LAW OFFICE OF
TRICIA A. BLANCHETTE

February 11, 2020
VIA HAND DELIVERY

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

RE: H. Dewain Herring v. State

Dear Sir:

Attached for filing, please find a Notice of Appeal and Certificate of Service for the above referenced case. I have also attached the underlying Orders. As the Notice states, it is my understanding that the Honorable Jocelyn Newman has issued an Amended Form Four Order yesterday, which will not alter the case disposition. I am filing this Notice prior to receipt of the Amended Form Four Order to ensure it is timely filed form the receipt of the attached Form Four Order. Upon receipt, I will send a copy of the Amended Form Four Order.

At this time, I am in the process of being retained to handle this appeal. If not retained within the next 10 days, I will see that the case is properly transferred to the Office of Appellate Defense.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Richland County Clerk of Court
Samuel Key, Assistant Attorney General
H. Dewain Herring

PO Box 2147 • Leesville, SC 29070
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Jocelyn Newman, Circuit Court Judge

Case No.: 2010-CP-40-03783

H. Dewain Herring, Petitioner,

vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

H. Dewain Herring, Petitioner, appeals the Order Denying Post Conviction Relief issued by the Honorable Jocelyn Newman on May 9, 2019, which was filed on May 10, 2019. Petitioner also appeals the Order denying Applicant's Motion Pursuant to Rule 59 (a) & (e), SCRCP, which was issued via Form Four on January 3, 2020 and filed on January 7, 2020.[1] Petitioner, through counsel, received notice of the entry of the latter Order on January 13, 2020.

Respectfully submitted,

Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

February 11, 2020

[1] It is counsel's understanding that the Honorable Jocelyn Newman is issuing an amended Form Four Order on or about February 10, 2020, which will not change the disposition and will be provided to this Court upon receipt.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
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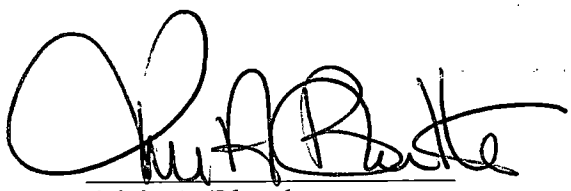
vs.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I served this 11th day of February 2020 a copy of a Notice of Appeal and underlying Orders on Samuel Key, of the Attorney General's Office, via hand delivery to the Office of the Attorney General addressed as follows:

Office of the Attorney General
Att: Samuel Key, Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
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February 11, 2020

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010CP4003783

H. DEWAIN HERRING (SCDC #321951)

PLAINTIFF(S)

STATE OF SOUTH CAROLINA

DEFENDANT(S)

Submitted by: NEWMAN, J.	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

RICHLAND COUNTY FILED
2020 JAN -7 AM 10:40

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Applicant's Motion Pursuant to Rule 59(a) & (e), SCRCP (filed on May 20, 2019) is DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2757
Judge Code

January 3, 2020
Date

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND H. Dewain Herring (SCDC #321951), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2010-CP-40-03783 **ORDER DENYING POST-CONVICTION RELIEF**

This matter comes before the Court upon Application for Post-Conviction Relief ("PCR") filed by Applicant H. Dewain Herring ("Applicant") on June 4, 2010. Respondent State of South Carolina ("the State") filed its Return on July 21, 2010. An evidentiary hearing was convened at the Richland County Judicial Center on January 4, 2017. Applicant appeared along with his counsel, Tricia A. Blanchette, Esquire ("PCR Counsel"); and the State was represented by then-Assistant Attorney General Jessica E. Kinard, Esquire.

For the reasons set forth below, the Application for PCR is DENIED.

PROCEDURAL HISTORY

The underlying case concerns the conviction of Applicant, a former Columbia-area attorney, for the shooting death of an employee of Chastity's Gold Nightclub ("Chastity's") after he was removed from the club in the early morning hours of January 29, 2006. He was subsequently indicted during the February 2006 term of the Richland County Grand Jury for murder (2006-GS-40-00881) and pointing and presenting a firearm (2006-GS-40-00914). On May 7, 2007, Applicant proceeded to jury trial before the Honorable G. Thomas Cooper, Jr., at the

Richland County Judicial Center, raising the defense of involuntary intoxication. He was represented by Richard A. Harpootlian, Esquire ("Trial Counsel").

I. Prosecution's Case-in-Chief

According to witnesses, Applicant – as identified by several eyewitnesses – arrived at Chastity's at around 11:00 p.m. on January 28, 2006. While inside the club, he signaled to "Mia," a dancer, that he wanted a private "lap dance" in the club's "Champagne Room." After Applicant was escorted to the Champagne Room by Carl, a bouncer, Mia left the room to freshen up before performing the dance. When Carl checked on Applicant, he was completely nude, masturbating, and said he was "waiting on a girl." Carl told him to leave, but Applicant did not respond.

Carl went and got another bouncer, "John John," who went in the room to talk to Applicant. Eventually, Applicant and John John emerged, and Carl told Applicant that the police would be called if he didn't leave. A third bouncer, Donald Hawkins, overheard Applicant threaten to kill Carl and John John and intervened to assist John John in escorting Applicant outside the club. Surveillance video from the club showed Applicant exiting at 11:56 p.m.

When Applicant got into his vehicle, he leaned towards the glove compartment before driving out of the parking lot. Just after midnight, the bouncers watched him drive away, and one took down his license plate number. Soon after, they saw Applicant's vehicle driving back towards Chastity's, so they went back inside the building. John John stood just inside the front door watching Applicant through the window.

According to video surveillance, Applicant's vehicle returned to the club's parking lot, stopped directly in front of the building before firing a gunshot, then drove away. John John was struck by the bullet that passed through the club's front door, killing him.

Police officers were called to the club, given Applicant's license plate number, and shown video surveillance footage – all of which helped to identify him. They ultimately went to Applicant's home to speak to him, but he didn't answer the door; so officers obtained a search warrant and forcibly entered the home. As they approached him, Applicant retrieved a gun and pointed it them, refusing to put it down even when ordered by officers to do so. During the standoff, Applicant was shot in the arm by one of the officers before they retreated. After a significant period of time negotiating with him – both by the officers on the scene and the 911 operator contacted by Applicant – Applicant was taken into custody.

The South Carolina Law Enforcement Division ("SLED") assisted in the investigation of that evening's events. Although Applicant initially denied having been to Chastity's that evening, after being advised that there was video footage of him, he admitted being there but having a "hazy" recollection of the night. Applicant also told SLED agents that he had driven his vehicle there, that he went into the Champagne Room for a lap dance, and that he had a gun in his car at the time – although he was unsure which of his five firearms he had taken that night. Finally, Applicant told SLED agents multiple stories about firing his weapon while leaving Chastity's – that didn't recall doing so; that if he did, it's possible that his Ruger .357 pistol "went off" accidentally; and that he remembered shooting the gun but wasn't aiming at anyone. Applicant was arrested and charged with the murder of John John.

Officers located gunshot residue in the passenger's side of his vehicle, though none was found on the driver's side or on his hands. They also found a Ruger .357 in Applicant's home, from which one round of ammunition had been fired. Bullet fragments retrieved during John John's autopsy were conclusively matched to Applicant's gun.

II. Trial Defense

Several witnesses testified in Applicant's defense at trial. In particular, a dancer from Chastity's testified that she had heard stories of people putting things in others' drinks at the club. A second dancer testified that she believed that she had been involuntarily drugged at Chastity's. A third dancer observed the second that evening and agreed that she had been drugged.

Applicant also presented the testimony of Lawton H. Yates, Jr., who was qualified as an expert in the areas of firearms and ballistics. Yates testified that no trajectory analysis was done by law enforcement at Chastity's on the night of the incident. He further opined that headlines in nearby traffic could have caused the reflection at issue in the video and that the video showed no evidence of a gun being fired from Applicant's car. Yates further explained that it was likely that the gun could have accidentally discharged if Applicant was moving towards the glove compartment.

Applicant testified in his defense. He admitted to the jury that went to Chastity's that night and that it is his image captured on video. Applicant believed that he was drugged at the club, testifying that he ordered a drink there but had no coherent memory of anything that happened afterwards. He didn't deny pointing a gun at the officers in his home, but told the jury that he wears glasses, is hard of hearing, and sleeps with a medical device that makes an audible humming noise. Finally, Applicant testified – and was vigorously cross-examined – about having a clear memory of certain events yet claiming not to recall others at all.

Applicant's next witness was Dr. John Holbrook, an expert in pharmacology. Dr. Holbrook opined that Applicant did ingest a "date rape drug" on the evening in question. He testified that date rape drugs can cause amnesia and loosen inhibitions. In his opinion, because Applicant's behavior was allegedly out of character, because he demonstrated behavioral disinhibition when

he undressed, and because he had no memory after a certain time, Applicant must have been drugged. According to Dr. Holbrook, had Applicant been drug tested that evening, results would have indicated the presence of some drug. Finally, in explaining why Applicant may not have appeared intoxicated to observers, Dr. Holbrook testified that the drugs should have worn off by the time Applicant was being questioned by police.

III. Prosecution's Rebuttal at Trial

The State's first reply witness was Dr. Demi Garvin, an expert in forensic toxicology. In preparation for her testimony, she reviewed relevant incident reports, witness statements, medical records, recordings of 911 calls, and the testimony of Applicant and Dr. Holbrook. Dr. Garvin testified that in her opinion, to a reasonable degree of scientific and medical certainty, Applicant was not involuntarily intoxicated at the time of the incident. In fact, given the amount of alcohol voluntarily ingested by Applicant, any surreptitiously-given drug would have rendered him relatively incapacitated or significantly impaired. In her opinion, Applicant's intentional actions and ability to fend for himself were inconsistent with such a level of intoxication. Finally, Dr. Garvin testified that she believed that Applicant knew right from wrong at the time of the incident.

IV. Conviction

On May 21, 2007, Applicant was found guilty as indicted. Judge Cooper sentenced him to concurrent terms of imprisonment of thirty (30) years for murder and five (5) years for pointing and presenting a firearm. Applicant is now confined in the South Carolina Department of Corrections ("SCDC") pursuant to orders of commitment issued by the Richland County Clerk of Court as a result of his conviction.

V. Appeal

Trial Counsel filed and perfected a direct appeal on Applicant's behalf. The appeal was certified to the Supreme Court of South Carolina from the Court of Appeals upon counsel's motion. On December 21, 2009, the Supreme Court affirmed Applicant's conviction and sentence. *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009). A timely Petition for Rehearing was filed but was denied on May 14, 2010. The Remittitur was issued the same day.

VI. Petition for Writ of Habeas Corpus

After filing this Application for PCR (on June 4, 2010), Applicant also filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. *Herring v. Stevenson*, 0:11-160-MBS-PJG. That petition, filed on February 3, 2011 pursuant to 28 U.S.C. §2254, was dismissed upon the District Court's grant of summary judgment in favor of the State. By Opinion and Order filed on March 19, 2012, the Honorable Margaret B. Seymour accepted the Magistrate's Report and Recommendation, dismissed the petition, and denied a certificate of appealability. Nevertheless, Applicant attempted to appeal the District Court's decision in the United States Court of Appeals for the Fourth Circuit. By unpublished per curiam opinion and Judgment, both filed on August 21, 2012, the appellate court dismissed the appeal.

VII. Current Application for PCR

In response to the initial Application for PCR, the State filed its Return on July 23, 2010, and filed a Motion for a More Definite Statement on June 29, 2012. In response, on September 12, 2016, Applicant filed his "Amendment to Application for Post Conviction Relief."

In the Application and Amendment, Applicant alleges that he is being held in custody unlawfully due to ineffective assistance of Trial Counsel.[1] Specifically, Applicant alleges that:

1. Trial counsel rendered ineffective assistance of counsel by failing to engage in meaningful plea negotiations.

2. Trial counsel rendered ineffective assistance of counsel by failing to argue for a change of venue.

3. Trial counsel rendered ineffective assistance of counsel by failing to present a reasonable defense through the calling of available witnesses, utilization and objection to evidence, utilization of expert witnesses, request for instructions on lesser included offenses and meaningful closing argument.

4. Trial counsel rendered ineffective assistance of counsel by failing to properly address Applicant's mental health through the utilization of experts prior to and during trial to assist in plea negotiations, preparation of a defense, pre-trial motions, presenting a defense at trial, preparing and presenting Applicant's trial testimony, making closing arguments and in overall mitigation.

5. Trial counsel rendered ineffective assistance of counsel by failing to properly prepare and fully utilize a crime scene investigation expert prior to and during trial.

6. Trial counsel rendered ineffective assistance of counsel by failing to object to the testimony and exhibit offered regarding a NASA enhancement when no person from NASA was present or called at trial.

7. Trial counsel rendered ineffective assistance of counsel by failing to be cognizant of the order utilized by the State to support the search warrant and object when the Order was incomplete as introduced at trial.

8. Trial counsel rendered ineffective assistance of counsel in the handling of Applicant's testimony and portrayal at trial.

[1] Although Applicant initially alleged that both Trial Counsel and appellate counsel were ineffective, the Amendment explicitly abandoned any claims regarding appellate counsel.

9. Trial counsel rendered ineffective assistance of counsel by failing to properly prepare and utilize Dr. Holbrook at trial, especially when his testimony opened the door to the reply testimony of Demi Garvin. Trial counsel further rendered ineffective assistance of counsel by failing to object to the utilization of Demi Garvin in reply in a capacity that exceeded her expert qualification and/or object to the testimony she offered.

10. Trial counsel rendered ineffective assistance of counsel by failing to offer any evidence to support an accident charge to support the arguments made in opening to the jury and object to the Solicitor's closing argument regarding an accident charge.

11. Trial counsel rendered ineffective assistance of counsel when he failed to object to the Solicitor's closing argument due to bolstering, burden shifting, injecting personal testimony, and errantly stating what the court's instructions would be.

12. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

In addition to the written allegations, Applicant offered testimony of several witnesses in support of his claims. During the evidentiary hearing, Trial Counsel, Tora Brawley, Ph.D., Donna Schwartz Maddox, M.D., R. Robert Tressel, and Peter Skidmore testified on Applicant's behalf.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for PCR alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of

performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). 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. In the absence of sufficient proof, the Application for PCR must be denied.

I. Plea Negotiations

Although Applicant alleges that Trial Counsel was deficient in failing to engage in meaningful plea negotiations, this Court disagrees.

During the evidentiary hearing, Trial Counsel testified that he did, in fact, attempt to negotiate a favorable plea offer for Applicant. According to Trial Counsel, the State's only offer was for Applicant to plead "straight up" to murder. When asked about the potential of using Applicant's insurance policies as leverage for a better plea offer, Trial Counsel competently and credibly described the intricacies of the policies and how that would become a reality in terms of settlement. Trial Counsel testified that when he broached the subject, the Solicitor indicated that

neither his office nor John John's family was interested in such a quid pro quo. No other evidence was presented on this issue.

Based on the foregoing, the Court finds that Applicant has failed to meet any of the *Strickland* requirements as to this allegation. Not only is there a lack of evidence as to Trial Counsel's alleged deficiency, but the evidence suggests the opposite – that Trial Counsel did more than necessary by investigating and suggesting a plea bargain that involved complex civil remedies for the victim's family. Therefore, this allegation is denied and dismissed.

II. Change of Venue

Next, Applicant contends that Trial Counsel should have petitioned the court for a change of venue and that his failure to do so rendered his performance deficient. Specifically, Applicant argues that the media coverage of this case warranted conducting the trial in another county. The Court disagrees.

Trial Counsel conceded that there was "a lot of media attention" to this case but stated that he nevertheless chose not to request an alternate venue. In his opinion, Lexington County would have been less favorable to Applicant than Richland County, and he believed it unlikely that a judge "would move it as far away as Charleston." Trial Counsel believed that he could select a "good jury" in Richland County as long as appropriate questions were asked of potential jurors during *voir dire*. No other evidence was offered on this issue.

Attorneys must be given leeway to make reasonable strategic decisions. *Strickland*, 466 U.S. 668. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Here, Trial Counsel articulated a reasonable trial strategy. In particular, he evaluated the potential outcomes of a motion for change of venue and provided credible testimony regarding his choice not to file such a motion. The Court can find neither deficiency nor prejudice to Applicant with respect to this allegation; therefore, this allegation is denied and dismissed.

III. Witnesses, Objections, Jury Instructions and Closing Arguments

Next, Applicant argues that Trial Counsel rendered ineffective assistance by failing to present a reasonable defense through the calling of available witnesses, utilization and objection to evidence, utilization of expert witnesses, request for instructions on lesser included offenses and meaningful closing argument. At the outset of the evidentiary hearing, PCR Counsel indicated that this allegation is merely "a catchall issue" to be discussed in more detail by the other allegations; and this Court agrees with that assessment.

The only portion of this claim which is not encompassed by other allegations is Trial Counsel's alleged failure to call available witnesses at trial. At the evidentiary hearing, however, Applicant failed to present testimony from any witness who could have or should have been available to testify during the trial. Because prejudice from Trial Counsel's failure to call witnesses cannot be shown where the witnesses do not testify at the PCR hearing, this allegation must be denied and dismissed. *See, e.g., Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992).

IV. Applicant's Mental Health

The apparent focus of the Application for PCR is the assertion that Trial Counsel failed to properly address Applicant's mental health throughout the case. Applicant argues that Trial Counsel should have consulted experts and used their findings to assist in plea negotiations, pre-trial hearings, presenting a defense at trial, in closing arguments, and in overall mitigation.

In an effort to prove this allegation, Applicant presented testimony from Doctors Tora Brawley and Donna Schwartz Maddox, both of whom evaluated Applicant at separate times. Dr. Brawley, an expert in neuropsychology, evaluated Applicant on March 15, 2016 by interviewing him and administering a battery of tests to assess his level of cognition. Those findings, according to Dr. Brawley, are consistent with the presence of mild dementia.

Dr. Brawley subsequently conducted a "dementia interview" with Applicant's wife and son. She testified that after the interviews and having reviewed Applicant's test results and prior medical records, she believed that Applicant was suffering from mental impairments at the time of the incident, which comports with another doctor's report form that time.[2]

Dr. Donna Schwartz Maddox, a psychiatrist, was admitted as an expert in forensic psychology. She also examined Applicant and was able to develop several diagnoses, as well as explanations for those conditions. Like Dr. Brawley, Dr. Maddox found signs of dementia in Applicant. She also diagnosed Applicant with alcohol abuse disorder, obstructive sleep apnea, hypertension, and a number of other medical problems. Ultimately, Dr. Maddox opined, to a reasonable degree of medical certainty, that Applicant was suffering from a neurocognitive disorder at the time of this offense. Additionally, Dr. Maddox testified that, while people with dementia have varying levels of functioning, Applicant "appears a lot more intact than what he is because he has very good vocal skills and he can answer questions."

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[2] Applicant also offered the report of a neuropsychological evaluation performed by Dr. William E. Haxton, dated June 17, 2006. The report concludes that Applicant "experiences marked deficiencies in several areas" and that, "[b]ecause of his history of good verbal and mathematical skills, Mr. Herring can give the impression that he is continuing to function at his previously optimal level. However, these skills mask his loss of ability to quickly process new information and to integrate disparate pieces of abstract information to formulate a comprehensive conceptualization of central theme."

Trial Counsel also testified on this issue, stating that he was aware that Applicant was suffering from mental illness because he had been under the care of a psychiatrist, Dr. Phil Steude, prior to the incident. In fact, Trial Counsel contacted Dr. Steude to determine whether Applicant's diagnosed bipolar disorder and prescribed medications would support a defense to the criminal charges. Trial Counsel testified that if Dr. Steude would have provided helpful information, he would have presented his testimony at trial.

Trial Counsel stated that he relied heavily on the opinions of Dr. Steude, who made no mention of dementia or the June 2006 report of Dr. Haxton – only bipolar disorder. More specifically, he testified that he relied on the treating psychiatrist, Dr. Steude, to interpret any reports for him. He also admitted that his understanding of dementia was not entirely correct at the time, believing that Applicant's demeanor in their meetings was inconsistent with dementia; however, no one – including Dr. Steude – corrected his misapprehension. Trial Counsel also testified that he had concerns about whether mental health expert testimony would be admissible at trial, although he believes that it may have been useful during plea negotiations or regarding voluntariness of a statement during a *Jackson v. Denno*[3] hearing. However, Trial Counsel clarified that he neither knew nor had reason to know of the full extent of Applicant's mental health issues during his representation.

Ultimately, the Court finds that this allegation must be denied. Trial counsel reasonably relied on the advice and interpretation of Applicant's treating psychiatrist, Dr. Steude, who he believed to be the ultimate expert – someone with existing experience and knowledge of the

[3] 378 U.S. 368 (1964).

Applicant both before and after the incident.[4] *See Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008) (counsel not ineffective for relying on expert opinion in structuring a defense of client). Trial Counsel's testified that he had no reason to doubt the accuracy of Dr. Steude's opinion and evaluation of Applicant, which is both logical and credible. While Applicant likely suffered from dementia at the time of the incident, the Court cannot find that Trial Counsel's representation was deficient.

Applicant is also unable to satisfy the second prong of the *Strickland* test, as the State presented overwhelming evidence of Applicant's guilt. It is well-settled case law in South Carolina that the prejudice prong of *Strickland* cannot be satisfied if there is overwhelming evidence of guilt. *See Payne v. State*, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (*citing Strickland*, 466 U.S. at 687). Therefore, this allegation is denied and dismissed.

V. Crime Scene Investigation

In support of his contention that Trial Counsel failed to properly prepare and fully utilize a crime scene investigation expert prior to and during trial, Applicant offered the testimony of Ralph Robert Tressel. Tressel is the Chief Criminal Investigator for Cobb County District Attorney's Office in Marietta, Georgia, and is an expert in crime scene investigation and homicide investigation. In preparation for his testimony, he reviewed the transcript of the trial as well as the physical evidence collected by law enforcement.

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[4] While Applicant presented expert testimony from Drs. Brawley and Maddox, their testimony is not probative as to whether counsel was deficient in relying on Dr. Steude's opinion. *See, e.g., McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) (finding that a later expert opinion does not show incompetence of counsel for relying on the first expert counsel consulted with). Requiring counsel to further investigate their experts' opinions would defeat the entire purpose of consulting with experts. *See Stokley v. Ryan*, 659 F.3d 802, 814 (9th Cir. 2011).

I. Trajectory

Tressel criticized the manner in which the criminal investigation was conducted and managed in Applicant's case. Specifically, he first testified that the photos and written documentation collected by police officers at Chastity's were insufficient to analyze the trajectory of the projectile that killed John John. Tressel stated that no relevant measurements were taken and, therefore, no analysis could be done, in contrast with the treatment of the shooting at Applicant's home. He also criticized law enforcement for not keeping the door through which the projectile traveled. Finally, Tressel testified that, based upon his review of the video surveillance and still photographs from Chastity's, he was unable to see the "distinctive marking of a flash of a gun going off," but recognized that there could be reasonable explanations for that.

This testimony seems to have been introduced to counter the extensive testimony about the gun's flash that was presented at trial; however, the Court does not find it persuasive regarding the allegation to which it is aimed, which is one of ineffective assistance of counsel for failure to properly prepare and fully utilize an expert of this nature. Tressel testified about a number of other things, such as whether sending the surveillance video to NASA for analysis was or could have been beneficial; if a proper chain of custody had been followed regarding NASA analysis; whether the bullet could have ricocheted; and whether the shot could have been firing by accident. However, none of his opinions bear on the undisputed fact that a gun was fired from Applicant's vehicle towards Chastity's; and none of his testimony impacted on the trial testimony given by Yates. Therefore, the Court cannot find that further expert witness testimony at trial would have been necessary or that the failure of Trial Counsel to retain additional experts rendered him deficient.

Because Trial Counsel performed within expected norms, he cannot be deemed deficient under the *Strickland* standard. Even if he was deficient, Applicant has not proven that he suffered prejudice as a result of the alleged deficiency. In particular, there is no evidence that the testimony of an additional expert witness would have had an impact on the result of the trial. Rather, at trial, the State presented overwhelming evidence of Applicant's guilt. The law is well-settled that the prejudice prong of *Strickland* cannot be satisfied if there is overwhelming evidence of guilt. *See, e.g., Payne v. State*, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (*citing Strickland*, 466 U.S. at 687). Therefore, this allegation is denied and dismissed.

VI. NASA Enhancement Testimony

Applicant believes that Trial Counsel was ineffective because he failed to object to the testimony and accompanying exhibit introduced by the State regarding NASA's enhancement of the video surveillance. Applicant contends that because no witness from NASA testified at trial, Trial Counsel should have objected to the introduction of the testimony and exhibit.

In response to this allegation, Trial Counsel testified that he believed that the exhibit and testimony in question were actually helpful to Applicant's case. Trial Counsel initially lodged an objection but withdrew it after hearing the witness' testimony (by way of proffer outside of the jury's presence) and determining that the testimony supported Applicant's defense – that the gun fired accidentally rather than Applicant having intentionally aimed and shot at the door to Chastity's. In fact, he believed that the video bolstered the testimony of Ron Yates, the expert in firearms and ballistics retained by Applicant. Trial Counsel also didn't believe it necessary to locate the NASA analyst that created the video because "there wasn't anything pejorative" about the video.

In response, Tressel offered the legal opinion that the person who analyzes the evidence should be the witness to testify about it at trial. The Court also heard the testimony of Peter Skidmore, a private investigator retained by Applicant, who attempted to locate the NASA analyst. Ultimately, although Skidmore located him, the analyst was unable to find his file for Applicant's case.

After considering the evidence presented on this issue, the Court cannot find that Trial Counsel rendered ineffective assistance to Applicant. Instead, Trial Counsel objected to the testimony, previewed the testimony in the jury's absence, determined it to be favorable, and withdrew his objection – a credible, reasonable trial strategy. In order to obtain relief, Applicant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689; *see also, e.g., Solomon v. State*, 347 S.C. 635, 557 S.E.2d 666 (2001) (finding failure to request "not guilty" option on verdict form was not unreasonable for strategic reasons where counsel's strategy was to argue that defendant was guilty of only the lesser offense). Applicant has not met his burden; therefore, this allegation must be denied and dismissed.

VII. Search Warrant

Next, Applicant argues that he is entitled to a new trial because Trial Counsel was not familiar with Richland County's updated policies regarding the issuance of search warrants. Applicant also complains that Trial Counsel should have objected when the State introduced as an exhibit an incomplete copy of the policy (which is, in fact, an Order issued by then-Chief Justice of the Supreme Court of South Carolina). The Court disagrees.

During the evidentiary hearing, Trial Counsel testified about what occurred during the pre-trial hearing wherein Applicant moved for suppression of a search warrant. Trial Counsel admitted

that at the time of trial, he was unaware that an Order had been issued permitting Richland County officers to obtain search warrants via facsimile. He learned of it either during or immediately prior to trial. However, Trial Counsel testified that he had time to research the issue prior to trial, leading him to believe that the appropriate procedure had not been followed.

At trial, the State introduced an incomplete copy of the Order as an exhibit, and Trial Counsel made no objection. During the evidentiary hearing, he indicated that, at the time, he was unaware that it was an incomplete document. Trial Counsel looked but was unable to locate a copy of the Order in any of the places one would expect to find an administrative order. Although he raised this issue on appeal (and it was raised by other counsel in Applicant's Petition for Writ of Habeas Corpus), he did not pursue the issue any further at trial because the best argument to make was that regardless of the presentation of the exhibit, law enforcement had not complied with its mandates. The court disagreed and denied the suppression motion.

Ultimately, the Court finds that Trial Counsel was not deficient in his initial ignorance of the administrative order or in his failure to object to the introduction of an incomplete copy of the administrative order. He had time to research and review the Order and made a thorough legal argument about the Order as applied to the search warrant at issue. Trial Counsel also successfully preserved the issue for appeal (though that appellate argument was later denied). There is no evidence which would support Applicant's contention that Trial Counsel's performance fell below prevailing professional norms or that he suffered prejudice as a result. *See. e.g.. Cherry*, 300 S.C. at 117, 386 S.E. 2d at 625 (*citing Strickland*, 466 U.S. at 688). Therefore, this allegation is denied and dismissed.

IX. Testimony of Drs. Holbrook and Garvin

Applicant also believes that Trial Counsel failed to properly prepare and utilize Dr. Holbrook's testimony at trial; that this failure "opened the door" to the State's introduction of Dr. Garvin as a rebuttal witness; and that Trial Counsel should have objected to Dr. Garvin testifying about matters which exceeded the scope of her expertise.

At trial, Dr. Holbrook testified in support of Applicant's defense of involuntary intoxication and discussed the potential consequences of ingesting illicit drugs at the same time as Applicant's prescribed bipolar medications. The State objected to this testimony, arguing that it raised the issue of Applicant's mental health. Trial Counsel testified that he certainly never intended to "open the door" to discussions regarding Applicant's mental health, particularly because he believed that doing so could suggest that Applicant was voluntarily – rather than involuntarily – intoxicated at the time of the incident.

In response to Dr. Holbrook, Dr. Garvin testified, giving expert opinions regarding involuntary intoxication. Trial Counsel believed the fact that she would testify would be helpful to their case, but ultimately it was "[a]pparently not positive enough." He disputed PCR Counsel's suggestion that involuntary intoxication was "a last minute defense," stating that he recalled interviewing employees of Chastity's about patrons' drinks being "spiked."

The explanations offered by Trial Counsel amount to clearly-articulated strategic decisions and, therefore, cannot reasonably be challenged. *See, e.g., Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). As to the preparation of Dr. Holbrook for his trial testimony, the Court similarly finds Trial Counsel's performance to be sufficient. Further, Applicant has

VIII. Applicant's Trial Testimony

Applicant also criticizes the handling of his trial testimony and the light in which he was portrayed by Trial Counsel.

Trial Counsel testified that he prepared Applicant for his testimony over several weeks. Applicant went to Trial Counsel's office five or six times, during which Applicant's testimony was rehearsed and a mock prosecutor "battered him about" with questions. According to Trial Counsel, Applicant "did extraordinarily well" and "really, really knocked it out of the park." He believed that it was important to portray Applicant as contrite and upset that he had killed another human being. Trial Counsel felt that Applicant was well-prepared for his testimony. Despite the preparation, however, Trial Counsel felt that Applicant performed horribly at trial, showed no contrition, and became stoic. He testified that it was the worst testimony he had ever seen and that everyone was shocked by the performance. In hindsight he admitted that Applicant's poor presentation may have been attributed to dementia; however, at the time of trial he was unaware of any issues which could impact Applicant's demeanor. When asked about his characterization of during closing arguments, Trial Counsel explained, "You know, the jury had seen him. They had heard him. I mean, I don't know how you undo that."

The Court finds the uncontroverted testimony of Trial Counsel to be credible. It appears that his meetings with Applicant were numerous, lengthy and thorough – well beyond professional norms. Any detriment to the case caused by Applicant's testimony was owing only to issues which were unknown to – and could not have been foreseen by – Trial Counsel. Therefore, the Court cannot determine that Trial Counsel's performance was deficient or that his representation caused any prejudice to Applicant; and this allegation must be denied and dismissed.

shown no prejudice resulting from the fact that Dr. Holbrook was questioned about statements that had not reviewed prior to trial because, among other reasons, he testified after reviewing them that they did not change his opinions. For the foregoing reasons, this allegation is denied and dismissed.

X. Jury Charge Regarding "Accident"

Applicant argues that Trial Counsel failed to offer any evidence to support a jury charge on the defense of accident, as he outlined in his opening statement; and that he failed to object to comments made about such a charge by the Solicitor in his closing argument. Trial Counsel confirmed that accident was one of the main theories of Applicant's defense but also testified that the trial court "took that off the table" when he refused to instruct the jury about that defense.

In addition, PCR counsel questioned him about *State v. Santiago*, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006), a case in which Trial Counsel introduced the expert testimony of Dr. Maddox on mental health issues. Trial Counsel admitted that he had discovered a way to "back-door[] the testimony" of expert witnesses and offer testimony from psychiatrists. When asked to juxtapose this strategy with the testimony of Dr. Holbrook in this case, Trial Counsel explained that the strategy only works in federal courts.

Trial Counsel also testified about the concepts of accident and voluntariness, which he maintains that he fully explored as defenses. He stated, "We attempted to show that either he was fumbling with the gun or the gun was below the window of the car when it went off, as if he had taken it out of the glove compartment and it went off either accidentally or he was not competent to handle it." While this supported Trial Counsel's intended accident argument, the trial court's refusal to instruct the jury on that defense caused him to refocus his efforts on proving involuntary manslaughter. He also explained that, because the trial judge had ruled that accident was not a

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2010CP4003783

H Dewain #321951 Herring
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

FILED
2019 MAY 10 AM 8:43
RICHLAND COUNTY
CLERK OF COURT

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 May 2019 to attorneys of record or to parties (when appearing pro se) as follows:

Tricia A. Blanchette

Lindsey Ann McCallister

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

defense, he did not view the statements made during closing argument as objectionable in the context.

The Court finds the theories and defenses described by Trial Counsel to be rational, well-articulated, and well within the realm of professional norms. In fact, despite the trial court's refusal to charge the law of accident to the jury, Trial Counsel was able to introduce evidence related to an accident in an attempt to show a lack of malicious intent and to counter the State's evidence. Applicant has not met his burden of proving ineffective assistance of counsel, and this allegation must be denied and dismissed.

XI. Solicitor's Closing Argument

Applicant's final argument is that Trial Counsel should have objected to the Solicitor's closing argument. He contends that the argument contained improper bolstering, burden shifting, injecting personal testimony, and errantly stating what the court's instructions would be.

Although Applicant takes issue with the Solicitor praising the work of law enforcement and asking the jury for fairness, Trial Counsel explained that he saw no reason to object to those statements. Instead, he explained his distaste for repeated objections and leaving a bad impression on jurors; and he stated that when he makes an objection, he wants it "to really count." Trial Counsel also testified that he didn't believe that improper bolstering occurred and that the statements made by the Solicitor didn't cause "any major harm."

Applicant has failed to prove that Trial Counsel's credible, clear trial strategy fell below reasonable professional norms or that, but for his conduct, the outcome of the trial would have been different. Because the evidence fails to meet the requirements of *Strickland*, this allegation is denied and dismissed.

IT IS, THERFORE, ORDERED that the Application for Post-Conviction Relief is DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant shall remain in the custody of the South Carolina Department of Corrections to complete the service of his sentence.

AND IT IS SO ORDERED.

Jocelyn Newman
Circuit Court Judge

May 9, 2019
Columbia, South Carolina.