Well, I have been involved in four or five death penalty
3 cases, a couple of times as first chair and a couple of times
4 as second year.

5 Q: Okay. How long, I guess, before the trial of this case
6 was the death penalty off the table?

7 A: I do not specifically recall. It would be in the record
8 because there was a motion which was made related to taking
9 the death penalty off the table when Mr. Johnson came back as
10 having intellectual disability and the Supreme Court decision
11 said those people are not subject to capital punishment.

12 Thereafter, I think I filed a motion. The State pretty
13 much conceded that he was no longer eligible for the death
14 penalty and, thereafter, I was his sole attorney and we went
15 from there.

16 Q: Okay. Had you filed or had you retained a mitigation
17 expert or anything like that as far as sentencing goes at
18 that point?

19 A: Yes. We were actively preparing for a death penalty
20 case with a mitigation specialist, with other folks to help
21 us prepare.

22 Q: Okay. If you could, so the judge is aware, what were
23 the general allegations against Mr. Johnson and his co-
24 defendants?

25 A: Generally, it was alleged that he and I think it was

1 three other young men went into an elderly lady's home here
2 in Florence, broke into the home, and while she was in bed,
3 one of the younger co-defendants -- I believe he was called
4 Amp -- went into the room. Depending on whose version of
5 events you believe, Mr. Johnson allegedly went into the room
6 as well.

7 They were holding her down and the younger co-defendant,
8 according to the evidence, stabbed her and, according to him,
9 left the room. Mr. Johnson proceeded to do the same thing.

10 They left, taking items with them, stole her car, and
11 there are witnesses that put Mr. Johnson and a co-defendant
12 in the car. He had a thumbprint on the window of the car.
13 He also had touch DNA on the -- on the steering wheel of the
14 car.

15 Later, he was arrested. He gave statements. He -- at
16 some point, he and a co-defendant -- they went back to the
17 home and took some items, but in addition, they took her body
18 and wrapped it up and tried to hide it. He led law
19 enforcement to where the body was, as well as there were
20 items from the home found under some type of crawlspace where
21 he lived.

22 Q: Okay. Did you have an opportunity to discuss with Mr.
23 Johnson the statement that he gave to law enforcement?

24 A: Yes, sir.

25 Q: Did you have any questions about the voluntariness of

1 that statement?

2 A: Yes, sir. And a motion was filed related to that based
3 upon, you know, Jackson v. Denno, the voluntariness of the
4 statement. I also had one of our experts testify at that
5 motion hearing about his lack of being able to give a
6 voluntary statement.

7 Q: Okay.

8 A: But the judge overruled that.

9 Q: At approximately the same time he gave a statement, he
10 also gave DNA samples, as well as fingerprints, to law
11 enforcement; is that right?

12 A: That sounds correct.

13 Q: Did you have the same argument essentially for the
14 giving of those items as the same thing?

15 A: Yes. And I think that I filed those motions. I think
16 that, in the long term, that's a little harder to win in
17 terms of gathering DNA, but certainly for purposes of the
18 buccal swab, I think I did make that motion.

19 Q: Okay. Did you have a chance to review the search where
20 the items were located at Mr. Johnson's residence?

21 A: I believe that I went to that residence because I think
22 perhaps his father was living there.

23 Q: Okay.

24 A: So actually, I'm not sure if you mean -- if you're
25 asking me about the search warrant itself or you're referring

1 to the items under the home, if I saw the crawlspace.

2 I think that the State's argument was that he didn't --
3 based upon where the items were, his right of privacy did not
4 even rise to the level that I could object to that. I'm not
5 sure if the judge actually took that up or not.

6 Q: That was my question. Just simply if you had a chance
7 to review the circumstances of how those items were located
8 and if you had any issues with that.

9 A: Well, as I recall, they went there and perhaps his dad
10 showed them the crawlspace.

11 Q: Okay.

12 A: And so the dad owned the home. The dad consented to the
13 search of the crawlspace.

14 Q: Okay. What -- as you were preparing for this case --
15 and I know it was a lengthy period of time from -- from your
16 employment and Mr. Johnson's arrest until the trial began.
17 What were your defenses or what was your theory of the case?

18 A: The case was very difficult in terms of figuring out a
19 defense that might potentially work. Naturally, at first,
20 the key focus was to try and make sure that he did not
21 receive the death penalty.

22 When that was off the table, then the manner of
23 defending it was primarily to focus on the lack or rather the
24 fact that the State had not proven him guilty beyond a
25 reasonable doubt. The co-defendants who were testifying had

1 a dog in the fight. The fact that he was there didn't mean
2 that he was operating under the hand of one is the hand of
3 all, a mere presence type of argument.

4 So primarily reasonable doubt, mere presence, and the
5 State didn't meet their burden of proof, but obviously, when
6 -- obviously, based upon the evidence that I've discussed,
7 some of which I've discussed, it was a very difficult
8 argument to make, but we couldn't get the State to give him a
9 better deal. So --

10 Q: Okay. Mr. Hoffmeyer, do you happen to have a copy of
11 the transcript up there with you?

12 A: No, I do not.

13 MR. WALLER: Bear with me one second. Your Honor, may I
14 approach the witness?

15 THE COURT: Yes, sir.

16 MR. WALLER: I think that's the right one.

17 THE WITNESS: Okay.

18 MR. WALLER: Mr. Hoffmeyer, I'm going to trade out with
19 you.

20 THE WITNESS: Sure. Here you go.

21 MR. WALLER: I've got different copies here.

22 THE WITNESS: I gotcha.

23 MR. WALLER: Your Honor, I believe the set of five
24 smaller transcripts is the complete transcript.

25 THE COURT: Okay.

1 BY MR. WALLER:

2 Q: Mr. Hoffmeyer, you made several motions to exclude
3 evidence pretrial. Is that your recollection?

4 A: Yes. Yes, sir, it is.

5 Q: Okay. Some of those were exclusion of any references to
6 gangs or gang affiliations; is that right?

7 A: Yes, sir.

8 Q: Okay. And I know they are on the record. Did you also
9 make a motion to -- I think I already asked this -- to
10 suppress the statements, as well as the DNA evidence obtained
11 by Mr. Johnson's consent?

12 A: Yes, sir. I believe that I did.

13 Q: Okay. Mr. Hoffmeyer, if I could get you to turn to page
14 238 at line 10 through 14?

15 A: Yes, sir. I see that.

16 Q: Was there a strategy decision behind not objecting to
17 that testimony?

18 A: No. I don't think there was a strategic decision by not
19 objecting to the saliva sample for the buccal swab and the
20 fingerprints. I think that I made that motion in limine
21 perhaps and should have renewed that objection at that point
22 to protect the record.

23 Q: Okay.

24 MR. WALLER: And, Your Honor, in all candor to the
25 Court, several pages later on page 240, Mr. Hoffmeyer does

1 object to the actual documents when the exhibits actually
2 come into evidence.

3 THE COURT: Okay, sir.

4 BY MR. WALLER:

5 A: Well, it may be then that I thought my timing should
6 have been when the documents came in as opposed to their
7 saying that we took these things because the evidence wasn't
8 in yet. So that may have been my timing was to make the
9 objection when the actual evidence came in.

10 Q: Okay. Mr. Hoffmeyer, I'm not going to direct you to the
11 transcript, but just out of your recollection, you objected
12 numerous times to hearsay testimony, also leading questions
13 by the solicitor. Did you ever consider making a motion for
14 mistrial based on that kind of cumulative effect of those
15 things?

16 A: I must not have or I would have made a motion for
17 mistrial. I don't recall enough about the specifics of them
18 as to whether most of them were sustained or overruled or if
19 any rose to the level that I felt that it was so improper
20 that a motion for mistrial would be appropriate. So to
21 answer your question, no, I didn't, but I don't remember the
22 specific -- specifics of the Court's response, nor the
23 objectionable question by the prosecution.

24 Q: Certainly. And also, I acknowledge the irony of how I
25 asked that question.

1 So at the close of the State's case, you did not renew
2 your objections. You did make a motion for a directed
3 verdict, but you did not renew all of your previous motions
4 and objections. Was there a strategy decision behind that?

5 A: No, sir. I didn't realize that if the State concluded
6 their case and I move for a directed verdict, I was required
7 to renew each and every objection potentially. Also, there
8 was no additional evidence introduced where I would have been
9 somehow waiving my prior objections, but out of an abundance
10 of caution, the next one I try I will certainly renew them at
11 the end of the State's case.

12 Q: All right. Mr. Hoffmeyer, if I could get you to turn to
13 page 339? I believe that might be in the second section.

14 A: Mr. Waller, you said 339?

15 Q: Yes, sir.

16 A: Excuse me. 439 or 339?

17 Q: 339. I believe it's in Volume Number 2.

18 A: Yes, sir.

19 Q: If you look at lines 14 through 18, this is the
20 testimony of the forensic pathologist.

21 A: Yes, sir.

22 Q: Okay. During the solicitor's closing argument on page
23 739 to -- going over to 740, the solicitor makes a comment
24 that they can't tell which stab wound actually killed the
25 victim.

1 A: Yes, sir. I don't see that particularly, but if you say
2 it's there, I'm sure it is.

3 Q: I mean I apologize. It's the beginning of line 24 on
4 page 739 and going through line 3 on page 740.

5 A: I see it.

6 Q: Okay. Was there a strategy decision behind not
7 objecting to those facts that differ from what the forensic
8 pathologist testified to?

9 A: No, sir. It looks like he's indicating that they don't
10 know which stab wound killed -- led to her death, whereas the
11 pathologist testified that it was the stab wound to her
12 jugular vein. As I recall, the autopsy report had seven stab
13 wounds.

14 Q: Okay.

15 A: And naturally, given the hand of one is the hand of all
16 and all the other evidence in the case, the focus wasn't so
17 much on, well, even if you believe my client stabbed her six
18 times, he didn't stab her the one time that led to her death.

19 Q: Okay. The only testimony presented as to the actual
20 stabbings was that Amp Wilson stabbed her once in the neck.
21 Is that your recollection?

22 A: That's what I recall is that he said he stabbed her in
23 the neck and then he left and my client stabbed her, I guess,
24 the other six remaining times.

25 Q: Okay. The State didn't present any evidence of how she

1 was stabbed. Is that your recollection? Just that Mr.

2 Wilson left and, when they located the body, it had seven
3 stab wounds?

4 A: I'm sure the forensic pathologist testified about where
5 the stab wounds were.

6 Q: Certainly. I'm asking about how -- who actually did
7 those other six stab wounds.

8 A: Oh, I'm sorry. My understanding is as far as that
9 testimony was Amp had given a statement. As far as the
10 evidence, I don't remember specifically who testified other
11 than as my client being in there and that occurring, as you
12 are aware.

13 Q: Certainly, Your Honor. Or certainly, Mr. Hoffmeyer.

14 Mr. Hoffmeyer, you made a motion or several motions
15 pretrial to preclude the death penalty and also to suppress
16 the statements and the DNA evidence. Part of that included a
17 competency evaluation?

18 A: Yes, sir.

19 Q: Did you ever give any thought to introducing evidence of
20 Mr. Johnson's intellectual disabilities?

21 A: I thought about doing that through the expert who had
22 testified at the hearing related to his statement because, of
23 course, the jury has to determine also whether the statement
24 is given freely and voluntarily. So that would have given me
25 the opportunity to put that expert up, have him say or

1 testify very similarly to what he did in camera with the
2 judge, and then the jury would know about his intellectual
3 disability, even if they still believed the statement. I
4 believed that the jury was going to believe the statement was
5 given freely and voluntarily, and I also felt like I did not
6 want to lose my last argument because we had so little to
7 work with.

8 Q: Okay.

9 A: So that was a strategic decision.

10 Q: Okay. So you thought that, no matter what, the jury was
11 going to believe that it was freely and voluntarily given?

12 A: Yes, sir. And, of course, they were aware of his
13 actions after this crime and things such as that, and it just
14 made it implausible in some sense to me the jury is going to
15 find he didn't know what he was -- the statement he was
16 giving when it's corroborated and the officers made good
17 witnesses on their going over his rights with him. I just
18 felt like that was a losing cause.

19 Q: Okay. Were you aware of members of the jury pool
20 potentially knowing Mr. Johnson?

21 A: No, sir. I do not recall that. The way I tend to do it
22 when I have cases such as this is my client and I are right
23 there together and, as each juror stands up -- I can't
24 remember -- I believe they would have come all the way down,
25 not just stand up. We talk about them and go over whether

1 we're going to strike them or not, and I want my client's
2 input on that. So anything that came to his attention as we
3 were going over the list and them coming forward, he and I
4 would have discussed and made a decision.

5 Q: Okay.

6 MR. WALLER: I beg the Court's indulgence for just a
7 moment.

8 THE COURT: Yes, sir.

9 MR. WALLER: Thank you, Mr. Hoffmeyer. Please answer
10 any questions Ms. McCallister has.

11 THE WITNESS: You're welcome.

12 CROSS-EXAMINATION

13 BY MS. MCCALLISTER:

14 Q: Mr. Hoffmeyer, you testified a little bit about how you
15 came to be appointed on this case and that there were other
16 attorneys who were involved in it with you; is that correct?

17 A: Yes, ma'am.

18 Q: Okay. And then after the death penalty was taken off
19 the table, it just became your case?

20 A: Yes, ma'am.

21 Q: Is that right? And did you say how long you were the
22 sole representation on this case? Do you know how long it
23 was?

24 A: I'm sorry. I do not know.

25 Q: Okay. Do you know how long you were representing Mr.

1 Johnson in total?

2 A: I do not know. I know it was a right good while.

3 Q: Was it several years?

4 A: I believe it was at least a year or two. Hopefully,
5 there's the order of appointment.

6 Q: Okay. And I think you testified that initially your
7 focus was trying to get the death penalty off the table;
8 correct?

9 A: Yes, ma'am. That was certainly one of the main focuses.

10 Q: Okay. And so -- and part of that focus was doing this
11 evaluation and figuring out the extent of the intellectual
12 disabilities that Mr. Johnson has; is that right?

13 A: Yes, ma'am.

14 Q: And he had an evaluation by the State; is that correct?

15 A: Yes, ma'am.

16 Q: And did you -- were you present? Did you participate in
17 that evaluation at all?

18 A: I did.

19 Q: So you were there with him at least while the evaluation
20 was --

21 A: Yes, ma'am. I was there either all the time or part of
22 the time.

23 Q: Okay. And then you also had your own expert evaluate
24 him; is that correct?

25 A: I think I did.

1 Q: Or did they -- do you recall if they evaluated him or if
2 they at least reviewed the State's evaluation? Is that
3 correct?

4 A: I'm having trouble remembering specifically, but the
5 State's evaluation, of course, impacted the intellectual
6 disability. But there would've also been an evaluation for
7 criminal responsibility and his competency to stand trial.

8 Q: Okay.

9 A: So I'm not -- I'm just not certain as far as that, as
10 far as our own expert. It seems like I did, but I just can't
11 recall.

12 Q: Okay. Do you recall at the motions hearing that your
13 position was that he had this intellectual disability and it
14 was so severe that he could not have consented or he wouldn't
15 understand what he was doing when he said, yes, I want to
16 give a statement?

17 A: Yes, ma'am.

18 Q: And you had an expert who came and testified to that at
19 that motions hearing?

20 A: Yes, ma'am.

21 Q: The Denno hearing; is that right?

22 A: Yes, ma'am.

23 Q: Okay. And the judge ruled against you on that; correct?

24 A: Yes, ma'am. And you are right because that same expert
25 would have probably reviewed the competency stuff.

1 Q: Okay.

2 A: So I did have his input.

3 Q: Okay. And so you have these hearings and you also at
4 the same time, I believe on the same day, had a hearing
5 regarding the other evidence that Mr. Waller was asking you
6 about, the fingerprints and the DNA coming -- whether --
7 whether that evidence should come in; correct?

8 A: Yes, ma'am.

9 Q: I think you argued that, again, he couldn't understand
10 and consent to that evidence?

11 A: Yes, ma'am.

12 Q: Is that right? Okay. And that I think you also argued
13 to suppress the items found at his home; is that right?

14 A: Yes, ma'am.

15 Q: Because they -- the officers were able to find those
16 things because of his statement; is that right?

17 A: Yes, ma'am.

18 Q: Okay. And so all of those issues you had pretrial
19 motions hearings on and then those issues were -- you were
20 ruled against on all of those issues; correct?

21 A: Yes, ma'am.

22 Q: And so the State was able to present all of that
23 evidence in its case?

24 A: Yes, ma'am.

25 Q: And you objected during the trial and renewed those

1 objections from your pretrial motions; is that correct?

2 A: Yes, ma'am.

3 Q: Okay. And each time, the judge ruled against you at
4 trial as well?

5 A: Yes, ma'am.

6 Q: Okay. So once -- once those motions had been heard and
7 that -- that -- you knew that information was going to be
8 presented at trial, in terms of your defense, what was sort
9 of -- what was left for you to work with at that point?

10 A: Reasonable doubt.

11 Q: Okay. And so is that -- that's what you were saying
12 when you explained why you didn't present some of that
13 evidence is because -- what I'm trying to get at is I think
14 you said earlier is that you didn't -- you thought about
15 introducing the expert at trial?

16 A: Yes, ma'am. I thought about having him testify and then
17 the jury would, of course, be charged -- well, they probably
18 still were charged that they had to determine whether the
19 statement was given freely and voluntarily, beyond a
20 reasonable doubt, and that type of thing, but the other side
21 of that coin is then I lose my last argument and that's
22 really all we had was my last argument on reasonable doubt
23 and mere presence and that type of thing.

24 Q: Okay. And as -- as to the issue of the jury determining
25 the voluntariness of the statement, do you recall that you

1 asked for a jury instruction at the time the statement was
2 introduced about that, about their role?

3 A: I -- my -- I would have to look at the transcript, but
4 my guess is that I would have requested that charge at the
5 time.

6 Q: Okay. And it was given; is that -- is that right? To
7 your recollection?

8 A: If the transcript says that, yes, ma'am. That would be
9 something I would typically request.

10 Q: So -- so you got a jury charge at the time the statement
11 was introduced saying it was up to them to decide if this was
12 really his statement and if it was really voluntary?

13 A: Yes, ma'am.

14 Q: And then again at the close of all of the evidence?

15 A: Yes, ma'am.

16 Q: Okay. And Mr. Waller asked you a little bit about some
17 objections that maybe you could have made to the solicitor's
18 closing argument. Do you -- do you always object if
19 something is objectionable?

20 A: That's a good question because sometimes you feel like
21 what is being said, while it's something you don't
22 specifically recall, it's not going to influence the case and
23 you worry about the jury's wondering why you're objecting to
24 something that isn't maybe a crucial part of the case and you
25 try and -- obviously, I try to object to anything that I

1 think is appropriate and is prejudicial to my client. And
2 sometimes, quite frankly, you're in a murder trial for four
3 or five days, you're trying as hard as you can to think,
4 listen, and remember what was said three days ago, and you
5 miss an objection.

6 Q: Okay. And so that issue that Mr. Waller asked you about
7 about, you know, the solicitor and the stab wound and which
8 one killed her, did you think that that was something that
9 was so objectionable that it would -- it was completely
10 unfair to have the solicitor say that?

11 A: No, ma'am.

12 Q: Okay. And is it fair to say that -- I think you
13 testified that there were seven stab wounds, but there was no
14 one who could say which person did which stab wound; is that
15 fair?

16 A: Yes, ma'am. I think the evidence that was pointed out
17 by Mr. Waller was about Amp being the one that stabbed her in
18 the neck and so that would have inferentially meant that had
19 to be the stab wound that killed her. I hadn't seen -- I
20 hadn't looked at the autopsy report that quickly and I don't
21 recall the forensic pathologist's testimony that clearly. I
22 don't know that it wasn't a little broader than that in terms
23 of how he described the stab wounds and what could've led to
24 her death. So --

25 Q: Okay. But the State's theory of the case was that Amp

1 did -- Amp stabbed her once and then your client stabbed her
2 the additional times; is that correct?

3 A: Yes, ma'am.

4 Q: Okay. And so there was testimony from Amp about --
5 about that; correct? That he didn't admit to stabbing her
6 seven times? He said I stabbed her once and left and Mr.
7 Johnson was still in there doing stuff to her?

8 A: Yes, ma'am. That's correct, as far as I recall, and I
9 believe that was in his statement.

10 Q: Okay. Okay. And the issue -- I think Mr. Waller was
11 asking you a little bit about these motions that you filed on
12 the DNA, the fingerprints, and you made sort of the same
13 consent argument there. And I think you said that those --
14 the issue of the DNA and the fingerprints would have been
15 harder to win. Can you explain that?

16 A: Well, I think that they were -- they will get his DNA,
17 period. They can have a Schmerber hearing. They can get it.

18 Q: Okay.

19 A: And they're going to get it. I've had clients in the
20 middle of a trial have to give up their DNA.

21 Q: Okay.

22 A: And as far as the fingerprint, I think his fingerprints
23 -- I don't know. I can't recall his criminal record. I mean
24 the fingerprints -- and it's not an intrusion into your body.
25 The standard for that is pretty low. I just don't think that

1 it's going to be hard for the State to get DNA evidence and
2 fingerprint evidence.

3 Q: Okay. So even if the statement had been kept out, the
4 State, in your opinion, likely still would have had the DNA
5 and the fingerprint evidence that put him in the victim's
6 car?

7 A: Yes, ma'am.

8 Q: And he -- he admitted that in his statement as well to
9 that he entered the car; is that right?

10 A: Yes, ma'am.

11 Q: Or he had been in the car?

12 A: Yes, ma'am.

13 Q: Okay. And you also had the issue of the items found at
14 his home. Your argument was that that was kind of the fruit
15 of the poisonous tree from his statement, but I think you
16 told Mr. Waller that it was the father's home; is that
17 correct?

18 A: If I recall correctly, yes. Yes, ma'am.

19 Q: And that he was the one who consented to the search of
20 that crawlspace?

21 A: That's what I believe occurred.

22 Q: Okay.

23 A: As I recall.

24 Q: So the State had a second avenue for getting that
25 evidence in as well; is that right?

1 A: Yes, ma'am.

2 Q: Okay. And you didn't see any -- you didn't see any way
3 to counter the father's consent?

4 A: No, ma'am. I don't think legally that would have held
5 any weight. You know, in hindsight, I probably would've
6 raised that, a privacy issue, too. I don't know that he
7 would've had any privacy issue in a crawlspace at his dad's
8 home though that his dad consented to.

9 Q: And your testimony about the juror -- the juror issue
10 was that y'all -- y'all were looking at the jurors together.
11 You were able to physically see them and stand up and look at
12 them; is that right?

13 A: Yes, ma'am. That's correct.

14 Q: And so he was -- Mr. Johnson was with you and never
15 mentioned that he knew somebody or had a problem with
16 somebody on the jury; is that right?

17 A: I'm certain that he never told me that he had any
18 objections or problem with any juror. I would have stricken
19 them. And if I ran out of strikes, I would have moved that
20 they be stricken for cause.

21 Q: Okay.

22 MS. MCCALLISTER: I beg the Court's indulgence for a
23 moment.

24 THE COURT: Yes, ma'am.

25 MS. MCCALLISTER: Okay.

1 BY MS. MCCALLISTER:

2 Q: Mr. Waller asked you about kind of your decision not to
3 make a motion for a mistrial based on kind of the cumulative
4 effect of some objections that you had made. In your
5 opinion, was there a basis to make a mistrial on that ground?

6 A: No, ma'am.

7 Q: If there had been, would you have done it?

8 A: Yes, ma'am.

9 Q: Okay. And I think Mr. Waller also asked you about
10 making a directed verdict motion at the end of the State's
11 case and so, if I'm understanding your testimony correctly,
12 you made that motion and then you also rested? The defense
13 rested?

14 A: Yes, ma'am.

15 Q: So there was no -- nothing else that was introduced that
16 would have sort of waived your objections --

17 A: Yes, ma'am. That's --

18 Q: -- at the end of the State's case; is that right?

19 A: Yes, ma'am.

20 Q: Okay.

21 A: That's my understanding procedurally.

22 Q: Okay. So -- so to your knowledge, you were following
23 the correct procedures; is that right?

24 A: Yes, ma'am.

25 Q: Okay.

1 MS. MCCALLISTER: I think that's all the questions I
2 have.

3 THE COURT: Mr. Waller?

4 REDIRECT EXAMINATION

5 BY MR. WALLER:

6 Q: Mr. Hoffmeyer, you have testified that you wanted to
7 preserve last closing argument?

8 A: Yes, sir.

9 Q: That you argued mere presence during that last closing
10 argument?

11 A: I -- no. If you want to point me to my closing
12 argument, I'll be glad to review it.

13 Q: Well, I -- I'm just going by what you just testified to
14 as far as what you wanted to argue.

15 A: My belief is that the jury would be charged on mere
16 presence. I believe I requested it.

17 Q: Okay. Now, I think I argued reasonable doubt. If I --
18 if I argued mere presence, it should be in the transcript.
19 If I didn't argue mere presence, then it's not in the
20 transcript.

21 Q: Okay. Mere presence was charged to the jury either by
22 itself or during the hand of one/hand of all accomplice
23 liability charge. The evidence of the other six stab wounds,
24 not the one done by Amp that he testified to that was in the
25 neck of the victim, was circumstantial; is that right? It's

1 the old snow on the ground overnight example?

2 A: Mr. Waller, I'm not sure I'm understanding the question.
3 I thought that the forensic pathologist probably testified to
4 that about the other stab wounds.

5 Q: I'm asking a poor question. I apologize. Amp Wilson's
6 testimony was that he stabbed the victim the first time, one
7 time in the neck, and then left the room?

8 A: Yes, sir.

9 Q: And then when -- when your client left the room also
10 that she had seven stab wounds, but he never actually viewed
11 Mr. Johnson stabbing the victim?

12 A: Yes, sir. That Amp did not.

13 Q: Correct.

14 A: That's the way I recall it.

15 Q: Okay. So if the -- if the jury was to believe the
16 theory of mere presence or that Mr. Johnson was merely
17 present, would the solicitor arguing to the jury that all of
18 the stab wounds or you can't tell which stab wound caused the
19 death -- would that not be something that they -- that was
20 improper given the testimony of the forensic pathologist that
21 he -- that the neck stab wound was the one that -- the fatal
22 one?

23 A: Well, yes, sir. Clearly, I think that, you know, if the
24 solicitor is arguing something that is not in evidence and I
25 think it's a big issue and I catch it, I should object to it.

1 I think that -- I don't know why the jury reached the verdict
2 that they did, but naturally, there was a concern there that
3 the hand of one is the hand of all and it was just difficult
4 to know sometimes where to focus my objection or how to argue
5 those types of things, but I certainly understand your point.

6 If he's saying that this led to the death and the
7 evidence is that this co-defendant did it, then perhaps
8 somehow, some way, despite the hand of one is the hand of
9 all, another six stab wounds, the jury will focus on that and
10 maybe do something differently, but I can't -- I certainly
11 can't say and it's kind of difficult to know when there were
12 six other stab wounds.

13 Q: Okay. Regarding your decision not to call the
14 psychologist, you proffered testimony from the officer about
15 Mr. Johnson's intellectual disability; is that correct? Do
16 you recall that?

17 A: If that was during the in-camera hearing with my expert,
18 perhaps I did.

19 Q: It was not. It was during the trial. You sought to ask
20 questions about if he had known at the time of the trial that
21 he had disability, would their -- have questions -- would
22 their questions about his waiver of rights have been
23 different?

24 A: Yes, sir, Mr. Waller. I re -- I recall that. It seems
25 like that was objected to by the State. It may have been

1 sustained because they didn't have any knowledge at that
2 time.

3 Q: That's correct. You proffered that testimony. Does the
4 -- does your proffer testimony change your strategy as far as
5 not calling your expert?

6 A: No, sir.

7 MR. WALLER: Nothing further. Thank you, Mr. Hoffmeyer.

8 THE COURT: Ms. McCallister?

9 MS. MCCALLISTER: I just want to clarify.

10 RECROSS-EXAMINATION

11 BY MS. MCCALLISTER:

12 Q: Is it -- is it your recollection that the State really
13 was proceeding under two alternate theories in this case
14 about Mr. Johnson's involvement, that he was either the
15 ringleader or it was the hand of one is the hand of all
16 issue? Is that right?

17 A: Oh, yes, ma'am. They were. Right.

18 Q: Okay. And so -- so the State's argument was he was
19 guilty either way? You can believe his statement or you can
20 believe Amp Wilson's statement, but either way he's there and
21 he's guilty?

22 A: Yes, ma'am.

23 Q: Okay. Okay.

24 MS. MCCALLISTER: Thank you, Your Honor.

25 THE COURT: Mr. Waller?

1 MR. WALLER: Nothing further, Your Honor.

2 THE COURT: Thank you, sir.

3 THE WITNESS: Thank you.

4 THE COURT: Mr. Waller?

5 MR. WALLER: Nothing further from the applicant, Your
6 Honor.

7 THE COURT: Ms. McCallister?

8 MS. MCCALLISTER: Your Honor, I have no witnesses for
9 the State. I would just ask Your Honor to review the -- the
10 appellate documents that should be in your packet and if
11 you'll hear me on a couple of issues in terms of argument,
12 Your Honor.

13 THE COURT: Sure. I'll be glad to. Are you ready?

14 MR. WALLER: Certainly, Your Honor.

15 THE COURT: Okay.

16 MR. WALLER: Your Honor, I would second Ms.
17 McCallister's request to review the appellate documents.
18 Your Honor, I think the testimony today is clear when viewed
19 in conjunction with both the transcript, as well as the
20 appellate documents.

21 Mr. Hoffmeyer, I believe, did an excellent job of
22 preserving his pretrial issues for that appeal. I don't have
23 an exact count, but I believe it was somewhere in the nature
24 of 20 times that he, you know, informed the judge of his
25 continuing objection that he knew was already overruled and

1 he even proffered testimony regarding the voluntariness of
2 the statements, as well as the giving of the DNA and
3 fingerprint evidence.

4 Your Honor, however, I think that the -- not calling the
5 expert witness to testify about the intellectual disabilities
6 that Mr. Johnson suffered from I think was an error. I think
7 that opens up many more options to Mr. Hoffmeyer's defense
8 than it takes away by losing last closing argument.

9 While Mr. Johnson was the oldest of the individuals, he
10 was only older than one individual by a couple years. Again,
11 raising the intellectual disabilities, I think that the jury
12 could have concluded that he wasn't the ringleader, as the
13 State alleged, but was someone who was either following along
14 or just got caught up in a situation.

15 Your Honor, I believe that it was an error to not object
16 during the solicitor's closing argument. Certainly, Mr.
17 Hoffmeyer testified that while you're not going to object to
18 everything that is purely objectionable, if an objection
19 needs to be made, then that's certainly something you need to
20 do.

21 When the solicitor argued that it was -- the cause of
22 death could not be determined as to these seven stab wounds,
23 that's just wrong based on what the forensic pathologist
24 testified to. The pathologist testified that it was the stab
25 wound in the neck that ultimately led to the death of the

1 victim.

2 Your Honor, again, I would ask you to review the
3 documents and the sections of the transcript that were
4 pointed out. Thank you.

5 THE COURT: Ms. McCallister?

6 MS. MCCALLISTER: Thank you, Your Honor.

7 In terms of the issues that were preserved or Mr.
8 Waller's argument that some of these issues were not
9 preserved for appeal, I think when that Court reads the Court
10 of Appeals' decision, it's clear that decision was made on
11 the merits. There was no finding that these issues were not
12 preserved, and the issues that were raised were the
13 voluntariness of his statement, the admission of the
14 fingerprint evidence, the DNA evidence. All of that was
15 raised on direct appeal, Your Honor, and the Court of Appeals
16 affirmed the conviction after a full briefing and did not,
17 that I see in that opinion, make any finding that some of
18 this was not preserved.

19 MR. WALLER: And, Your Honor, if I was unclear, I
20 apologize. That's not my argument at all. I think they were
21 very properly preserved.

22 THE COURT: Preserved.

23 MS. MCCALLISTER: I'm sorry. Maybe I misunderstood you
24 or misunderstand.

25 THE COURT: You did. He did say that.

1 MS. MCCALLISTER: Okay. Your Honor, in terms of the
2 decision not to introduce evidence from the expert about his
3 intellectual disability, I think Mr. Hoffmeyer explained that
4 quite thoroughly. That there was -- in addition, even if he
5 introduced that evidence and the jury found that the
6 statement was not voluntary, there was plenty of other
7 evidence that would still be admissible for the State's case:
8 the DNA, the fingerprints, the items found at his father's
9 house. That he did not have good grounds to challenge and so
10 he made the strategic decision not to put up an expert and
11 evidence and lose his last argument when he felt like it was
12 a losing issue.

13 And I think Mr. Hoffmeyer, as the attorney, he has lots
14 of experience. He knows what he's doing. He's entitled to
15 make that kind of strategic decision.

16 And in terms of the issue with the evidence, Your Honor,
17 in my reading of that statement in the solicitor's closing
18 argument, in conjunction with the pathologist's testimony,
19 there were -- there were, the way I read it, multiple stab
20 wounds to the neck. And so the pathologist did testify it
21 would have been the stab wound to the jugular vein that
22 killed her, but there was no testimony and no way to ID who
23 made that, who did that stab wound.

24 So yes, Mr. Wilson testified, yes, I stabbed her one
25 time and then I left, and the inference is Mr. Johnson

1 must've done the other six, but I don't think there's any
2 testimony as to which stab wound was first, which one was
3 second, which one was third, et cetera, Your Honor, and who
4 did which ones. There was no way to know that.

5 And that was I think the reason why the State chose to
6 proceed under both theories because they were -- they were
7 proceeding under the theory that he was the principal and,
8 you know, even if they decided they didn't believe that, that
9 he was still there and he was still involved through the hand
10 of one/hand of all.

11 So I think that Mr. Hoffmeyer, you know, properly let
12 that statement go and that that statement was not so
13 inflammatory that it rendered the whole trial unfair at that
14 point, Your Honor.

15 I think that's all from the State, Your Honor. Thank
16 you.

17 THE COURT: Anything else, Mr. Waller?

18 MR. WALLER: Nothing further, Your Honor.

19 THE COURT: All right. This one I will take under
20 consideration. I want to read that information that you
21 cited, Ms. McCallister, and perhaps today or certainly within
22 a day or two have your decision.

23 MR. WALLER: Thank you, Your Honor.

24 THE COURT: Thank you for your patience.

25 (WHEREUPON, the proceedings ended at 11:39 a.m.)

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

Court Reporter

August 4, 2019

Case No. 2016-CP-21-02545

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

David G. Johnson, #312138,
Applicant,

v.

State of South Carolina,
Respondent.IN THE COURT OF COMMON PLEAS
IN THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2016-CP-21-2545

ORDER OF DISMISSAL

2019 MAY 13 AM 10:05
DORIS FOWLES CHENA
CCCP & GS
FLORENCE COUNTY, SC

FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed October 19, 2016. An evidentiary hearing into the matter was convened on April 3, 2018, at the Florence County Courthouse. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. W. James Hoffmeyer, Esquire, Applicant's trial counsel, testified for the State. At the close of all the evidence, the Court requested post-trial memoranda on the issue of whether trial counsel failed to object to improper comments in the Solicitor's closing argument. After reviewing the evidence and testimony from the hearing along with the arguments of counsel, this Court now denies and dismisses the application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the September 2009 term of the Florence County Grand Jury for murder, first-degree burglary, armed robbery, possession of weapon during the commission of a violent crime, and conspiracy



CERTIFIED: A TRUE COPY


CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

(2009-GS-21-1564). W. James Hoffmeyer (Counsel), Esquire, represented Applicant. Solicitor E. L. Clements, III, Esquire, and Deputy Solicitor John C. Jeperfinger, Esquire, prosecuted the case. On February 13, 2012, Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. On February 17, 2012, the jury found Applicant guilty as indicted on all five counts. Judge Russo sentenced Applicant to imprisonment for consecutive terms of life without the possibility of parole for murder and first-degree burglary. Judge Russo also sentenced Applicant to thirty years for armed robbery and five years for conspiracy to run concurrent with the murder and first-degree burglary sentences. Judge Russo did not impose a sentence for possession of a weapon during the commission of a violent crime because Applicant had been sentenced to life without the possibility of parole.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the South Carolina Office of Indigent Defense – Appellate Defense Division perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on April 9, 2014. State v. Johnson, Op. No. 2014-UP-167 (S.C. Ct. App. filed April 9, 2014). Applicant filed a petition for rehearing with the South Carolina Court of Appeals on April 24, 2014. The Court of Appeals denied the petition by order filed on June 13, 2014.

Applicant then filed a petition for writ of certiorari to the South Carolina Supreme Court on July 17, 2014. By order dated February 20, 2015, the Supreme Court partially granted certiorari. The Supreme Court dismissed the writ as improvidently granted on December 2, 2015. State v. Johnson, Op. No. 2015-MO-067 (S.C. Sup. Ct. filed December 2, 2015). The remittitur was returned to the circuit court on December 2, 2015.

Applicant filed a petition for writ of certiorari to the United States Supreme Court on March 1, 2016. The United States Supreme Court denied the petition on April 18, 2016.

ALLEGATIONS

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

1. "Ineffective Assistance of Counsel," regarding:
 - a. "Failure to subject the case to a meaningful adversarial testing;"
 - b. "Failure at sentencing stage;
 - c. "Burden shifting;"
 - d. "Violations of Constitutional Rights;"
 - e. "Malicious prosecution;"
 - f. The defendant "suffered prejudice;"
 - g. "Suppression of evidence."

At the call of the case, counsel for Applicant clarified his allegations as follows:

1. Ineffective Assistance of Trial Counsel, in that:
 - a. Counsel was ineffective for failing to object to members of the jury pool who knew Applicant;
 - b. Counsel was ineffective for failing to object to the solicitor's improper closing argument;
 - c. Counsel was ineffective for failing to object to testimony regarding the DNA and fingerprint evidence, rendering those issues unpreserved for appeal;
 - d. Counsel was ineffective for failing to renew his objections at the close of the evidence;
 - e. Counsel was ineffective for failing to introduce evidence of Applicant's intellectual disability;
 - f. Counsel was ineffective for failing to move for a mistrial based on the solicitor's improper questions.

Therefore, this Court finds Applicant has abandoned his original allegations to the extent the allegations in the original application can be construed as separate issues from those contained in the amendment. Those allegations are waived and are hereby denied and dismissed with prejudice.



SUMMARY OF FACTS ADDUCED AT TRIAL

The victim in this case was sixty-nine-year-old Willie Mae Hayes. On August 25, 2008, family members received a call notifying them Ms. Hayes had not shown up for work, which was very unusual. Worried, her family went to her home to check on her, but Ms. Hayes was not there. Upon inspection of the home, her brother found the back door unlocked and unsecured by the reinforced bar she usually placed on the door for added security. Tr. pp. 134-35. Ms. Hayes's daughter also noticed a broken vase, then saw a television was missing. Tr. pp. 139-40. Her son noticed a screen had been removed from a window and saw other evidence of disarray, specifically twisted bed linens in Ms. Hayes's bedroom. Tr. pp. 143-44. At first, the family thought perhaps Ms. Hayes had an accident but after calling the hospital, their concern increased, and they called the police. Tr. pp. 140, 144.

Upon arrival, officers found a point of entry in the kitchen and blood in the bedroom on the mattress and surrounding areas. Tr. pp. 205, 214-18, 363-64. Upon further investigation, officers located Ms. Hayes's car parked in the general area near the home. Tr. pp. 269-70. They also found a bag of pillows close to the home which tested presumptively positive for blood. Tr. pp. 214, 377-78. Additional investigation in the area led police to request Applicant come by and speak with the officers. Officers left messages at Applicant's home, with his father, and put the "word on the street." Tr. pp. 535-37, 654-60.

Applicant voluntarily went to the station to speak with investigating officers. Officers Drayton and Godwin were the lead investigators; however, they were busy interviewing another individual when Applicant arrived. Officer Compton therefore sat with Applicant in the meantime. Applicant chatted with Compton, had a snack and drink, and even took a nap while waiting. Compton testified the conversation was cordial, pleasant, and intelligent. Tr. pp. 37-40,

60-61, 444-49. Several hours (perhaps as many as eight hours) passed before Compton became "curious" and asked Applicant if, given that the other detectives were still busy, Applicant would talk to him instead. Tr. pp. 40-41, 54-55. Applicant agreed to talk, and Compton read Applicant his Miranda rights. Tr. p. 41. Compton testified he read each one, "one at a time," and advised Applicant to "listen up carefully." Tr. pp. 41-42. Compton asked if Applicant understood his rights, and Applicant indicated he did. Compton testified he had no indication Applicant did not or could not understand. Compton further explained he had experience with individuals who could not understand and did not see any "red flags" or cause to stop the interview. Tr. pp. 45-46, 452-54.

During his conversation with Compton, Applicant initially denied involvement, then admitted he was in the home. He also agreed to show investigators where the body was dumped. He indicated Anthony Wilson, known to Applicant as "Amp," told him where the body was located. Tr. pp. 47-50, 84, 455-59, 497-501. Another officer, Officer Raines, came in to Compton's office during the questioning. Raines also testified in pre-trial that he "heard nothing that would lead [him] to think that [Applicant] was not understanding what was being said." Tr. p. 67.

After leading officers to Ms. Hayes's body and returning to the station, Applicant gave another statement, which was recorded. He was re-read his Miranda rights, again appeared to understand his rights, and no threats were made or coercive tactics used. Tr. pp. 77-83, 547-50, 673, 681-85. In this second statement, Applicant again admitted to being in the home but blamed Wilson for the murder. However, Applicant admitted taking part in driving the car afterwards and dumping the body. Tr. pp. 686. Applicant also took officers to his father's home and showed them the hidden electronics taken from Ms. Hayes's home. Tr. pp. 79-80, 83-84, 556-60, 673-75.



Forensic testing determined the blood on the mattress, the bed rail, the bedroom curtains, and the pillows belonged to Ms. Hayes. Tr. pp. 312-13. Additional forensic testing matched samples from the steering wheel in the car to Applicant with "[t]he probability of randomly selecting an unrelated individual having a [matching] DNA profile" as one in five point one quadrillion. Tr. p. 303. Applicant's fingerprints were also found on the driver's side area of Ms. Hayes's car. Tr. pp. 417.

Applicant's co-defendants Anthony Wilson and Gregory Montgomery testified at trial. Wilson testified he was fourteen-years old in August 2008. He testified on August 25, 2008, he was sitting in a swing in Rashawn Bailey's yard next to Ms. Hayes's home when Applicant asked him to "walk with him," and they went next door to Ms. Hayes's house. Applicant asked Wilson, who was small, to climb through a window to gain entry to the house. Wilson opened the door for Applicant and Bailey. Tr. pp. 584, 589-94.

According to Wilson, at one point, he looked in the bedroom and saw Applicant sitting on top of Ms. Hayes in her bed. Applicant had a pillow over Ms. Hayes, and Applicant instructed Wilson to enter the room. Applicant then pulled a pocketknife open and gave it to Wilson, telling him to stab Ms. Hayes. Wilson, at Applicant's repeated urging, stabbed Ms. Hayes once and ran outside. Tr. pp. 596-98. Applicant came out and asked for Wilson's help in disposing of the body. Wilson and Applicant carried the body out of the house, wrapped in a sheet, and transported it in Ms. Hayes's car out into the country. Tr. pp. 600-01. Wilson and Applicant eventually placed the body in a ditch by the side of the road. Applicant was concerned the body could be seen, and Wilson attempted to cover the body with twigs and leaves. They then returned to Ms. Hayes's home and met up with Montgomery, who reentered the home with Wilson and Applicant. Tr. pp. 602-03.

Montgomery testified similarly in that he saw Applicant and Wilson in Ms. Hayes's car as they returned. He asked Applicant, who was driving, where he had gotten the car. Applicant replied "he had pulled a lick, which means he had committed a robbery." Montgomery also testified he asked for additional details, but Applicant said Montgomery would be scared if Applicant told him, so Montgomery determined he did not want to know and did not press Applicant further. Tr. pp. 631-33. Montgomery then took a ride around the block with Applicant and Wilson in Ms. Hayes's car. After they returned, Applicant asked Montgomery if he would like to "pull a lick." The group exited the car and went into Ms. Hayes's home. Montgomery testified he entered the home with Applicant and Wilson. He noted the back door was already open. Tr. pp. 633-34. Montgomery could not find anything he "wanted like a TV, VCR, and stuff like that," so he went to the kitchen and took a pack of chicken and Kool-Aid. Tr. p. 635.

Ms. Hayes was stabbed seven times along the front of her neck, with the deepest wound measuring 3.8 inches. Her cause of death was determined to be "stab wounds to her neck with the disruption of the jugular vein." Tr. pp. 388-89. Defense counsel argued at trial, consistent with Applicant's final statement, that Applicant was at Ms. Hayes's home, but did not stab Ms. Hayes. Tr. pp. 765-72. Nonetheless, the jury convicted Applicant as indicted on all charges. Tr. pp. 804-05.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant testified he was in the Florence County Detention Center for four years prior to trial, and he had two different attorneys before Counsel was appointed to his case. According to Applicant, he and Counsel did not talk about the statements given by his codefendants, the DNA testing/evidence, or the fingerprint evidence. Applicant testified he and Counsel also did not discuss the statements he gave to law enforcement himself, and he claimed he did not understand

the waiver of rights form he signed. Further, Applicant testified he was sent for an evaluation at the Department of Mental Health, and he told Counsel he was in special education classes. However, Applicant testified he and Counsel did not discuss the results of the evaluation.

Applicant also testified Counsel told him Counsel would talk to the victim's family and the Solicitor to see if they could negotiate a plea agreement for a thirty-year sentence, but the State was only willing to offer life. Applicant testified the State originally gave notice of intent to seek the death penalty, which he discussed briefly with Counsel, but he did not fully understand the information Counsel conveyed. Applicant testified he was unable to provide any useful information to Counsel about his case. Finally, Applicant testified he knew several members of the jury pool who were selected for his case, which he told Counsel, but Counsel did not take any action.

Counsel testified he was originally appointed to the case because he is certified as "first chair" counsel in death penalty cases, and the State had, at one time, given notice of intent to seek the death penalty in Applicant's case. Counsel testified he had tried four or five death penalty cases, some as first chair and some as second chair. Counsel testified he actively prepared the case in expectation of the State seeking the death penalty, including retaining a mitigation expert on mental health. Counsel also testified he made a motion to require the State to withdraw the death penalty notice after Applicant was evaluated and found to have an intellectual disability, and the State thereafter conceded he was not eligible on that basis. However, Counsel could not convince the State to offer a better plea agreement than life without parole.

Counsel testified he discussed both of Applicant's statements with Applicant and challenged the propriety of their admission in a pre-trial Jackson v. Denno hearing. Counsel

testified he retained an expert who testified regarding Applicant's ability, or lack thereof, to give a voluntary statement. Counsel further testified he made similar motions regarding whether Applicant could understand what he was consenting to in order to voluntarily give his fingerprints and a DNA samples, but he felt those motions would be harder to win, and the State would be able to use the DNA and fingerprints even if Applicant's statements were suppressed. Counsel testified, in the end, his motions were all denied. Counsel also testified he investigated the circumstances of the search of Applicant's father's home and went to view the crawl space where the stolen items were recovered. According to Counsel, Applicant's father (the homeowner) consented to the search, and the items were found in an area where Applicant did not have a reasonable expectation of privacy.

Counsel testified he objected to the admission of all of this evidence at trial and renewed his motions at the appropriate times. For example, Counsel pointed out where he objected to the admission of the reports of the DNA and fingerprint analyses. See Tr. p. 240. Counsel also explained he moved for a direct verdict and renewed all of his previous motions at the close of the State's case, and because he did not introduce any further evidence, he did not believe he needed to object or renew those motions again when the defense rested. Counsel testified he objected throughout the State's examination of witnesses, but he did not consider making a motion for a mistrial based on the cumulative effect of the State's allegedly improper questioning because he did not believe it rose to that level and because some objections were overruled. Finally, Counsel testified he did not object to the Solicitor's comment during closing arguments that there was no way to know which stab wound actually killed the victim because he did not believe that statements was objectionable as a mischaracterization of the pathologist's testimony. Counsel explained he interpreted the comment as the Solicitor merely pointing out that there was

no way to determine which of the seven wounds was the fatal wound, chronologically, and the State's theory was that Wilson inflicted the first wound, but Applicant inflicted the remaining six. Counsel indicated this information was presented to the jury through Wilson's trial testimony and previous statement to police. Counsel further explained he does not always object during closing because it can call more attention to an issue and because it is often difficult to remember exactly what is said throughout a long trial.

Counsel further testified it was difficult to come up with a viable defense in this case, and his primary focus was on preventing Applicant from receiving the death penalty. Counsel testified once that was off the table, he focused on trying to create reasonable doubt by arguing the codefendants were biased, and Applicant was merely present at the scene but did not stab the victim. Counsel further explained he decided not to call the expert who testified during the Denno hearing in front of the jury because he did not think the jury would find Applicant's statement involuntary, and, because he had so little else to work with, he felt it was important to retain the last argument to the jury.

Finally, Counsel testified Applicant never indicated he knew any of the members of the larger jury pool or the individual members of Applicant's jury. Counsel explained his practice is to discuss with his clients whether or not to strike each juror as the jurors stand because he wants his clients' input. According to Counsel, he and Applicant would have decided together whether to accept or strike each juror, and Applicant never told him he had an objection to any of the jurors.



FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and has heard the testimony at the PCR hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). Second, counsel's 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, 386 S.E.2d at 625.



Further, the standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 668.

1. Failure to object to members of the jury pool who allegedly knew Applicant

As noted above, where an applicant alleges ineffective assistance of counsel as a ground for relief, he must prove his trial counsel was deficient, and "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." Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

As to the issue of whether Counsel was ineffective for failing to object to members of the jury pool who knew Applicant, this Court finds Counsel was not deficient nor was Applicant prejudiced by Counsel's representation. This Court finds Counsel's testimony on this issue to be credible, while also finding Applicant's testimony not credible. Counsel explained his practice is to discuss with his client whether or not to strike each juror as the jurors stand because he wants his clients' input, and he and Applicant would have made the decision whether to accept or strike each juror together. Counsel testified Applicant never informed him he knew any of the members of the larger jury pool or the individual members of Applicant's jury, and therefore, the Court finds Counsel was not deficient because he was not put on notice of the need to take any action. Additionally, Applicant testified only that he knew some of the jurors, but he failed to offer any evidence whatsoever of how that fact prejudiced him. Accordingly, this Court finds Applicant has wholly failed to establish prejudice.



Because Applicant has not met his burden as to either prong of the Strickland test, this allegation shall be denied and dismissed with prejudice.

2. Failure to object to the Solicitor's closing argument

Applicant alleges the Solicitor's statement in closing argument that Ms. Hayes "just died from the all the stab wounds" was a misstatement of the evidence to which Counsel should have objected. However, this Court finds, when viewed in context of the entire argument on the matter, it is clear Solicitor Clements was referring to testimony in the record in which the pathologist testified she could not say for certain which stab wound was the fatal wound, chronologically, and therefore, the jury could reasonably conclude it was one of the seven wounds the State asserted Applicant was responsible for inflicting, either personally or by instructing Wilson to stab her.

In closing, the Solicitor argued, Dr. Presnell "said she was stabbed seven times. And she told Mr. Jeperfinger, 'I can't say which stab wound actually killed her.' You know, because there's no way to say this stab wound was first, this was second, this was third. She just died from all the stab wounds." Tr. p. 739, line 23 – p. 740, line 3. The Solicitor continued, "Well, the only other person that we know of that was in that room was David Johnson, so if Anthony was telling the truth [that] he stabbed her one time. . . either David Johnson had to get somebody else to come in the room and finish stabbing her or David Johnson had to finish stabbing her himself. And that's the main fact I think you can infer from the circumstantial evidence. . . ." Tr. p. 340, lines 3-6, 17-22.

As mentioned above, during her direct examination, Dr. Presnell testified Ms. Hayes sustained "seven stab wounds across the front of her neck," one of which "disrupted the jugular vein." Tr. p. 338-39. Presnell also testified, after considering all the injuries, she "determined

[Ms. Hayes'] cause of death was due to the stab wound, the stab wounds to her neck with disruption of the jugular vein." Tr. p. 339. In a follow up question, Dr. Presnell stated more specifically the stab wound to the jugular vein was the fatal injury. However, she also explicitly testified she could not determine "*chronologically* which wound occurred first." Tr. p. 339 (emphasis added).

It is well settled that "the solicitor must confine his arguments to the evidence in the record and its reasonable inferences." State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

In the context of the full argument made by Solicitor Clements, his statement, "she just died from all the stab wounds" is clearly referring to the uncertainty regarding the order in which the wounds were inflicted. Given Presnell's testimony that Ms. Hayes died from "the stab wounds to her neck," in conjunction with the testimony that she could not identify whether the wound to the jugular was the first inflicted or the last or any of those in between, the Solicitor's comment in closing was supported by the record and the reasonable inferences to be drawn from

it. Therefore, this Court finds the Solicitor's comment was unobjectionable, as Counsel determined, and Counsel cannot be deficient for failing to object to it.

In addition, the Court finds even if the comment was objectionable, Applicant suffered no prejudice. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record). "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. The burden of proof is on [Applicant] to show prejudice." Tucker, 324 S.C. at 169, 478 S.E.2d at 267-68 (internal citations omitted). "In evaluating prejudice, a number of factors should be considered: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." United States v. Mason, 344 F. App'x 851, 854 (4th Cir. 2009). When making this determination, courts "review the 'alleged impropriety of argument in the context of the entire record.'" State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (quoting Brown v. State, 383 S.C. 506 (2009)).

As discussed above, this Court finds Solicitor Clements' comment was not misleading when considered in the context of the entire record and within the closing argument itself, as it referred to the uncertainty with regard to the order of the wounds, and Dr. Presnell's statement Ms. Hayes died from the stab wounds, in the plural. Additionally, this is the only portion of the Solicitor's closing Applicant alleges is improper. The entirety of the Solicitor's closing, however, covers approximately thirty pages of the trial transcript. Tr. pp. 728-58. The comment

at issue is an isolated statement within the context of a lengthy, and generally unobjectionable, closing argument. Further, immediately prior to beginning closing arguments, the trial judge instructed the jury, as he did before to opening statements, that "what the lawyers tell you in their closing arguments is. . . not in evidence," and the evidence in the case for their consideration was limited to "the testimony of witnesses that [the jury] heard from during the course of the week and then any exhibits which came in during the course of the trial." Tr. pp. 727-28.

Both of Applicant's statements to police officers placed him at the home as a participant in the robbery and in the room when the stabbing occurred. In his first, unrecorded statement to police, Applicant admitted "he cut her throat." Tr. p. 459. In his recorded statement, Applicant admitted he entered the house knowing Ms. Hayes was there and the group planned to rob her, though he denied stabbing Ms. Hayes and claimed he merely watched as Anthony did so. However, Applicant's second version of events was contested by the State, and Wilson testified at trial Applicant actually gave him the knife and encouraged him to stab Ms. Hayes. Tr. p. 596-98.

At a minimum, by Applicant's own admission, he knowingly burglarized Ms. Hayes's home, at night, and witnessed the stabbing. Additionally, Applicant's fingerprints were found in the driver's compartment of her car and items missing from her home were recovered at Applicant's home. Tr. pp. 417, 556-58. There was also compelling testimony by a codefendant from which the jury could reasonably infer Applicant inflicted at least some of the stab wounds himself and find him guilty as a principal. See State v. Zeigler, 364 S.C. 94, 103, 107, 610 S.E.2d 859, 864, 866 (Ct. App. 2005) ("To be guilty as an aider or abettor, the participant must have knowledge of the principal's criminal conduct. . . . 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.”). See also State v. MacFarlane, 188 Conn. 542, 450 A.2d 374 (1982) (finding trial court properly instructed jury it could find defendant guilty of felony murder even if they found the other participant in the burglary actually caused the victim’s death).

The State presented alternate theories of Applicant’s liability as both a principal and as an accomplice under the hand of one, hand of all theory. Under “the hand of one is the hand of all theory [of accomplice liability], 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. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017) (internal quotations omitted). This Court finds there was overwhelming evidence of Applicant’s guilt at least as an accomplice, if not a principal. Accordingly, this Court also finds any error in the Solicitor’s closing argument was harmless, and Applicant was not prejudiced by Counsel’s alleged deficiency. See State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29–30 (2014) (“Error ‘is harmless where a defendant’s guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.’” (quoting State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006))); Edmond v. State, 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000) (noting the relevant factors in a prejudice analysis “are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt.”).

Therefore, because Applicant has failed to prove either deficiency or prejudice, this allegation shall be denied and dismissed with prejudice.

3. Failure to object to testimony regarding the DNA and fingerprint evidence; failure to renew objections at the close of the evidence

Applicant contends Counsel was ineffective because he failed to properly object to the admission of DNA and fingerprint evidence, rendering those issues unpreserved for appeal.

Applicant also claims Counsel failed to properly renew his pre-trial and trial objections and motions at the close of all evidence. The Court finds these allegations are without merit and should be dismissed.

The Court has reviewed the appellate documents from Applicant's direct appeal. On appeal, Applicant raised several issues, including whether the trial court erred when it found his statement to be voluntary and whether the trial court erred in admitting the DNA and fingerprint evidence. The Court of Appeals opinion in this case addresses both issues on the merits and makes no mention of doing so despite the issues being unpreserved. By implication then, the Court of Appeals found the issues preserved, and this Court finds Counsel was therefore not deficient. Additionally, the Court of Appeals fully reviewed the trial court's decision to admit this evidence and affirmed its decision to do so. Applicant therefore received his "full bite at the apple" as to these issues, and Applicant was not prejudiced by any alleged deficiency. See State v. Johnson, Op. No. 2014-UP-167 (S.C. Ct. App. filed April 9, 2014) (finding even with the acknowledgment Johnson may have had cognitive deficits, there was evidence to support the admission of his statement as well as the DNA and fingerprint evidence).

Because Applicant has failed to meet his burden as to either prong of the Strickland test, these allegations shall be denied and dismissed with prejudice.

4. Failure to introduce evidence of Applicant's intellectual disability

Applicant contends Counsel was ineffective for failing to introduce evidence of Applicant's intellectual disability during the defense case. For the reason articulated below, the Court finds this allegation is without merit and should be dismissed.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made

all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690. There is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). “[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include ‘which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.’ What motions to file and ‘whether to put on evidence so as to preserve the final word in closing argument’ are also strategic and tactical decisions to be made by trial counsel.” Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted).

Trial counsel’s strategy is reviewed under “an objective standard of reasonableness.” Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004). Here, Counsel credibly testified he chose not to call expert witness to testify as to Applicant’s intellectual disability before the jury, even though he did offer such testimony during the pre-trial Jackson v. Denno hearing on the voluntariness of Applicant’s statement. Counsel explained he did not believe the



jury was likely to find Applicant's statement had been given involuntarily and putting up the witness would have caused the defense to lose the last argument to the jury. Counsel explained because of the difficulty in formulating a viable defense other than arguing reasonable doubt, he felt it was particularly important to retain the last argument in this case. This Court finds this is a reasonable trial strategy clearly based on Counsel's professional assessment of the case, and therefore, this Court finds Counsel was not deficient in declining to call the expert witness.

Further, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Applicant did not call any witnesses or present any evidence to substantiate the very defense he alleges he was unable to present at trial due to Counsel's deficiency. Accordingly, Applicant has failed to meet his burden of proving he was prejudiced by Counsel's performance at trial. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."). This Court will not second guess Counsel's trial tactics, especially in light of the Court's finding Applicant has not met his burden of proving he was prejudiced by such tactics.

Accordingly, because Applicant has failed to prove either deficiency or prejudice, this allegation shall be denied and dismissed with prejudice.

5. Failure to move for a mistrial based on the solicitor's improper questions

Applicant next alleges Counsel was ineffective for failing to move for a mistrial based on the cumulative effect of improper questions from the Solicitor. Applicant contends Counsel objected throughout trial to the State's questioning on the basis of leading and hearsay, but Counsel should have also moved for a mistrial based on the cumulative prejudicial effect of the objectionable questioning.

Here, Applicant concedes Counsel made appropriate objections throughout the trial. His only contention is that because Counsel repeatedly made the same two objections – to elicitation of hearsay and leading questioning – Counsel should have also made a mistrial based on the prejudicial effect of the State's allegedly improper questions. Had the motion for a mistrial been made, the trial court's decision would have been reviewed under an abuse of discretion standard on appeal. "The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amount to an error of law. . . . In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000) (internal citations omitted). This Court finds Applicant has failed to meet this high standard. This Court has reviewed the trial record and notes several of Counsel's objections were overruled or were sustained before any answer was given by the witness, thus no prejudice resulted to Applicant. See, e.g., Tr. pp. 210-11, 331-32, 465, 499, 578, 635, 640. Further, because "[t]he power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes," this Court finds it is not reasonably likely Applicant would have prevailed on this on appeal had such a motion been made. State v. Kirby, 269 S.C. 25, 28-29, 236 S.E.2d 33, 34-35 (1977).

Because Counsel was not deficient, nor was Applicant prejudiced by Counsel's decision to move for a mistrial in this situation, this allegation shall be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by his representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

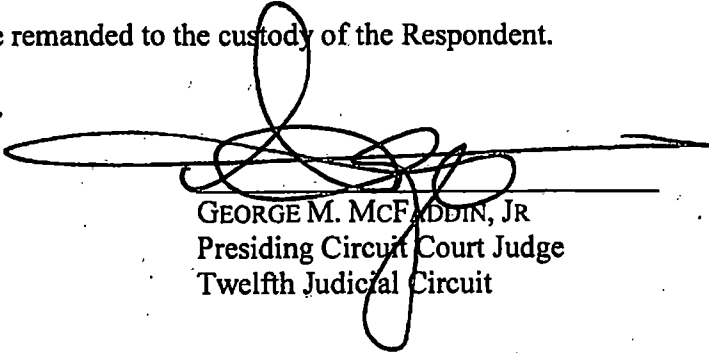
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right 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, PCR 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:

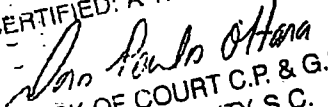
1. the Application for Post-Conviction Relief is denied and dismissed
with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.


GEORGE M. MCFADDIN, JR
Presiding Circuit Court Judge
Twelfth Judicial Circuit

May 8, 2019

FILED
2019 MAY 13 AM 10:05
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

WITNESSES

Melvin Godwin Florence Police Department



E. L. CLEMENTS, III

ARREST WARRANT NUMBER

2009-GS-21-1564 2009-GS-21-1564A
2009-GS-21-1564B

2009-GS-21-1564C 2009-GS-21-1564D

ACTION OF GRAND JURY



Newton Fowler

Foreperson of Grand Jury

Date:

VERDICT

TRUE BILL

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-21-1564

The State of South Carolina

County of

FLORENCE

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2009

THE STATE

vs.

DAVID GERRARD JOHNSON

Indictment for

MURDER,
BURGLARY FIRST DEGREE,
ARMED ROBBERY,
POSSESSION OF WEAPON DURING THE
COMMISSION OF A VIOLENT CRIME,
AND CONSPIRACY

CERTIFIED: A TRUE COPY
Clerk of Court C.P. & G.S.
FLORENCE COUNTY, S.C.
Carrie J. S. [Signature]

FILED
2009 SEP 10 PM 1:06
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COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

INDICTMENT FOR

MURDER, BURGLARY FIRST DEGREE,
ARMED ROBBERY, POSSESSION OF WEAPON
DURING THE COMMISSION OF A VIOLENT CRIME
AND CONSPIRACY

At a Court of General Sessions, convened on SEPTEMBER 10, 2009 the Grand Jurors of FLORENCE County present upon their oath:

COUNT ONE- MURDER

CDR: 0116

16-03-0010, 0020, 16-01-0060

That DAVID GERRARD JOHNSON did in Florence County, on or about August 24, 2008, feloniously, willfully, and with malice aforethought, kill one Willie Mae Hayes, by means of stabbing her with a knife, and that the said Willie Mae Hayes did die as a proximate result thereof, in violation of Sections 16-03-0010, 0020 and 16-01-0060, S. C. Code of Laws, 1976, as amended.

COUNT TWO- BURGLARY FIRST DEGREE

CDR: 0079

16-11-0311, 16-01-0060

That DAVID GERRARD JOHNSON did in Florence County on or about August 24, 2008, willfully and unlawfully enter the dwelling of Willie Mae Hayes, located at [REDACTED], Florence, SC, without consent and with the intent to commit a crime therein, and/or said defendant entered or remained in said dwelling in the nighttime; and/or when effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime was armed with a deadly weapon or explosive; and/or caused physical injury to a person who is not a participant in the crime; and/or used or threatened the use of a dangerous instrument; and/or displayed what was or appeared to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; in violation of Sections 16-11-0311 and 16-01-0060, S. C. Code of Laws, 1976, as amended.

COUNT THREE - ARMED ROBBERY

CDR: 0139

16-11-0330(A), 16-01-0060

That DAVID GERRARD JOHNSON did in Florence County on or about August 24, 2008, while armed with a deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a knife, did feloniously rob one Willie Mae Hayes, by means of force or intimidation, goods or monies of the said Willie Mae Hayes, in violation of Sections 16-11-0330(A) and 16-01-0060, S. C. Code of Laws, 1976, as amended.

ATTACHED TO AND BECOMING A PART OF THE ORIGINAL INDICTMENT FOR MURDER, BURGLARY FIRST DEGREE, ARMED ROBBERY, POSSESSION OF WEAPON DURING THE COMMISSION OF A VIOLENT CRIME, AND CONSPIRACY WITH THE AFORESAID NAMES(S) OF DAVID GERRARD JOHNSON SHOWN THEREON:

**COUNT FOUR- POSSESSION OF WEAPON DURING THE
COMMISSION OF A VIOLENT CRIME**

CDR: 0549

16-23-0490

That DAVID GERRARD JOHNSON did in Florence County, on or about August 24, 2008, possess and/or visibly displayed a weapon, to wit: a knife, during the commission of a violent crime, to wit: Murder, Burglary First Degree, and/or Armed Robbery, in violation of Section 16-23-0490, S. C. Code of Laws, 1976, as amended.

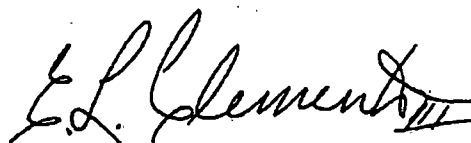
COUNT FIVE- CONSPIRACY

CDR: 0049

16-17-0410

That DAVID GERRARD JOHNSON did in Florence County on or about August 24, 2008, unlawfully, willfully, knowingly, wickedly and feloniously unite, combine, conspire, confederate, agree between and among three other co-defendants, and have tacit understanding with each other for the purpose of committing the crimes of Murder, Burglary First Degree, and/or Armed Robbery, in violation of Section 16-17-410, S. C. Code of Laws, 1976, as amended.

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



E.L. Clements, III
TWELFTH CIRCUIT SOLICITOR