

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2017-CP-28-0060

Willie Starnes, SCDC # 287191, Appellant


v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Willie Starnes hereby appeals from the Order of the Diane S. Goodstein, presiding Judge for the 5th Judicial Circuit, filed January 24, 2020 and received by counsel for the Applicant on January 27, 2020.

January 28, 2020



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JAN 30 2020

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CERTIFICATE OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;

Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on January 28, 2020 by
depositing one copy in the U.S. Mail, postage prepaid:

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STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Willie Thomas Starnes, #287191,)

C. A. No. 2017-CP-28-0060

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

FILED FOR RECORD
2020 JAN 24 AM 10:55
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 24, 2017, by Willie Thomas Starnes (Applicant). The State (Respondent) filed a Return on July 21, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened June 19, 2019, at the Richland County Courthouse before the undersigned. Applicant was present at the hearing and represented by Kristy G. Goldberg, Esquire. Assistant Attorney General Lindsey A. McCallister of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's wife, Patricia Starnes, also testified. Jason Kirincich, Esquire, Applicant's trial counsel testified for Respondent. This Court also had before it a copy of the records of the Kershaw County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's Return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. This is a Certified

Copy of Original on File in this Court
Janet C. Hasty
Clerk of Court Kershaw County

to orders of commitment of the Kershaw County Clerk of Court. In December 2013, the Kershaw County Grand Jury indicted Applicant for murder (2013-GS-28-1041) and armed robbery (2013-GS-28-1040). Jason D. Kirincich (Counsel) represented Applicant. Deputy Solicitor Brett A. Perry, Assistant Solicitor Curtis A. Pauling, III, Esquire, and Assistant Solicitor Curtis R. Hutchinson, Esquire prosecuted the case. On August 25-28, 2014, Applicant proceeded to trial before the Honorable DeAndrea G. Benjamin. The jury found Applicant guilty as indicted on both charges. Judge Benjamin sentenced Applicant to imprisonment for concurrent terms of life in prison.¹

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire of the Office of Appellate Defense perfected the appeal. Applicant, through appellate counsel, raised the issue of whether the trial court erred in admitting the victim's statements to two witnesses under the excited utterance exception to hearsay under the Rule 803(2), SCRE. The South Carolina Court of Appeals affirmed Applicant's conviction on December 21, 2016. State v. Starnes, Op. No. 2016-UP-522 (S.C. Ct. App. filed December 21, 2016). The remittitur was returned to the circuit court on January 10, 2017.

Applicant timely filed this PCR application on January 24, 2017.

SUMMARY OF FACTS ADDUCED AT TRIAL

At trial, the State presented evidence Applicant intentionally hit Alan Robinson (Robinson) with his SUV, stole Robinson's moped by loading the moped into the SUV, and then turned around and ran over Robinson again. While lying on the side of the road, Robinson told family members someone driving an SUV hit him and knocked him off his moped. Tr. p. 207.

¹ The State served Applicant notice of its intent to seek a mandatory sentence of life without parole at trial based on Applicant's prior record. Tr. pp. 764-66.

Robinson also said the driver then turned around and drove back over Robinson, crushing him. Tr. pp. 207-09, 502, 531. Ultimately, Robinson died at the hospital from his injuries. Tr. p. 522.

William Pate (Pate), Robinson's nephew, testified he and his wife were leaving their home in Bethune on the evening of August 24, 2013, when they saw something lying on the side of the road but could not determine what it was.² Tr. pp. 201-02. As they drove closer, Pate realized it was Robinson, his uncle, and he and wife stopped and jumped out of the car. Tr. p. 202. They observed Robinson lying with his head on an embankment and his feet facing the middle of the road. Tr. p. 204. Pate testified his uncle was upset and agitated, moaning and crying and saying, "God help me." Tr. pp. 207-08. Pate stated Robinson was "screaming in pain," incapable of much movement, and could not stand up. Tr. p. 208. Robinson told Pate someone bumped his moped, got out of the vehicle, hit him in the face, and knocked him off the moped. Tr. p. 207. The person then stole the moped by loading it into the vehicle. Tr. p. 208. Robinson told Pate the person got back in the vehicle, drove down the street, turned around, and drove back to run Robinson over. Tr. pp. 208-09. Robinson described the vehicle as similar to a neighbor's dark blue Chevrolet Tahoe. Tr. p. 221. Pate noted it was Robinson's habit, while riding his moped, to pull over to the side of the road if a vehicle came up behind him to let the other vehicle pass by.³ Tr. p. 209.

Martha Pate (Martha), William Pate's wife, testified when they first spotted Robinson on the side of the road, he was holding his stomach and kept yelling, "Help me!" and "I'm in pain!" Tr. pp. 230-31. Similar to her husband's testimony, Martha stated Robinson told them someone took his moped and then ran him over. Tr. pp. 231, 233. Specifically, she testified Robinson believed two people took the moped, and put it in the back of a vehicle the same dark color as a

² The victim lived on the Pates' property. Tr. p. 201.

³ Pate's wife confirmed Robinson was "very, very careful" on the moped. Tr. p. 234.

neighbor's. Tr. pp. 232-33. Martha further testified she called 911, and when law enforcement arrived, she and her husband told them what Robinson said had happened to him. Tr. pp. 235, 237. Martha noted she and her husband were the only people to talk to Robinson before the ambulance and paramedics arrived. Tr. p. 238.

Paramedic Michelle Marble (Marble) testified Robinson was conscious when she and her partner arrived, and Robinson told them he had been hit by a vehicle. Tr. pp. 259-62. Marble testified they loaded Robinson in the ambulance and headed toward Kershaw Health, the closest hospital. Tr. p. 267. However, Robinson's blood pressure continued to drop and his symptoms deteriorated, so Marble received permission to airlift Robinson to the closest major trauma center, which was in Richland County. Tr. pp. 267-68.

An orthopedic physician examined Robinson and testified Robinson had a shattered pelvis – the bone was broken in the front, back, and both sides. Tr. pp. 487, 493, 498-500. The doctor explained the injury indicated Robinson endured “trauma to both sides of the pelvis or some sort of a crush injury.” Tr. p. 502. Robinson also had a broken ankle, fractured collarbone, multiple tears in his small and large bowel, as well as “significant areas of blood vessels that were bleeding.” Tr. pp. 501, 503-04. The autopsy revealed multiple rib fractures, a hemorrhage in Robinson's abdominal cavity, and injuries to some of the major arteries near his pelvis. Tr. p. 529. The pathologist who performed the autopsy testified she could “feel the shards of broken bone” in the pelvis area and stated Robinson suffered “very severe traumatic injuries.” Tr. p. 530. The pathologist determined Robinson's cause of death to be “blunt force injuries” consistent with being hit by a vehicle, and she categorized the manner of death as homicide. Tr. p. 531.

Investigators with both the highway patrol and Kershaw County Sheriff's Office worked the case initially, because they were not sure if the incident was an accident or an intentional act.

Tr. pp. 318-19. However, once investigators observed the scene and spoke with the family members and Applicant's wife, they determined someone intentionally harmed Robinson in order to steal his moped. Tr. pp. 313-14, 319. At the scene, investigators "could clearly see where something had been disturbed, the dirt was kicked up."⁴ Tr. p. 314. Moreover, by following the tire tracks, they could see where a vehicle drove up the road, executed a three or four-point turn, and drove back down the road. Tr. p. 315, 321-22. Investigators testified their observations of the scene matched what family members told them Robinson said. Tr. pp. 316-17:

On August 26, 2013, investigators received a tip that someone who worked at a poultry processing plant in Bethune had information about the incident. Tr. pp. 423, 474-75. When they arrived at the plant, they spoke with Patricia Starnes (Patricia), Applicant's wife. Tr. p. 368. Patricia told investigators Applicant was involved in the crash and showed them her black Chevrolet Tahoe, which was parked outside the plant. Tr. pp. 423-24. Investigators found damage to the Tahoe's front bumper, and the defense stipulated at trial that paint found on the bumper was consistent with paint from Robinson's moped. Tr. pp. 379, 423. Patricia testified her husband "was doing drugs" and "acting crazy" around the time of the incident. Tr. p. 369. According to Patricia, Applicant left in her Tahoe the day before the incident, and when he returned the next night, he kept mumbling, "What are you going to do?" and told Patricia "he had done something bad." Tr. p. 370. Patricia told investigators Applicant admitted he hit someone on a moped. Tr. p. 372. She also gave investigators an identification card belonging to Applicant, which had his picture on it. Tr. pp. 424-25.

After leaving the plant, investigators went back to examine the scene and to speak to

⁴ Freeman Road, where the incident occurred, was a dirt road. (R.p.69, lines 8-9).

Robinson's family members, when they spotted Applicant walking down the road. Tr. pp. 426-27. The lead investigator told Applicant he was a person of interest in the case, read Applicant's rights, and Applicant subsequently admitted he hit Alan Robinson.⁵ Tr. p. 427, 558, 560-61. After this admission, Applicant was arrested and taken to the sheriff's office where he gave two additional statements to investigators in which he admitted his involvement in the incident.⁶ Tr. p. 561, 563, 573-75, 585-86.

After his arrest, Applicant was placed in a holding cell with John Hunter. Tr. pp. 389-90. Hunter testified Applicant was "laughing and giggling." Tr. p. 390. Applicant told Hunter, "Well, ain't you heard? I'm a celebrity inmate" and said he was charged with murder. Tr. p. 390. Applicant explained to Hunter what happened on the night he killed Robinson:

[Applicant] told me how he was riding down the road. He was about half drunk, or whatever. He had been drinking a little bit. He was riding down the road. He seen the guy riding a moped and he thought it was a easy—a easy lick, or quick lick, or something the way he said it was like that.

And he said he pulled up beside him, he bumped into—bumped him, run him off into the ditch. He said he didn't try to hit him too hard because he didn't want to mess up the moped.

He said that when he seen the moped he knew it would be a quick fix or a quick lick, or something like that. He said he stopped, he

⁵Applicant gave conflicting information at various times to investigators, at first claiming someone else was with him, but it was later determined Applicant acted alone. Tr. pp. 575-76, 620.

⁶ During one of the interviews, Applicant told investigators where he sold the stolen moped, which was recovered and found to have damage consistent with that found on the Tahoe. Tr. p. 577. Robert Danzy (Danzy) testified Applicant tried to sell the moped to him for \$100; however, Danzy did not want it, and a friend bought it instead. Tr. p. 342. Danzy explained, "[I]t seemed like [the moped] was mighty hot," and Applicant seemed "nervous" and wanted to "get rid of it fast." Tr. pp. 343-45. Jerry Crawford (Crawford) testified he helped his nephew purchase the moped and stated, when he spoke to Applicant, he told Applicant the moped looked "mighty good" and asked him, "You sure it is not stolen?" Tr. pp. 357-58. Applicant told Crawford the moped was not stolen, and he wanted to sell it because it did not work very well. Tr. pp. 358, 360.

loaded up the moped. . . .

And—but he just made it out like it was just all fun and games,
like it was just a big joke. . . .

Tr. pp. 391-92.

Investigators obtained warrants and charged Applicant with murder after his first interview, in which he eventually confessed that he was the only one involved in the incident.

Tr. pp. 477, 598-601. A Kershaw County Grand Jury subsequently indicted Applicant for murder and armed robbery.

ALLEGATIONS RAISED

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

1. Ineffective Assistance of Counsel
 - a. “Counsel failed to adequately investigate and prepare for Applicant’s criminal trial proceedings.”
 - b. “Counsel specifically failed to interview and call certain favorable witnesses or present favorable evidence in Applicant’s defense.”
 - c. “Counsel failed to properly and adequately investigate and challenge the prosecution’s use of certain evidence and witnesses against Applicant.”
 - d. Applicant’s wife was being pressured and coerced by law enforcement officials and agents of the County prosecutor’s office, but Counsel did nothing to protect and preserve Applicant’s marital rights
 - e. “Trial Counsel should have, but did not, object or otherwise preserve for appellate review, the prosecutor’s unlawful use of confidential marital communications in violation of S.C. marital privilege laws.”
 - f. “Counsel failed to conduct defense interview with the State’s witnesses prior to Applicant’s criminal trial.”
 - g. “Counsel failed to investigate the defense that Applicant accidentally struck the victim and there was no element of intent to kill or malice at the time of fatal impact.”
 - h. “Failed to object or otherwise preserve for Appellate review the prosecution’s intentional removal of African-American members of the jury pool from service on Applicant’s petit jury in violation of Applicant’s Due Process Rights under *Batson v. Kentucky*.”
 - i. “Failed to properly object and argue for a mistrial when the record clearly showed that a member of Applicant’s petit jury panel was caught numerous times sleeping during critical proceedings of Applicant’s criminal trial.”

2. Ineffective Assistance of Appellate Counsel

- a. Applicant was entitled to effective assistance regarding the marital privilege issue
- b. "Failed to brief and argue as plain error the trial court's improper handling of sleeping juror issue"
- c. "Denial of Due Process of the Law"

Through PCR counsel, Applicant amended his application on May 29, 2019, to include the following allegations:

- a. Trial counsel failed to interview Patricia Starnes prior to trial and inform her of her right to assert spousal privilege.
- b. Trial counsel should have objected when the Solicitor informed the jury that the empty chair at the prosecution table was for the deceased victim.
- c. Trial counsel failed to share and disclose to Applicant new witness statements from William Pate and Martha Pate received immediately prior to trial.
- d. Trial counsel failed to object when the Court failed to advise Patricia Starnes of her right to choose not to testify.
- e. Trial counsel failed to consult an expert medical professional and obtain a second opinion regarding the victim's injuries.
- f. Trial counsel failed to request a mistrial or request to remove a sleeping juror with an alternate juror when a juror was caught sleeping during the trial.
- g. Trial counsel failed to properly communicate with the Applicant and prepare him for trial including preparing him to testify in trial.
- h. Trial counsel failed to effectively assist the Applicant in plea negotiations.

At the beginning of the evidentiary hearing, counsel for Applicant informed the Court Applicant wished to proceed on the amended application only, and Applicant further wished to withdraw allegation (e) of the amendment. Accordingly, this Court finds, to the extent the allegations in Applicant's original application can be construed as additional grounds for relief, those allegations are waived. All allegations in the original application, along with allegation (e) in the amended application, are hereby denied and dismissed with prejudice.

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant testified he is serving LWOP for murder and armed robbery. Applicant stated he was arrested on August 26, 2013, and remained in the county jail until his trial on August 25, 2014. Applicant further testified he was represented by Counsel, and agreed he met with

Counsel to review the case. Applicant explained Counsel read the "motion of discovery" to him, but some items were still missing at that time. Applicant testified Counsel told him it would not be safe to give him a copy of the discovery documents, but they read the materials together. Specifically, Applicant testified the SLED report analyzing the paint found on the truck was missing, and the paint from the moped on the truck was the only physical evidence linking him to the crime. On cross-examination, Applicant conceded he received the SLED report before trial.

Applicant explained the victim was found on the side of the road by some of the victim's relatives - Martha and William Pate. Applicant testified he was concerned about their statements because, in his opinion, their trial testimony differed from the written statements to say the murder was premeditated. Applicant testified he only found out about the statements being updated two days before trial. Applicant stated the Pates claimed at trial the victim said Applicant got out of the car and hit him and then ran him over a second time. Applicant testified Counsel never mentioned the new statements to him or shared them. Applicant opined this information was harmful to his case, and the Pates' testimony the victim was in pain and screaming, "Oh God, help me" changed the outcome of his case. Applicant testified he had "no idea" if his decision to plead guilty or go to trial would have been different had he known about these statements, but he felt he "should have received these statements before trial."

Regarding plea negotiations, Applicant testified Counsel never conveyed an offer to him, but the solicitor personally offered thirty years served day-for-day and said Applicant would receive life without parole (LWOP) at trial. Applicant told the solicitor he would accept twenty-five years, but the solicitor refused. According to Applicant, this exchange took place outside Counsel's presence, and Applicant never discussed the offer with Counsel. Applicant further

stated Counsel mentioned a fourteen-year sentence during trial, which Applicant said he would accept, but then Counsel indicated the State would not agree. Applicant testified he did not understand he was facing LWOP because he cannot read. Applicant first testified he was not served with the LWOP notice, but then testified he was served three times by the lieutenant at the jail.

Applicant further testified his wife testified at trial, and he asked Counsel to object to her testimony. According to Applicant, Counsel said the jurors needed to hear her testimony because it would help show remorse. Applicant testified his wife said he got on his knees and claimed to have hit someone on a moped. However, Applicant testified all he ever told his wife was that he "did some stupid shit." Applicant testified he wanted Counsel to object to the testimony on the grounds of martial privilege.

Applicant also testified he wanted Counsel to move for a mistrial or request the removal of a juror for sleeping during trial. Applicant testified he did not see the sleeping juror himself. Regarding Applicant's right to testify at trial, Applicant explained Counsel said it would not have been in his best interest to do so because his statement to law enforcement was all the jury needed to hear, and the State would introduce his prior record if he testified. Applicant stated he did not have anything else he wanted to add, and he agreed his testimony was not necessary at trial. Finally, Applicant testified he believed Counsel would have been granted a continuance had he asked for one. On cross-examination, Applicant explained the local newspaper mentioned the murder trial was set to begin, but the judge denied his request to change venue.⁷

⁷ The Court then asked a clarifying question regarding the change of venue motion. The trial court addressed the newspaper article during jury selection. It does not appear from the record that Counsel filed a motion to change venue.

Applicant's wife, Patricia Starnes (Patricia), also testified. Patricia explained she was still legally married to Applicant, but they had no ongoing relationship and had not spoken in over three years. Patricia testified she was interviewed by law enforcement and gave a statement concerning some conversations she had with Applicant. Patricia first testified the solicitor interviewed her prior to the trial, but on cross-examination, she conceded, based on her statement in the trial transcript, they had never met. Patricia stated she could not recall if she ever met with Counsel prior to the trial. Patricia testified she was not aware she could assert spousal privilege, and if she had been aware, she would have done so because she did not want to testify. On cross-examination, Patricia agreed the conversations with Applicant comprised only a portion of her statement and testimony, and some was based on her own observations of Applicant's behavior. Patricia testified she never informed the trial court before or during her testimony that she did not want to testify or that she wanted an attorney.

Counsel testified he was the only attorney ever appointed to represent Applicant in this case. Counsel recalled the appointment because the solicitor informed him of it and gave him an overview of the facts. Counsel testified he went to meet with Applicant within two days of Applicant's arrest. Counsel stated he met with Applicant six to ten times at the jail and several times at the courthouse and the Sheriff's Office. Counsel further testified he received the first batch of discovery in November 2013 and continued to receive additional discovery up until trial. Counsel stated he received the SLED report mentioned by Applicant before trial, and that evidence was not an issue at trial. Counsel explained the defense theory of the case was accident. He explained the defense conceded Applicant hit the victim but maintained it was not intentional act. Counsel testified, the State's theory, on the other hand, was that it was an intentional act to get money for drugs. Because the focus of the defense was Applicant's intent in hitting the

moped, the SLED evidence of paint transfer between the moped and Applicant's vehicle was not a contested fact at trial.

Regarding the second statements of William and Martha Pate, Counsel testified he received them before trial, but he could not recall exactly when. On cross-examination, Counsel noted the statements were dated August 12, 2014, and the trial began on August 25, 2014. Counsel also testified he did not remember specifically reviewing the statements with Applicant, but he met with Applicant a week before trial and went over all the discovery they had. Counsel explained Highway Patrol took the first set of statements, and the difference between those and the second set was the part where Applicant turned around and struck the victim with the car the second time. Counsel testified that information was damaging to the defense of accident. However, Counsel conceded that if Applicant admitted to the second strike in his own statement to law enforcement, then the Pates' second statement did not contain new information.⁸ Counsel also agreed the State always alleged the first strike of the moped was intentional, and the victim's medical records indicated the victim had been run over by a vehicle.

Counsel agreed he never spoke with Patricia because she and Applicant did not seem to have a good relationship leading up to trial. Counsel explained he had a copy of her statement so he knew what she was going to say. Counsel stated Patricia's boss initially notified law enforcement because Patricia told a coworker, "Willie did something stupid last night." Counsel further stated Patricia's statement to law enforcement contained similar language, and Counsel stated Patricia came to trial and gave testimony Applicant "confessed" to her that he had hit someone on a moped. Counsel characterized Patricia's testimony as "damaging," but agreed it was not inconsistent with the defense theory of accident. Further, Counsel testified, in his

⁸ The State introduced the audio tape of Applicant's statement as an exhibit, on which Applicant admits he turned the car around and struck the victim a second time before driving off.

professional opinion, it would not have been appropriate for him to discuss spousal privilege with Patricia. Counsel testified he felt doing so could be construed as witness tampering. Counsel stated it did not seem right to have that discussion with her at the time, and it still did not sit right with him as he was testifying. Counsel agreed he could have asked the court to inform Patricia of the law regarding spousal privilege, and he did not know why he did not ask.

Regarding the sleeping juror, Counsel explained he brought to the trial court's attention that a juror had her eyes closed, and Counsel was not sure if she was sleeping or if something else was going on. Counsel stated the trial judge questioned the juror and determined she was not sleeping. Counsel testified he did not recall why he did not ask the judge to remove the juror except that he felt it was clear the judge was not going to do it. Counsel recalled there was some discussion about using an alternate juror, but the court questioned the "sleeping" juror and was satisfied she could continue to serve.

Counsel testified Applicant indicated early on he did not want a trial. Counsel stated the only plea offer the State ever extended was thirty years for murder. Counsel stated he conveyed that offer to Applicant, but Applicant wanted something in the range of twenty-to-twenty-five years. Counsel testified the solicitor would not agree to reduce the charge below murder. Counsel also testified he did not recall a plea offer for fourteen years. Counsel testified he and Applicant knew the State would seek LWOP early in the case, and Counsel explained to Applicant what that meant. Counsel stated he believed Applicant understood the implications of turning down the State's plea offer. On cross-examination, Counsel testified the thirty-year offer expired before he received the Pates' second statements, and he did not recall asking the State to re-extend that offer based on new discovery.

Finally, Counsel agreed the solicitor's opening statement about leaving an empty chair at the State's table for the victim may have been objectionable. Counsel explained, however, he does not always object to opening statements, and in this case, it was not a secret it was a murder trial at that point. Counsel further stated the defense did not contest the fact victim was killed, and Applicant had hit him. Counsel noted he objected at points during the solicitor's opening, but stated the line about the chair may not have seemed like a big deal at the time.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court has reviewed the evidence presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony and evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's appellate records, and it has considered the legal arguments made by the attorneys. This Court finds the combined record of the trial transcript and the testimony from the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2014).

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

cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

Allegations (a) & (d): Trial counsel failed to interview Patricia Starnes prior to trial and inform her of her right to assert spousal privilege and trial counsel failed to object when the Court failed to advise Patricia Starnes of her right to choose not to testify

Applicant alleges Counsel was constitutionally ineffective because he did not speak to Applicant's wife before trial and inform her of her right to assert spousal privilege, nor did he object when the trial court failed to advise her of the same.

"The spousal privilege provides that in criminal cases married persons cannot be compelled to testify against their spouses concerning any communication made between them during their marriage." State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996); see also S.C. Code Ann. § 19-11-30 ("[N]o husband or wife may be required to disclose any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage."). The right to exercise the privilege against disclosing marital communications is solely that of the witness spouse from whom the privileged information is being sought. State v. Motes, 264 S.C. 317 (1975). Here, although Patricia testified she would have asserted her

spousal privilege had she known of her right to do so, the record is clear she never expressed her desire not to testify before or during trial. The statutory provisions and case law are clear the privilege must be affirmatively asserted by the witness-spouse, which Patricia did not do in this case. Because she did not assert it, she waived the privilege. In addition, Counsel testified law enforcement was alerted to speak to Patricia because her boss overheard her telling another coworker Applicant had done "something stupid." Thus, arguably, Patricia had already waived her privilege by discussing the conversation with someone other than her spouse. See, e.g., Marshall v. Marshall, 282 S.C. 534, 538, 320 S.E.2d 44, 46-47 (Ct. App. 1984) (holding in the context of attorney-client privilege "[a]ny voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject"). Further, Counsel credibly testified, because it was not his client's privilege to assert, he did not feel it was not appropriate for him to discuss the issue with Patricia.

Accordingly, this Court finds Counsel was not deficient in choosing not to speak to Patricia about her spousal privilege before trial, nor in failing to object when the trial court did not raise the issue. This Court also finds credible Counsel's explanation of why he did not have the conversation – because he felt it was unethical and potentially illegal for him to do so – to be credible and reasonable. See State v. Cogdell, 273 S.C. 563, 568, 257 S.E.2d 748, 750 (1979) ("At common law it is an offense to do any act which prevents, obstructs, impedes, or hinders the administration of justice."); State v. Lyles-Gray, 328 S.C. 458, 465, 492 S.E.2d 802, 806 (Ct. App. 1997) (citing WILLIAM S. MCANNINCH & W. GASTON FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 430 (3d ed. 1996)) ("Many other acts do not fall within the statutory scheme of Article 4, such as destruction or substitution of evidence or dissuading or preventing a witness

from attending or testifying at trial. These acts, therefore, would be punishable under the common law of obstruction of justice.”).

Additionally, the Court finds Applicant failed to establish how he was prejudiced by Patricia’s testimony. Although Counsel testified the testimony was “damaging,” Counsel also conceded Patricia’s statement at trial that Applicant confessed he had “done something stupid” and “hit someone with a moped” was consistent with the defense of accident. Moreover, Applicant admitted to hitting the victim in his statement to law enforcement, so Patricia’s statement was cumulative. See, e.g., State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (holding any error in admission of evidence cumulative to other not-objected-to evidence is harmless), overruled on other grounds by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

Because Applicant has failed to establish either deficiency or prejudice, relief is denied on this ground, and the allegation is dismissed.

Allegation (b): Trial counsel should have objected when the Solicitor informed the jury that the empty chair at the prosecution table was for the deceased victim

Applicant alleges Counsel should have objected during the State’s opening argument when the solicitor informed the jury the empty chair at the prosecution table was for the deceased victim. At the evidentiary hearing, Counsel agreed the statement may have been objectionable. However, Counsel explained he does not always object to opening statements, and in this case, it was not a secret the jury was there for a murder trial. Counsel further stated the defense did not contest the fact victim was dead, and Applicant had hit him. Counsel noted he objected at points during the solicitor’s opening, but he stated the line about the chair may not have seemed like a big deal at the time.

This Court finds Counsel was not deficient in failing to object to this line of argument. “The opening statement serves to inform the jury of the general nature of the action and the

issues involved so they can better understand the evidence presented. The solicitor is permitted in opening statement to outline the facts the state intends to prove. As long as the State introduces evidence to reasonably support the stated facts, there is no error." State v. Kornahrens, 290 S.C. 281 (1986) (internal citations omitted). Of course, the State in this case introduced copious evidence the victim died. Further, as Counsel noted in his testimony, the defense was not contesting that fact or even the fact Applicant had caused the death.

This Court finds, even if the argument was objectionable, Counsel articulated a valid reason for declining to object. See Stone v. State, 419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017) ("There are a variety of reasons counsel may soundly choose not to make such an objection, including the reality that not all evidence offered by the State is harmful to the defendant."); Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996) (holding where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective). Counsel stated at the time the statement was made, it may not have seemed like a big deal to him. Specifically, the jury already knew Applicant was charged with murder, and the defense did not contest the victim died and Applicant hit the victim. The Court finds credible Counsel's testimony regarding this issue. Further, the Court finds reasonable Counsel's inclination the statement was not a big deal at the time because of the defense's theory of accident. Therefore, because Counsel was not deficient, Applicant's request for relief as to this allegation is denied.

Allegation (c): Trial counsel failed to share and disclose to Applicant new witness statements from William Pate and Martha Pate received immediately prior to trial

Applicant alleges Counsel was ineffective for failing to inform him of new witness statements from the victim's family members, William and Martha Pate, received "immediately"

prior to trial. Applicant alleges this failure prejudiced him because the statements contained a new contention that Applicant deliberately struck the victim with his vehicle a second time.

Counsel testified the statements were dated August 12, 2014, and the trial began on August 25, 2014. Counsel also testified he did not remember specifically reviewing the statements with Applicant, but he met with Applicant a week before trial and went over all the discovery they had at that time. Counsel testified he received the statements before trial, but he could not recall exactly when. Applicant testified Counsel never mentioned the new statements to him or shared them. Applicant also testified he had “no idea” if his decision to plead guilty or go to trial would have been different had he known about these statements, although he felt he “should have received these statements before trial.”

The Court finds when Counsel received the statements and whether Applicant knew of them is irrelevant because Applicant himself admitted to striking the victim a second time. The State introduced the audio tape of Applicant’s statement as an exhibit, on which Applicant admits he turned the car around and struck the victim a second time before driving off. Thus, the information contained within the Pates’ second statements was not new information, and the timing if its disclosure did not prejudice Applicant in any way. Moreover, Applicant candidly admitted he did not know if the statements would have changed his decision to proceed with a trial. Based on this testimony from Applicant, the Court finds Applicant has failed to meet his burden regarding prejudice on this issue—whether he would have pleaded guilty rather than proceeding to trial. See, e.g., Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009) (holding a PCR applicant must prove actual prejudice regarding allegation counsel’s deficient performance caused him to reject a favorable plea bargain), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Because Applicant has failed to prove

either deficiency or prejudice, the Court declines to grant relief on this allegation, and it is denied and dismissed.

Allegation (f): Trial counsel failed to request a mistrial or request to remove a sleeping juror with an alternate juror when a juror was caught sleeping during the trial.

Applicant alleges Counsel was ineffective for failing to move for a mistrial or removal of a juror who was allegedly caught sleeping during trial. This Court disagrees.

During trial, Counsel raised the issue of a potentially sleeping juror. Tr. p. 587. The juror informed the court she did not feel well and asked for a break, which the trial court immediately gave. Tr. pp. 586-87. The trial court then stated, “[A]fter you brought it to my attention, I watched her. I don’t think she was sleeping. . . . She had her eyes closed when he was testifying, and then she would open them up.” Tr. p. 588. After the break, the trial court instructed the juror told a bailiff she was fine, and the trial court instructed her to let the bailiffs know if she started feeling bad again. Tr. pp. 590-91.

Immediately after the State rested, Counsel raised the issue again, alerting the trial court the sick juror may have been sleeping. Tr. pp. 638-39. The trial court responded it had been watching the juror, and although she would close her eyes at times, she would always open them and make eye contact. Tr. p. 639. The trial court stated, “I kept looking because I got the note. . . . Every time I would look... if her eyes were closed, she would open them back up within a matter of seconds and she was making direct eye contact with me.” Tr. p. 640.

Counsel testified he did not recall why he did not ask the judge to remove the juror except that he felt it was clear the judge was not going to do it. Counsel recalled there was some discussion about using an alternate juror, but the court questioned the “sleeping” juror and was satisfied she could continue to serve. As discussed above, the trial transcript confirms Counsel’s recollection of events.

Accordingly, the Court finds Applicant has failed to prove either deficiency or prejudice as to Counsel's handling of the "sleeping juror" situation. Counsel brought the matter to the trial court's attention, the juror informed the court she was not feeling well but could continue to serve, and the trial court monitored the juror closely for the remainder of the trial and did not see her actually sleeping. Thus, Counsel did not have a basis to make either a motion for a mistrial or a motion to have the juror removed. Further, Applicant did not present testimony from the juror in question or any other juror to show how the alleged sleeping had any effect on the outcome of his case. Therefore, this Court also finds Applicant has failed to prove he was prejudiced by Counsel's handling of the situation. See State v. Smith, 338 S.C. 66 (Ct. App. 1999) (finding the trial judge did not abuse his discretion in refusing to dismiss a "sleeping" juror where the judge observed the juror and did not believe him to be sleeping, but merely listening with his eyes closed).

This Court thus declines to grant relief as to this allegation, and it is denied and dismissed.

Allegation (g): Trial counsel failed to properly communicate with the Applicant and prepare him for trial including preparing him to testify in trial

Applicant alleges Counsel was constitutionally ineffective because he did not properly communicate with Applicant during the course of the representation and did not prepare Applicant for trial. Applicant conceded during his testimony, however, he and Counsel discussed the issue and Counsel advised Applicant it would not have been in Applicant's best interest to testify because the jury would hear Applicant's statements regardless. Applicant also conceded Counsel informed him the State would introduce his prior record if he testified. This Court has also reviewed the trial transcript and finds it confirms Counsel and Applicant discussed the issue on multiple occasions prior to trial, and the decision not to testify was ultimately Applicant's.

The Court agrees with the finding of the trial court that Applicant made the decision freely and voluntarily, and the trial court appropriately questioned about him about his decision. Tr. pp. 652-55.

Additionally, Counsel credibly testified he met with Applicant within two days of Applicant's arrest. Counsel stated he met with Applicant six to ten times at the jail and several times at the courthouse and at the Sheriff's Office, including a week prior to trial when he and Applicant went over all of the discovery and evidence together. Moreover, when asked what his testimony would have been, Applicant stated he did not have anything else he wanted to add, and he agreed his testimony was not necessary.

Accordingly, this Court finds no deficiency or prejudice regarding Counsel's preparation for trial, his communication with Applicant about the case and trial, or his handling of Applicant's decision whether to testify. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Court therefore denies relief on this ground, and the allegation is dismissed.

Allegation (h): Trial counsel failed to effectively assist the Applicant in plea negotiations

Applicant contends Counsel was constitutionally ineffective in plea negotiations on Applicant's behalf. As to this issue, this Court finds Counsel's testimony credible and also finds Applicant's testimony not credible.

Applicant testified Counsel never conveyed any plea offer to him, but the solicitor personally conveyed an offer for thirty years served day-for-day and said otherwise Applicant would receive life without parole (LWOP) at trial. Applicant testified he told the solicitor he would accept twenty-five years, but the solicitor refused. According to Applicant, this exchange took place outside Counsel's presence, and Applicant never discussed the offer with Counsel. Applicant further stated Counsel mentioned a fourteen-year sentence during trial, which Applicant said he would accept, but then Counsel indicated the State would not agree. Applicant testified he did not understand he was facing LWOP at trial because he cannot read.

Counsel testified the State only extended a thirty-year offer for murder, and the solicitor refused to lower the charge below murder. Counsel stated he conveyed the offer to Applicant, but Applicant wanted something in the range of twenty-to-twenty-five years. Counsel also testified he did not recall a plea offer for fourteen years. Counsel testified he and Applicant knew the State would seek LWOP early in the case, and Counsel explained to Applicant what that meant. Counsel stated he believed Applicant understood the implications of turning down the State's plea offer. Counsel testified the thirty-year offer expired before he received the Pates' second statements.

“[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” Missouri v. Frye, 566 U.S. 134, 145(2012); see also Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting “rule that counsel’s failure to convey a plea offer constitutes deficient performance”), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant “must demonstrate a reasonable probability that: (1) he ‘would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;’ (2) ‘the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;’ and (3) ‘the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.’” Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed”).

It is undisputed Applicant knew of the thirty-year offer and rejected it. This Court finds Applicant has failed to establish a fourteen-year offer ever existed. Although Counsel testified the thirty-year offer expired before he received the Pates’ second statements, and he did not recall asking the State to re-extend the offer based on the “new” statements, as discussed above, the information contained in the Pates’ statements was not new as it matched the statement

Applicant himself gave law enforcement. Therefore, Applicant knew or should have known the jury would hear about the second strike at the time he made the decision to decline the State's thirty-year offer.

Accordingly, Applicant has offered no proof he would have "accepted the earlier plea offer had he been afforded effective assistance of counsel." In fact, Applicant received effective assistance, and nevertheless rejected the State's offer. This Court therefore finds this allegation should be denied and dismissed.

CONCLUSION

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

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

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 17 day of January, 2020.



DIANE S. GOODSTEIN
Presiding Judge
Fifth Judicial Circuit

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JAN 30 2020

[S.C. SUPREME COURT

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

January 28, 2020

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Willie Starnes, SCDC # 287191 vs. *State of South Carolina*
2017-CP-28-0060

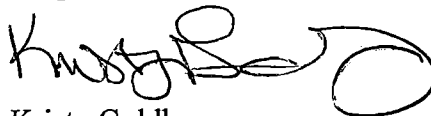
Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal and asking their office to open a file on his behalf, as I was **appointed** to represent Mr. Starnes on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Lindsey McCallister
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Willie Starnes, SCDC # 287191
Pelzer Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina 29669

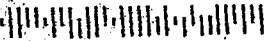
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JAN 30 2020

S.C. SUPREME COURT

Kershaw County Clerk of Court
ATTN: Lynn Lyons
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Office of Appellate Defense
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