VOLUME III OF III

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable Paul M. Burch, Circuit Court Judge

DEVATEE TYMAR CLINTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001272

APPENDIX

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1 gun. It look to be a tauris 9 or 380. That is how he
2 described it.
3 THE COURT: And Mr. Green was allegedly there?
4 MR. BARFIELD: Yes, sir. He has not been
5 convicted of anything but he is charged with burglary
6 first and armed robbery, I believe.
7 THE COURT: And was he to have been armed?
8 MR. BARFIELD: He was alleged to have been armed
9 and again as you know Mr. Green's nickname is Capone,
10 and Mr. Roseborough's statement indicates Capone had a
11 Mac 9 for sure. It had a long extended clip for it.
12 It looked like a machine gun pistol.
13 THE COURT: So that takes care of all the records
14 of Mr. Clinton and all the records of Mr. Green?
15 MR. BARFIELD: Yes, sir.
16 THE COURT: All right. Anything further,
17 solicitor?
18 MR. BARFIELD: Well, other than the victim
19 information or victim comments when you are ready for
20 that.
21 THE COURT: I will be glad to hear from anyone you
22 want me to hear from.
23 MR. BARFIELD: Whoever wants to talk step up to
24 that microphone. State your name and your relationship
25 to Jenika and say what you like to.

1 MS. STEVENSON: Your Honor, my name is Rachelle
2 Stevenson. I am the mother of Jenika Jones. It has
3 been a long two years and I know that what happened
4 today would not bring her back and there are no
5 winners in this, but I stand here asking for the
6 maximum sentence that you can give.
7 THE COURT: Thank you. Thank you very much.
8 THE COURT: Anybody else solicitor?
9 MR. BARFIELD: Anybody else want to speak. No,
10 sir.
11 THE COURT: That is all from the State.
12 THE COURT: Tell me solicitor the status of Miss
13 Jones's children?
14 MR. BARFIELD: Miss Jones's children, I believe are
15 being reared by Rachelle Stevenson and they are of
16 course two years older. They are probably three, four
17 and six now. Are you concerned -- you just want to
18 know where they are and whose taking care or them or
19 do you want to know how they are doing?
20 THE COURT: Well ---
21 MR. BARFIELD: Would you like to stand up and
22 address the judge about what effect this had had on
23 the children, I guess.
24 MS. STEVENSON: Your Honor the children are
25 somewhat doing good. They have had counseling

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1 sessions. My granddaughter she is still having a hard
2 time. She is always crying for her mother. Wants to
3 know why this happened to her mother. Had even asked
4 to see pictures of the men who killed her mother, so
5 she understands that her mother is not here.
6 The oldest grandchild he at one time was having
7 real bad problems. He was having problems in school
8 with his -- he was emotional. Angry. Had one time
9 started acting out, but he seems to have come down of
10 that a little. My youngest grandson, he knows of his
11 mom, but, you know, he'll point to a picture. That's
12 Jenika. That's my momma, but hasn't shown no emotions
13 cause he was so small. Other than that they are doing
14 reasonably okay.
15 THE COURT: Thank you. Thank you, very much.
16 Anything further solicitor?
17 MR. BARFIELD: No, sir.
18 THE COURT: All right. Thank you. Mr. Frick.
19 MR. FRICK: That you, Your Honor.
20 Your Honor, Mr. Clinton is 26 years of age. As you
21 are aware he is currently serving a ten-year sentence
22 in South Carolina Department of Corrections for the
23 last charge the solicitor spoke of which came out of
24 two events. The one event, the assault charge and
25 then the burglary charge which is Mr. Roseborough's

1 situation. In that situation Mr. Clinton has accepted
2 his responsibility. He has fully admitted his guilt
3 and his role in that situation. It is my estimation
4 that is what immediately made him a suspect in this
5 situation, in the case presently.
6 Your Honor is aware, and I just want to put it on
7 the record for the point of mitigation, that there
8 were other suspects in this case. Mr. Rashad Johnson
9 was immediately suspect because that was a name by
10 nickname that came out of the mouth of the youngest --
11 oldest child who got the attention of someone who
12 called law enforcement. Law enforcement did follow up
13 on that. There was an alibi, however, as it goes on
14 further the alibi didn't necessarily check out. But
15 there was no further investigation on that. I am not
16 saying that to bash law enforcement's investigation.
17 I am simply saying that there was another suspect as
18 is clear from the DNA that someone else was at the
19 scene and we have no idea who it was.
20 Regarding Mr. Delrico McDow, I don't think you
21 heard testimony on this, but Mr. Blakeney's testimony
22 is Mr. McDow was in the vehicle with them when it
23 occurred. Mr. McDow is on a GPS tracking device
24 probation, pardon and parol. The information that
25 probation and parol has about that tracking device was

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1 it never at any point got close to Roseanna Lane at
2 any time during that evening. So, that does not
3 support the evidence that Mr. Blakeney presented here
4 today or during this trial.
5 Your Honor, I say all that in somewhat mitigation.
6 Obviously, we are not standing here and this is not a
7 situation where we are able to tell you that we are
8 sorry for what we did because we stand here before you
9 and maintain our innocence in this case. I have
10 talked to Mr. Clinton about this situation. I don't
11 think he is going to address Your Honor because I've
12 advised him that from this point of course give Notice
13 of Appeal and it goes on and I don't want him to say
14 anything that can be used against him. So I ask you
15 not to hold anything in that regard against him for
16 lack of remorse or what not because I advised him from
17 a legal standpoint that that is probably in his best
18 interest.
19 Your Honor, he has been incarcerated since really
20 before the warrant came on this charge. We plead. He
21 had this charge on him when we entered the plea on the
22 other matters for which he is in the Department of
23 Corrections. I would ask you to credit him back to
24 the time at which he was served the warrant in this
25 case. I think he is due that because if he had gotten

1 out on those other charges he would not have gone
2 home. He would have been in the detention center here
3 in Lancaster without bond. So I think the prevailing
4 case law would be he is entitled to that time. I
5 would ask you for that. I.
6 He does have family. I know his mother is present.
7 I don't know if she wants to address the court or not,
8 but I do want the Court to know he does have family
9 that loves him, has been no one contact with us about
10 him. His mother, grandmother, cousins, sister have
11 all been speaking with him. So he does have folks out
12 there for him. Understanding he does have some stuff
13 on his record. Your Honor and I both know it is not
14 the most egregious record that I have seen and it's
15 likely not the most egregious record that you have
16 seen, although it does have ABHAN and this burglary
17 situation.
18 Judge, I do want to say, and not just simply to
19 bash Mr. Roseborough, but to talk about that
20 situation. He of course as a said Mr. Clinton has
21 admitted to his role in that. Mr. Roseborough did not
22 contact law enforcement. As you heard his testimony
23 in the pretrial motion, he was involved in drug
24 activity and that's why he didn't report it. That's
25 what he told law enforcement in his statement. I

1 understand that does not excuse anything at all, but I
2 think the Court needs to be aware of that and what the
3 entire situation was when it takes into consideration
4 for sentencing. So, I ask you for what leniency you
5 can show for my client who has somewhat of a limited
6 record although having had some exposure in general
7 sessions court.

8 THE COURT: Thank you. Thank you, Mr. Frick. And
9 I will ask is there anything you want to say Mr.
10 Clinton.

11 DEFENDANT CLINTON: No, sir.

12 THE COURT: Thank you. Miss Raney.

13 MS. RANEY: Thank you, Your Honor. As Your Honor
14 has heard throughout the course of this trial, my
15 client is 20 years old. He has a young daughter with
16 Miss Tinsley who you saw testify before you and a 9th
17 grade education. I have also similar to Mr. Frick
18 advised my client since he does wish to appeal to not
19 say anything during the course of sentencing as well.

20 I will say Your Honor, I actually just got to
21 know Mr. Green back in November of last year. He was
22 previously represented by a different attorney in our
23 office, so given that we had a trial date set when I
24 took over the case, frankly the bulk of my time with
25 Mr. Green has been spent focusing on this murder trial

1 rather than the other pending charge that the
2 solicitor referenced.
3 I can tell you that in spending a lot of time with
4 Mr. Green preparing for trial he has always been
5 nothing but, you know, a model client for me to deal
6 with. I think this has been extremely difficult
7 situation not only for him but for his family. As
8 Your Honor learned during the course of the trial his
9 sister who he grew up with and all of Al's family
10 member including my conversations with Mr. Green
11 himself they viewed Miss Jones as family member. Even
12 though she was not biological so, he thought of her as
13 a sister. So this has been difficult on many levels
14 because of the personnel connection there.
15 Mr. Green's family has been here in support of him
16 all week. I looked back to his mother earlier before
17 we came up here. I think she is a little to upset to
18 address the Court but I did want to bring it to the
19 attention of the Court that he does have family
20 support. They have been in contact with me throughout
21 my representation of Mr. Green being supportive of
22 him. I would ask Your Honor to take all of that as
23 well as his young age and his minimal criminal record
24 and the bulk of the evidence pointing in this case to
25 him not being the shooter. I echo Mr. Frick's

1 previous statement that there were certainly several
2 triable issues in this case and you take that into
3 consideration as well and ask that you consider
4 showing him some leniency sentencing him in the range
5 of thirty years, Your Honor, and giving him credit for
6 the time he has been in jail which has been since he
7 has been arrested on this charge for about two years
8 now.
9 THE COURT: Thank you, Miss Raney. Anything you
10 like to say Mr. Green?
11 DEFENDANT GREEN: No, sir.
12 THE COURT: And Mr. Frick you are appointed?
13 MR. FRICK: Yes, sir.
14 THE COURT: And Miss Raney you are appointed?
15 MS. RANEY: Yes, Your Honor.
16 THE COURT: Thank you. Thank you both very much
17 for taking on this very important assignment.
18 I don't have my list, the number of murder cases I
19 have tried as judge, but I probably charged six in the
20 last eight or nine months. I probably handled
21 hundreds over the course of my career; pre-judge and
22 judge. Some things -- no murder case is less tragic
23 or more tragic, but many times there are certain facts
24 that come out during the course of a trial that you
25 can't turn a blind eye to.

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1 I do take into account the young age of both of
2 these men, 26 and 20. Twenty?
3 MS. RANEY: Yes, Your Honor.
4 THE COURT: They both have a 9th grade education.
5 You are correct Mr. Frick and of course Miss Raney,
6 they do not have a lengthy criminal history. The bulk
7 of the direct and circumstantial evidence of course
8 would point to Mr. Clinton as the -- lack of a better
9 work the trigger man, and point to Mr. Green under the
10 theory of the hand of one, hand of all as present
11 aiding and abetting. Technically this case would have
12 perhaps qualified as a death penalty case because it
13 appeared it would be a burglary first having gone in
14 the residence with the intent to commit a crime
15 whether they had consent or not. If they held the
16 victim captive for any period of time even on just a
17 sofa, under the State versus Hall that would be
18 kidnapping.
19 There are certain places in the world that we
20 should feel safe, the first place is our home.
21 Whether it be a trailer, condominium, a two-bedroom
22 home, or a mansion. Here you have a young lady taking
23 care of three children, ages four and under, and the
24 testimony is such that three individuals get out of a
25 borrowed or perhaps rented white Cadillac to go to an

1 unarmed innocent mother of three with her babies there
2 and place a nine millimeter so close to the left side
3 of her cheek and jaw that there is a muzzle
4 impression. You look at woman some times and you see
5 a beauty mark, but they put a death mark on her; that
6 muzzle impression. And you see funerals passing, you
7 see family members riding in Cadillacs behind the
8 hearse. In this case the Cadillac that show up was
9 like a funeral car. Her fate was sealed on the 18th.
10 And then her children endured walking around in their
11 mother's blood; from there clothes, on there feet, on
12 there body. Some wounds never heal. Some stains can
13 never be removed. And then that young woman is
14 described as quote that bitch end quote.
15 2012-GS-29-616, Devatee Tymar Clinton, the jury
16 having convicted the defendant of the crime of murder,
17 the defendant is committed to the State Department of
18 Corrections for the term of life without parole.
19 2012-GS-29-636, Al Martinez Green, the jury having
20 convicted the defendant for the crime of murder, the
21 defendant is committed to a State Department of
22 Corrections for a term of life without parole. One
23 wouldn't have happened without the other.
24 Good luck to you Mr. Green. Good luck to you Mr.
25 Clinton. Sheriff. Thank you again, Mr. Frick and Ms.

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1 Raney for your service.

2 MS. RANEY: Thank you, Your Honor.

3 THE COURT: Anything further from the State?

4 MR. BARFIELD: No, sir.

5 THE COURT: From the defense?

6 MR. FRICK: Nothing.

7 MS. RANEY: No, sir.

8 THE COURT: Thank you. Thank you very much.

9 Court will be in recessed for the remainder of the

10 week.

11 (END OF TRANSCRIPT)

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1 CERTIFICATE

2

3 I, the undersigned Aileen Butler, Official Court Reporter

4 for the Seventh Judicial Circuit of the State of South Carolina,

5 do hereby certify that the foregoing is a true, accurate, and

6 complete transcript of record of all the proceedings in the

7 captioned case, in the Circuit Court for Lancaster County, South

8 Carolina, on the 14th day of March, 2014.

9 I do further certify that I am neither of kin, counsel, nor

10 interest to any party hereto,

11 May 24, 2014

12

13 Aileen Butler

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FORM 5

STATE OF SOUTH CAROLINA

County of Lancaster

Devatee Tymar Clinton # 317521
Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS
2018 CP 29 00110

APPLICATION FOR POST-CONVICTION RELIEF

FILED OFFICE OF CLERK OF COURT
2018 FEB -6 AM 11:37
CLERK OF COURT LANCASTER, SC

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution 990 Wisacky Highway, Bishopville, South Carolina 29010

2. Name and location of Court which imposed sentence Court of General Sessions; Lancaster, S.C

3. Name(s) of co-defendant(s) (if any) Al Martinez Green, & Wayne Blakeney Jr

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2012-GS-29-616 (Murder)

   (b)

(c) ______ ______ ______

5. The date upon which sentence was imposed and the terms of the sentence:

(a) March 14, 2014; Life

(b) ______

(c) ______

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ______

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere ______

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. ______

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. Denied

iii. ______

(c) the date of each such result:

i. August 22, 2016

ii. August 4, 2017

iii. ______

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. UnKnown

ii. UnKnown

iii. ______

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) ______

(c) ______

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel by failing to properly preserve the evidence, allowed

(b) by judge in ruling in limine and exculpatory to petition that another person actually committed

(c) the crime. Counsel made no objection or argument at all.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Issue was raised and won in pretrial motion in limine; during trial, counsel went to

(b) bring out the exculpatory testimony only to have the judge sustain the state objection

(c) and did not argue to apparent contradiction or properly preserve the issue whatever. They deficiency was highly prejudicial as testimony was exculpatory.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Petition for Rehearing

ii. ______

iii. ______

iv. ______

(b) the name and location of the Court in which each was filed:

i. South Carolina Court of Appeals

ii. ______

iii. ______

iv. ______

(c) the disposition thereof:

i. Denied

ii.

iii.

iv.

(d) the date of each such disposition:

i. August 22, 2016

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. unknown

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No, they have not

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii.

iii.

(b) the proceedings in which each ground was raised:

i. N/A

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) ______

(b) ______

(c) ______

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A

(b) your trial, if any? Yes, I was

(c) your sentencing? Yes, I was

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes, I was.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes, I was

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

(a) the name and address of each attorney who represented you:

i. William P. Frick, Post Office Box 637, Winnsboro, South Carolina 29180

ii. Chad N. Johnston, Post Office Box 9416, Columbia, South Carolina 29202

iii. ______

(b) the proceedings at which each such attorney represented you:

i. Trial and Sentencing

ii. South Carolina Court of Appeals & South Carolina Supreme Court

iii. ______

Revised 3/2003

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

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No, I am not.

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Lancaster)

I, Devatee Tymar Clinton # 317521, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Devatee Clinton

SWORN to and subscribed before me this 17 day of Jan., 2018.

Debra D. Eastridge (L.S.)
Notary Public

My Commission Expires: 3/3/2026

Revised 3/2003

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

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

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Devatee Clinton
Applicant

SWORN or affirmed to and subscribed before me this 17 day of Jan., 2018.

[signature]
Notary Public

My Commission Expires: 3/3/2026

Revised 3/2003

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER Devatee Tymar Clinton, 317521 Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT 2018-CP-29-0110 **RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on February 6, 2018, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. In March of 2012, the Lancaster County Grand Jury indicted Applicant for murder (2012-GS-29-616). His co-defendant, A1 Martinez Green, was also indicted for her murder (2012-GS-29-636). William P. Frick, Esquire, represented Applicant. Solicitor Douglas Barfield, Esquire, prosecuted the case. On March 14, 2014, Applicant proceeded to trial before the Honorable R. Knox McMahon and a jury. The jury found Applicant guilty as indicted. Judge McMahon sentenced Applicant to a term of life imprisonment without the possibility of parole.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense and Chad N. Johnson, Esquire, perfected the appeal. Following briefing and oral argument, the Court of Appeals affirmed Clinton's conviction on May 11, 2016. State v. Clinton, 2016-UP-206 (S.C. Ct.App. May 11, 2016). The Court denied Applicant's Petition for

Rehearing on August 22, 2016. Applicant petitioned the South Carolina Supreme Court for a Writ of Certiorari. The Court denied Applicant's Petition for Certiorari by order dated August 4, 2016. The Remittitur was returned to the circuit court on August 23, 2017.

Attached to this Return and incorporated by reference are the records of the Lancaster County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, is that, in January 2012, Jenika Jones, the murder victim, lived in a Lancaster County trailer park with her three minor children, ages four, two and one. Tr. pp. 216; 218-19; 221-26; 264-65. Unfortunately for Jenika, Devatee "Tate" Clinton's grandmother was her next door neighbor and Clinton was living there at the time. Tr. pp. 740; 751; 793.[1]

On the night of January 19, 2012, officers with the Lancaster County Sheriff's Office, responding to a dispatch for a home invasion at Jenika's residence, found her dead from a single gunshot wound to the head. Also, her minor children were still in the house. The only information that authorities had at that time was that three unnamed black males were seen running from the trailer. Tr. pp. 215-27; 233; 235-40.[2]

---

[1] Jenika's back door opened to the same area as the front door on the trailer owned by Clinton's grandmother. Tr. p. 793, lines 5-15.

[2] Although EMS responded to the residence, the victim was already dead from her wound and, after examining the body, the Lancaster County Coroner requested an autopsy of Jenika's body. Tr. pp. 255-60. Dr. Janice Ross, the forensic pathologist who performed the autopsy, opined that the cause of death was "[a] laceration of the brain due to the gunshot wound to the head." This wound "was right in front of the left ear on the left cheek." The bullet then travelled went backward[,]slightly upward and slightly toward the right, slightly toward the middle of the skull and it was found inside the skull just in the back just toward the right midline." Dr. Ross removed this bullet (State's Exhibit 34) and explained that the wound caused by it was the only injury found at autopsy. Tr. p. 357-64.

Latoya Green testified that she is Al Martinez Green's sister and that she had been both friends with and a cousin of Jenika Jones. Jenika and her children had shared an apartment with Latoya and Green at one time. When Jenika moved out, she moved into an apartment with the man she was dating, "Nard" Roseboro. Jenika had only lived in the trailer park for several weeks. Ms. Green testified that her brother and Clinton were friends. Tr. pp. 261-67.

Dominique Davis was living in a Lancaster apartment complex in January 2012. On the morning of January 18, 2012, Ms. Davis and her daughter went to the apartment of her friend and neighbor, Y'eisha Tinsley. Ms. Tinsley was Green's girlfriend at the time and Green was at her apartment that morning. Clinton and Ms. Tinsley's brother, Madrey Tinsley, were also there. While Ms. Davis and Ms. Tinsley were talking, Ms. Davis overheard Clinton and Green talk about doing a "lick" or robbing someone. She also heard Clinton say that "he had Taz's gun and he wasn't going to give it back to him." Further, Ms. Davis heard Green ask whether "she" drove "a black car." However, the men never mentioned an intended victim by name or location and Ms. Davis did not know whom the friends planned to rob. Tr. pp. 268-79.

Jamal Twitty lived in the same apartment complex as Ms. Davis and Ms. Tinsley in January 2012. Also, he knew both women, Clinton and Green. He did not know the victim. Mr. Twitty saw Green at Ms. Tinsley's apartment on the morning of January 18, 2012. Mr. Twitty did not see Clinton there that morning but he did not stay at the apartment very long. Tr. pp. 281-84.

Sometime between 10:00 and 11:00 p.m. on the 18th, Mr. Tate had a conversation with Clinton while the men were standing in the area outside Ms. Tinsley's apartment.[3] Teeshan Harris and Maleek Moore were also present. Clinton asked Mr. Twitty if Twitty wanted "to go

[3] The location where the conversation occurred was between Tinsley's apartment and Dominique Davis' apartment. Tr. p. 284.

on a lick with him." Mr. Twitty explained that a "lick" was slang for robbery. Mr. Twitty told Clinton, "yeah, whatever." Tr. pp. 284-86; pp. 287-88; 291-92.

In response to Mr. Twitty's question of where it would take place, Clinton said, "Not far." Twitty changed his mind about participating in the robbery and talked Clinton out of doing it on the 18th when Clinton asked if Twitty could get a car because Twitty did not have a car and his girlfriend had told him that her car was parked for the night. Tr. pp. 286-88; 292-93.

Green walked up a few minutes later, and Clinton asked Green whether Green "want[ed] to go on a lick." Green replied, "yeah, whatever," indicating that "he was down for it. ...[H]e was like, yeah, he's ready." After these conversations, the men went their separate ways. While Twitty did not see Clinton with a gun that night, he had previously seen Clinton with one. Twitty was not with either Clinton or Green on January 19th. Tr. pp. 286-89; 292-94.

Lt. Christy Rogers, of the Lancaster County Sheriff's Office, testified that she supervises the Office's crime scene investigators. In the early morning hours of January 19th, Lt. Rogers, Inv. Ken Taylor and Inv. Jeff Steel processed the victim's residence pursuant to a search warrant. There were no signs of forced entry on the front door and the back door was locked. In the den and kitchen area, they found the victim with the gunshot wound to her head and a great deal of blood. (*See* State's Exhibit 11). They also found a .380 cartridge casing (State's Exhibit 41) behind the couch on which they found the victim and between the couch and the wall. There was also a picture that had been knocked off of a wall near the front door and onto the floor. Tr. pp. 402-10; 413-15; 424-25; 434-35; 439; 452-54; 456-65.

There was a great deal of blood covering the victim's face, head, upper arms and on the couch under her body. Blood also pooled on the floor in that area. There were bloody footprints

that had apparently been transferred by Jenika's children or their bloody clothing. The only blood elsewhere in the residence had apparently been transferred by the children and there were no bloody footprints that appeared to have been left by adults. Tr. pp. 409; 416-18; 422-25; 456-61; 498-501; 503; 517-19.

The only other area of the residence that had been disturbed was the master bedroom, which had been "ransacked." Although no fingerprints of evidentiary value were recovered, there was no sign of forced entry and the front door was open when the officers arrived, Inv. Taylor took swabs from underneath the exterior and interior door handles to the screen door (State's Exhibit 42) and the main door (State's Exhibit 43), to see if touch DNA could be developed. Tr. pp. 409-12; 430-31; 456-61; 466-74.

Shakela Montgomery and her cousin, Tameca Nelson, testified that they dined at Applebee's on the night of January 19th. They returned to the trailer park where the crime occurred between 9:30 and 10:30 p.m. because they were planning to stay there that night with Shakela's brother. As soon as they turned onto the road going into the trailer park, they were almost run off of the road by a white car coming out of the trailer park traveling fast and without its lights on. Neither woman saw EMS, law enforcement or a crowd present at the time, and neither learned that a murder had occurred until the next day. Tr. pp. 242-52; 295-301.

Shakela could not tell anything about the other vehicle's occupants. However, she described the car as a late model vehicle, and indicated that it was "an Oldsmobile, Buick, [or] Cadillac style." Tr. pp. 247; 250; 252. Tameca likewise could not tell anything about the other car's occupants, but she testified that the car "was a white Cadillac with a rag top." Tr. pp. 297-98. She saw the same car parked at a nearby Piggy Wiggly the next day. It had a flat tire at that time. Tr. pp. 298-301.

As it turns out, the white car that they described was owned by fifty year old Pomp Blackmon. Mr. Blackmon testified that he had lived in the city of Lancaster, South Carolina for all of his life. On January 19th 2012, he owned an "[e]ggshell white" 1991 Cadillac Seville "rag top." *See* State's Exhibits 16-18 (photographs of vehicle). His car was not a convertible, but it looked like one. Mr. Blackmon would give a ride to others on occasion, but it was unusual for anyone to ask that he loan it to them. Tr. pp. 380-81; 383-84.

"A little after seven" on the night of January 19th, a black male, who was approximately 5' 8" tall and wearing a "bluish black" jumpsuit came to Mr. Blackmon's house and asked Mr. Blackmon to give him a ride to the store or let him use the Cadillac. Mr. Blackmon would not drive the car because he had been drinking beer and he would not let the man borrow the car because he knew that the man did not have a driver's license. This man said that his cousin had a license. The man momentarily left and returned with his cousin. When Mr. Blackmon saw that the cousin had a license, he let the men borrow the vehicle. After the car pulled out of Mr. Blackmon's driveway and sopped at a stop sign, two more men wearing hoodies got into the car. Tr. pp. 382-86.

Mr. Blackmon had expected that his Cadillac would be returned within ninety minutes and that he would receive beer and cigarettes in exchange for letting the men use his car. However, neither of these occurred. He reported his car missing to the City of Lancaster Police Department the next morning and set out, on foot, to find his car. He found it in the parking lot of Piggly Wiggly located roughly a mile from the crime scene around 5:00 p.m. on January 20th. It had a flat tire on the front, driver's side, and it was almost out of gas. Mr. Blackmon called police and let them know that he had found the car but he did not take it home until Saturday, January 21st. Tr. pp. 386-91; 397-98; 455.

When Mr. Blackmon got his car on Saturday, the key to the car was missing, the car had red mud on it, a piece of molding was missing, and a blue jumpsuit (State's Exhibit 37) and an ID card had been stuffed on the floorboard behind the passenger seat. Mr. Blackmon testified that the car was not muddy and the molding had not been missing when he loaned it on the 18th, that the ID card had not been in the car when he loaned it, and that the jumpsuit was not his. So, he called law enforcement to report what he had found, and he was later interviewed by Inv. Fred Thompson. Tr. pp. 391-401.

Frederick Thompson testified that he was employed as an investigator in the Lancaster County Sheriff's Office in January 2012, and that he spoke to Mr. Blackmon on January 23rd, 2012. Inv. Thompson seized the blue jumpsuit (State's Exhibit 37) and the ID card from the trunk of the Cadillac. Upon learning that a piece of the car's molding was missing, Inv. Thompson went to the road leading into the trailer park to see if he could locate the missing piece of molding. He found some molding in the area of that road and subsequently verified that it was the missing piece by comparing it to the space on the car that did not have molding. Tr. pp. 534-40; 546-47.

Additionally, Lt Rogers, Inv. Taylor and Inv. Steel processed Mr. Blackmon's Cadillac. Inv. Taylor first processed the car on January 23rd, 2012, at Mr. Blackmon's residence. All three officers processed it on March 7th, 2012, at a building owned by the Sheriff's Office. No identifiable latent prints were found, either inside or outside of the vehicle, when Inv. Taylor examined it on January 23rd. On March 7th, however, the officers searched it in the hopes of finding evidence of blood in it. They used a "blue star chemical" that reacts positively to the presumptive presence of blood to help locate possible areas of human blood and it reacted positively in several areas of the car. As a result, the officers took three swabs of reddish brown

stains from the rear seat (State's Exhibit 46) cuttings from the front driver's seat (State's Exhibit 47) and front passenger's seat (State's Exhibit 48); and cuttings from the front passenger's seat belt (State's Exhibit 49). Tr. pp. 440-42; 476-84.

Vivian Stradford testified that she has lived in Lancaster for thirty years and that she has had known Jenika Jones for three or four years. Also, she knows Clinton and she "knows of" Green. Someone called Ms. Stradford and informed her of Jenika's death around 10:30 p.m. on January 18th. After going to her aunt's house to discuss what she had heard with her aunt and cousin, Ms. Stradford drove to the Crenco convenience store, which is located on Main St. in Lancaster. A nightclub known as the Hole in the Wall was across the street from Crenco in January 2012. Tr. pp. 625-29.

Ms. Stradford saw Clinton walk up to Crenco before she went inside. He was wearing the blue jumpsuit that was found in the Cadillac (State's Exhibit 37), and he was coming from the Hole in the Wall. Clinton asked her for a cigarette and Ms. Stradford said that she did not have any but was going into the store to get some. When she told Clinton that "Somebody just killed my home girl," Clinton was uninterested in talking about the topic. Ms. Stradford went inside and purchased cigarettes. After she gave two to Clinton, he walked out of the store. By the time that Ms. Stradford reached her vehicle, he was gone. Tr. pp. 628-34.

Y'eisha Tinsley testified that she was Green's girlfriend and that she was pregnant with his child in January 2012. Ms. Tinsley also knows Clinton. She corroborated that Green, Clinton, Dominique Davis, and Jamal Twitty were all at her apartment during the day on January 18th. Tr. pp. 618-22.

Ms. Tinsley and Latoya Green learned about Jenika's death on the 19th. Ms. Tinsley and Green thereafter talked about where he had been on the night of the 18th. He told her that he had been at the Hole in the Wall and that he met up with Clinton there. Tr. pp. 622-24.

Wayne Anthony Blakeney, Jr., testified that he was arrested on March 8, 2012, and charged with murder in this case. He was facing between thirty years and life on that charge and the State had not made any promises in exchange for his testimony. Clinton is his cousin and friend, and they hung out together sometimes. Blakeney also knows Green and he knew Delico McDow by nickname. He was not close to Green or McDow, the latter of whom he had met through through Clinton. Tr. pp. 725-29; 732-34.

Clinton did not have a driver's license at the time and Blakeney drove Clinton places "a few times." Each time, Clinton provided the car. Mr. Blakeney testified that he was with Clinton Green and McDow on the night of January 18th, 2012. They met up in the Newton area. They later went to a residence, where they borrowed the white Cadillac shown in State's Exhibit 16. After Clinton spoke to the Cadillac's owner, the men got the car and Blakeney drove them to the Hole in the Wall. Tr. pp. 731-32; 734-38.

Mr. Blakeney drank beer while there. He did not think that Clinton had anything to drink. He did not pay close attention to Green or McDow and he did not know whether or not they also drank. The men eventually left the Hole in the Wall when Clinton said that he needed for Blakeney "to drive him to get some money." Clinton did not indicate who owed him the money or where they were going in order to get it. However, Clinton promised to give Blakeney some money. Tr. pp. 738-39.

So, the four men got into the white Cadillac, with Blakeney driving and Clinton in the passenger seat. Following Clinton's directions, Blakeney drove to the trailer park where Jenika

was murdered. As they rode to the trailer park, Blakeney saw that Clinton had a gun at his side. When they reached the trailer park, Blakeney parked the Cadillac in a location selected by Clinton. Tr. pp. 739-42; 744-45; 761-62.

Blakeney stayed in the car, but Clinton, Green and McDow got out of it. The three then went behind a trailer and disappeared. They ran back to the Cadillac about ten minutes later. Although Clinton told Blakeney to "just chill," Green and McDow yelled at him to "go." So, Blakeney drove "pretty quick[ly]" out of the trailer park and back to the Hole in the Wall. The four men hung out at the nightclub for thirty or forty minutes before leaving. Tr. pp. 743-47; 762-63; 774-75.

This time, two more men whom Blakeney did not know got into the car with them. Mr. Blakeney dropped off Green, McDow and the two strangers off in the Newton area. He then took Clinton home. Following Clinton's directions, Blakeney drove Clinton back to the trailer park that they had been in earlier and to the mobile home of Clinton's grandmother, where Clinton was staying. Tr. pp. 740; 747-49; 755; 764.

Along the way there, Clinton told Blakeney, "I shot that bitch."[4] By the time Clinton got out, it was well into the morning of January 19th. Tr. pp. 749-50; 755.

Clinton told Blakeney that he had left his gun in the glove compartment and he asked Blakeney to "hold it for him." Blakeney left the trailer park but soon realized that the car was low on gas. Also, it had a flat tire. So, Blakeney parked it in the parking lot of the Piggly Wiggly. He left the car unlocked with the key in it, but took Clinton's handgun with him. He then walked home. Tr. pp. 750-52.

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[4] Blakeney did not believe Clinton at first because he did not know to what Clinton was referring. Blakeney started to believe that Clinton had been serious when he found out about Jenika's death a couple of days later.

Several weeks later, Blakeney sold the gun to his cousin, Marcus Barnes. His arrest was prompted by a friend telling law enforcement that Blakeney had admitted involvement in the crime. After his March 2012 arrest, Blakeney gave a statement to the Sheriff's Office. While he was not completely truthful initially, he soon was completely honest about what had occurred. Also, both he and the Inv. Thompson unsuccessfully tried to get the weapon from Barnes. However, Barnes would not cooperate. Tr. pp. 752-57; 759; 793-94.

Also, following Clinton's arrest, Inv. Thompson also had three conversations with him concerning his whereabouts on the night of January 19th. The first conversation occurred on January 27th 2012 and was initiated by Clinton, who was in his jail cell. Clinton told Inv. Thompson that he had gone to "the Hole in the Wall nightclub on Market Street" and that his cousin, Tony Cunningham, had taken him there. Tr. pp. 795-97.

On February 23rd, 2012, Inv. Thompson interviewed Clinton in a break room at the Sheriff's Office. Clinton's trial attorney, William P. Frick, Esquire, was also present, as was Capt. Craig Bailey. Before they discussed the case, Inv. Thompson advised Clinton of and secured a written waiver of his *Miranda* rights,[5] with the exception of his right to counsel in light of counsel's presence. (State's Exhibit 61). The purpose of this lengthy interview was another attempt to establish where Clinton had been on the night of January 19th. Tr. pp. 797-807; 819-20.

Clinton claimed that he had been "[a]t the Self Controlled Brothers or at the Hole in the Wall." He also claimed that he had worn "a camouflage jumpsuit." Clinton brought up the topic of a blue jumpsuit. He admitted that he owned one but claimed that he would occasionally loan it to others. One person that he supposedly loaned it to was his roommate at the trailer park,

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[5] *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

Reggie Stover. Another was a person named "Wayne," but he did not give a last name for Wayne. Tr. pp. 808-09; 820-21.

Even though Jenika Jones lived in a mobile home immediately adjacent to the one in which Clinton was staying, he claimed that "[h]e didn't know that she lived in the mobile home right beside his." When asked about Pomp Blackmon and a white "rag top" Cadillac, Clinton initially claimed that he did not know Mr. Blackmon and that he had not seen such a car. However, he later admitted knowing Mr. Blackmon. He likewise admitted having seen Mr. Blackmon in various places and knowing both that Mr. Blackmon lived in the Newton area and that Mr. Blackmon owned a white "rag top" Cadillac. Tr. pp. 809-11.

Clinton denied that he had ever been in the white Cadillac. When asked whether it would be possible for his DNA to be in the Cadillac, he said that he had leaned into it once while talking to a girl. This occurred at the Hole in the Wall on January 19th, 2012. He explained that his DNA would be on the blue jumpsuit because he had touched it when he moved it in his residence and when he loaned it to people. Tr. pp. 811-12.

Inv. Thompson's third conversation with Clinton occurred on March 9, 2012. He first met with Clinton in the detention center and did not advise him of his *Miranda* rights at that time. Later that same day, however, Clinton initiated another conversation with Inv. Thompson and he was interviewed at the Sheriff's Office. Inv. Thompson advised Clinton of his *Miranda* rights and secured a written waiver of those rights before speaking to him. (*See* State's Exhibit 62). Inv. Thompson was especially careful to emphasize Clinton's waiver of his right to counsel because Mr. Frick represented him, but he wanted to speak to Inv. Thompson without Mr. Frick present. Tr. pp. 812-16; 822-23.

The resulting interview lasted "probably less than an hour." This time, Clinton admitted that he had seen Wayne Blakeney at the Hole in the Wall on January 19th. He also said that Blakeney was in the white Cadillac. Tr. pp. 816-17.

Capt. Michael Greene, of SLED, was likewise involved in the investigation of Jenika Jones' murder, and he interviewed Green on January 25th, 2012 at the Lancaster County Sheriff's Office. Green had already been arrested for murder. Before they spoke, Capt. Greene used a Lancaster County Sheriff's Office advice of rights form (State's Exhibit 63) to advise Green of his *Miranda* rights, and Green made a signed, written waiver of his rights. Capt. Bailey, of the Lancaster County Sheriff's Office was also present. Green was not restrained and was in street clothes. Tr. pp. 827-33.

In the interview, Green claimed the witness that he had been at the Hole in the Wall, starting around 11:30 p.m. on the night of January 19th. Tr. p. 834.

At various points during the investigation, investigators collected a known blood sample of the victim taken at autopsy (State's Exhibit 35), as well as buccal swabs from Clinton (State's Exhibit 38), Pomp Blackmon (State's Exhibit 50), Wayne Anthony Blakeney, Jr. (State's Exhibit 51), Delico Lamar McDow (State's Exhibit 52), and Green (State's Exhibit 53). This evidence was subsequently used for DNA testing by SLED. Tr. pp. 363-64; 418-21; 438-39; 484-88; 530-32.

A SLED DNA analyst took fourteen cuttings from the blue jumpsuit. SLED items 6.1 through 6.5 were introduced as State's Exhibit 56, and SLED items 6.6 through 6.14 were introduced as State's Exhibit 57. A presumptive test for the presence of blood was positive for each of these cuttings. Tr. pp. 570-73.

Maryann Boehm, another SLED DNA analyst, testified that she had received the victims known blood standard, as well as the buccal swabs from Clinton, Mr. Blackmon, Wayne Blakeney, Jr., McDow and Green. She was able to develop DNA profiles for each of these individuals. She also received a number of items of evidence and tested those items against the known standards. Specifically, she received the .380 shell casing; the swabs from the underside of the exterior storm door handle; swabs from the exterior doorknob on the main door; twelve cuttings from the blue jumpsuit; a swab from the jumpsuit and debris from the jumpsuit; cuttings from a portion of the passenger side seat belt; a cutting from a stained fabric from the front passenger seat; a cutting from stained fabric from the front driver's seat; and swabs of reddish brown stains from the rear seat, which she sub-categorized as swabs of reddish brown stains from the rear seat, seat section, and swabs of reddish brown stains from the rear seat back rest. Tr. pp. 585-87; 591-94; 596-97.

The DNA profile developed from the .380 shell casing found at the murder scene (State's Exhibit 41) matched the victim.[6] Tr. pp. 594-95. Agent Boehm did not get a match on the swabs from the storm door and the doorknob (State's Exhibits 42-43). Although Clinton, Green and Blakeney could be eliminated from the DNA found in the swab of the screen door handle (State's Exhibit 42), the co-defendant McDow could not be eliminated. With respect to the swab of the door handle (State's Exhibit 43), "no conclusive statement could be made regarding inclusion or exclusion of Jenika Jones or Devatee Clinton as contributor to the mixture." Tr. pp. 597-99.

Agent Boehm did not find human blood on any of the cuttings from the jumpsuit, State's Exhibits 56-57. The DNA profile developed on item 6.1 was a mixture of at least three people. The victim, Mr. Blackmon and the four defendants – Clinton, Green, McDow and Blakeney –

[6] Agent Boehm opined that "[t]he probability of randomly selecting an unrelated individual having a DNA profile matching this item is approximately one and 8.9 quadrillion." Tr. p. 595.

were excluded as possible contributors to this mixture. The DNA profile developed on item 6.2 was from an unidentified male. However, the DNA profile developed on item 6.3 was a mixture of at least two individuals and "Clinton could not be excluded as a possible contributor to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 580." Also, Agent Boehm opined that "[n]o conclusive statement can be made regarding the inclusion or exclusion of Jenika Jones as possible contributor to this mixture."[7] Tr. pp. 599-603; 610.

As to the DNA profile developed SLED item 6.4, a swab from the blue jumpsuit, Agent Boehm found a "mixture of at least four individuals." Again, Clinton could not be excluded as a possible contributor to the mixture. "The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 12." Also, she could not make a conclusive determination as to whether the victim, Green or McDow were contributors to the mixture found. Agent Boehm performed more specific testing for the presence of human blood on one of the cuttings from the Cadillac's passenger side seatbelt and the other cuttings and swabs taken from the Cadillac, but she did not find human blood. Tr. pp. 603-07.

SLED Agent Suzann Cromer, a firearms and tool mark examiner employed in SLED's forensic services laboratory, was qualified as an expert in firearms identification, without objection. Tr. pp. 705-07. Agent Cromer examined the fired bullet recovered from the victim's head at autopsy (State's Exhibit 34) and the .380 cartridge casing found at the scene. (State's Exhibit 41). Unfortunately, she did not have a firearm with which to compare these items because both items had markings on them that would have potentially allowed her to identify the items to a particular weapon. The .380 caliber casing was marked "CBC or Magtech

[7] She later explained that this means that "[t]here is not enough information to either include them or exclude them from that mixture." Tr. p. 615. Also, she was able to exclude all other individuals that she had compared as contributors. Tr. p. 603.

ammunition." Agent Cromer opined that the bullet had "nine [lands] and grooves and it was going to go spin to the left coming ... out of the barrel of the gun. At this time there is only one known manufacturer that uses nine left rifling and that is High Point firearms." She also explained that a .380 caliber bullet could be fired by a 9 mm. firearm because it is the same size as a 9 mm. Luger bullet. Tr. pp. 708-16.

III.

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

1. Ineffective Assistance of Counsel by failing to properly preserve the evidence, allowed by the judge in ruling in limine and exculpatory to petition that another a person actually committed the crime. Counsel made no objection or argument at all.
    a. Issue was raised and won in pretrial motion in limine during trial, counsel went to bring out the exculpatory testimony only to have the judge sustain the state objection and did not argue to apparent contradiction or properly preserve the issue whatever. They deficiency was highly prejudicial as testimony was exculpatory.

IV.

Respondent submits Applicant allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). 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 proceeding "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687;

Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only

individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VI.

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

VII.

WHEREFORE, having made its Return, Respondent requests an evidentiary hearing be held on any claims so requiring one.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
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June __, 2018

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	
	2018-CP-29-0110
DEVATEE TYMAR CLINTON, #317521,	
Applicant,	
vs	AFFIDAVIT OF SERVICE BY MAIL
STATE OF SOUTH CAROLINA,	
Respondent.	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Donae A. Minor, Esquire
Minor Law Offices, LLC.
1750 Highway 160 W, Ste. 101 #259
Fort Mill, South Carolina 29718

DATED this the 11th day of June 2018.

Kaitlyn S. Slice, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOR THE 6th JUDICIAL CIRCUIT
COUNTY OF LANCASTER	)	Case No.: 2018-CP-29-00110
Devatee Clinton (317521),	)	
	)	
Applicant,	)	**AMENDED POST-CONVICTION RELIEF APPLICATION**
	)	
v.	)	
	)	
State of South Carolina.	)	
	)	

The Applicant, Devatee Clinton (317521), by and through his undersigned attorney, hereby amends his PCR application filed on February 6, 2018, to add the following allegations:

Ineffective Assistance of Counsel as to **William Frick**, Esquire:

1. **Failure to properly preserve the record for Applicant's Appeal regarding the issue of excluding testimony of exculpatory statements made by the Victim's oldest minor child.**

While Counsel raised arguments (Excited Utterance, Hearsay Exception, South Carolina Rules of Evidence 803 (2)) in response to the State's Motion in Limine to exclude testimony of exculpatory statements made to Officers and First Responders by the Victim's oldest minor child, Counsel failed to further raise his argument regarding the admissibility of those statements or proffer what witness, Officer Ken Taylor's testimony would have been had he been able to testify regarding those statements. The additional argument and proffer were necessary for the Trial Judge to make a proper ruling and to preserve the record for Applicant's Appeal. Counsel's failure to raise the argument at any time during the Applicant's trial after the State's Motion in Limine resulted in the Trial Court sustaining the objection to exclude the exculpatory statements and thus unpreserved the issue for appellate review. But for Counsel's failure to tender any further arguments or proffer regarding the testimony, the issue of the exclusion of such exculpatory statements would have properly been before the Appellate Court. Said Counsel's failure highly prejudiced Applicant in his trial and in his timely appeal.

2. **Failure to present Hearsay Exception, Present Sense Impression (South Carolina Rules of Evidence 803 (1)) as an argument in response to the State's objection to the admissibility of exculpatory statements made to Officers and First Responders by the Victim's oldest minor child.**

The statements made by the Victim's oldest minor child identifying the alleged person who shot his mother qualify as a Present Sense Impression under South Carolina

Rules of Evidence, 803 (1). Counsel's failure to present this argument as a hearsay exception prejudiced the Applicant as it would have bolstered the Applicant's argument for admissibility of those statements. Further by Counsel's failure to present this argument, it did not preserve the record for this issue to be considered for Applicant's appeal.

3. **Failure to properly investigate Applicant's case including but not limited to:**
   a. Interviewing Potential Witnesses
   b. Evaluating the veracity and authenticity of DNA evidence and other evidence sought against Applicant
   c. Conducting an independent investigation of the crime scene
   d. Investigating the alleged suspect named by the Victim's oldest minor child to the Police and First Time Responders as the person who shot his mother as part of Applicant's defense

   Counsel's conduct constitutes a failure to render reasonable and effective assistance under prevailing norms.

Furthermore, the Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application and this Amended Application. Amendments should be liberally allowed when no prejudice to the opposing party will result. *See* Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,

By ______________________

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12-4, 2018

CERTIFICATE OF SERVICE

I certify that I have served this document **Amended Post Conviction Relief Application (Devatee Clinton (317521)** via email and United States Postal Service mail to:

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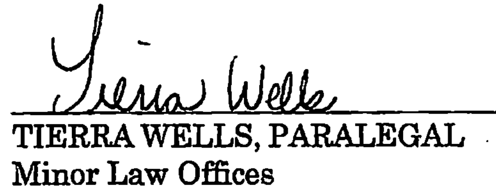
This 4th of December, 2018.



TIERRA WELLS, PARALEGAL
Minor Law Offices

STATE OF SOUTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
CIRCUIT COURT DIVISION
LANCASTER COUNTY — 2018-CP-29-00110

DEVATEE TYMAR CLINTON,

vs.

STATE OF SOUTH CAROLINA,

Defendant.

TRANSCRIPT OF RECORD

January 23, 2019
Lancaster, South Carolina

B E F O R E

The Honorable Paul M. Burch, Judge Presiding.

A P P E A R A N C E S

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(NONE OFFERED)

1 P R O C E E D I N G S
2 WEDNESDAY, JANUARY 23, 2019
3 LANCASTER, SOUTH CAROLINA
4 (Whereupon, the following proceedings were
5 held in open court. The defendant was
6 present with his attorney, along with
7 counsel for the State.)
8 * * *
9 MR. KEY: Your Honor, this is the case of Devatee
10 Tymar Clinton v. State of South Carolina, Case Number
11 2018-CP-29-0110. The Applicant is currently confined in
12 the South Carolina Department of Corrections pursuant to
13 Order of Commitment of the Lancaster County Clerk of
14 Court.
15 In March of 2012, the Lancaster County Grand Jury
16 indicted Applicant for murder. His co-defendant, Al
17 Martinez Green, was also indicted for murder.
18 He was represented by William Frick and Amy Raney.
19 Solicitor Barfield prosecuted the case. On March 14,
20 2014, Applicant proceeded to trial before The Honorable
21 R. Knox McMahon and a jury.
22 The verdict on that was guilty as indicted. Judge
23 McMahon sentenced him to a term of life imprisonment
24 without the possibility of parole.
25 Applicant filed a timely Notice of Appeal. Robert

1 Dunham of the Office of Appellate Defense and Chad N.
2 Johnson perfected the appeal.
3 Following briefing and argument, the Court of
4 Appeal confirmed Clinton's conviction on May 11, 2016.
5 The Court denied Applicant's petition for a hearing on
6 August 22, 2016. Applicant petitioned the South
7 Carolina Supreme Court for a Writ of Certioari.
8 The Court denied Applicant's petition for Cert by
9 an Order dated August 4, 2017. The remitterer was
10 issued on August 23, 2017.
11 In the amended PCR application, Mr. Clinton alleges
12 ineffective assistance of counsel for failure to
13 properly preserve the record for Applicant's appeal
14 regarding the issue of excluding testimony of
15 exculpatory statements made by the victim's oldest minor
16 child, failure to preserve the hearsay exception of
17 present-sense impression, South Carolina Rules of
18 Evidence Rule 803(1).
19 As an argument, in response to the State's
20 objection, is raised the admissibility of exculpatory
21 statements made to officers and first responders by the
22 victim's oldest minor child and failure to properly
23 investigate the case.
24 The Applicant is represented by Donae Minor. At
25 this point, I will hand it over to her.

1 MS. MINOR: If it please the Court, the Applicant
2 would like to call Mr. William Frick to the stand,
3 please.
4 * * *
5 WILLIAM FRICK, ESQ.,
6 called as a witness by and on behalf of
7 the Defense to testify, being first duly
8 sworn was examined and testified as follows:
9 * * *
10 DIRECT EXAMINATION
11 BY MS. MINOR:
12 Q Good afternoon, Mr. Frick.
13 A Good afternoon.
14 Q Where are you currently employed?
15 A I am a Deputy Public Defender for the Sixth
16 Judicial Circuit.
17 Q You were the trial attorney for Mr. Clinton in his
18 murder trial that took place in March of 2014; correct?
19 A Yes, ma'am.
20 Q You have been admitted to practice law in the State
21 of South Carolina since 2001; is that correct?
22 A That's correct.
23 Q At the time of this trial, you had been practicing
24 for about 13 years; is that correct?
25 A Yes, ma'am.

1 Q Was Mr. Clinton's trial your first murder trial?
2 A No, ma'am.
3 Q How much experience did you have at that time with
4 murder trials?
5 A I had been a prosector for about five years in the
6 Fourth Circuit and the Sixth Circuit and the Attorney
7 General's Office. I handled many homicide cases there.
8 At the time that this occurred, the trial occurred,
9 I had been full time with the Public Defender's Office
10 for probably five or six years. I handled murders
11 trials and various other offenses.
12 Q What did you do to prepare for Mr. Clinton's murder
13 trial?
14 A Reviewed the case file. I participated in pretrial
15 interviews when law enforcement wanted to talk to Mr.
16 Clinton prior to them seeking the warrant.
17 I went to visit him when he was incarcerated in
18 McCormick Institution. I think I went there two times
19 talking about the case. It was just general trial
20 preparation.
21 Q You recall in Mr. Clinton's trial that the State
22 made a Motion in Limine, basically, to exclude some
23 exculpatory statements of the victim's minor child;
24 correct?
25 A Yes, ma'am.

1 Q You do recall that that evidence particularly
2 alluded to that someone else may have been responsible
3 for the victim's death?
4 A Absolutely.
5 Q You would agree with me that the circumstances of
6 the incidents for that testimony is that the victim's
7 minor child alerted neighbors of the crime? The
8 neighbors called the police around 10:09 p.m. I am
9 reading from the transcript.
10 Officers were dispatched around 10:12 p.m. One of
11 them was Officer Ken Taylor, and that is one of the
12 witnesses that you cross-examined?
13 A Yes, ma'am.
14 Q Officer Ken Taylor collected evidence, and, also,
15 per his testimony, interacted with the minor children,
16 one of them who made the statement that was in question?
17 A That is what I recall. Yes, ma'am.
18 Q You recall making the argument for the excited
19 utterance hearsay exception; correct?
20 A Yes, ma'am.
21 Q Based on your argument, you recall that the Judge
22 ruled that if the proper foundation was laid, that
23 testimony could be admitted into evidence?
24 A I think that is what he said in the Motion in
25 Limine when the State made their motion to exclude what

1 we were trying to get in.
2 Q Yes. That is what I was referring to.
3 A Then as I was examining Investigator Ken Taylor,
4 the Judge inexplicably said that he wasn't going to
5 allow me to go further into the questioning. I don't
6 know why he changed his mind. I just know he changed
7 his mind.
8 Q The statement, as you recall, is "Shy's daddy shot
9 mommy."
10 A Yes.
11 Q Shy was later identified as someone; correct?
12 A Yes, ma'am. I believe, for whatever reason, they
13 interviewed Shy's girlfriend, and she gave him an alibi.
14 They believed her over anybody else in the statement,
15 for whatever reason.
16 Q Did you look any further into that?
17 A I did not.
18 Q Why?
19 A It didn't seem like it was going to go anywhere.
20 Q Do you agree that that statement would qualify as a
21 present sense impression hearsay exception?
22 A I think it's possible. I was going under the
23 excited utterance, because I thought it was the most
24 appropriate at the time, because the child was in the
25 moment of the excitement.

1 Q During the trial -- we have the Motion in Limine.
2 Later during the trial, you started cross-examining
3 Investigator Ken Taylor regarding the statements of that
4 child; correct?
5 A Yes, ma'am.
6 Q The State made an objection after you asked the
7 question of, was anything told to him by the minor
8 children; correct?
9 A Yes, ma'am.
10 Q You recall that you didn't respond to that
11 objection or offer any argument to that objection; is
12 that correct?
13 A I asked the question. I didn't ask to elicit any
14 hearsay. I simply asked, did anybody tell you anything?
15 The Judge shut that down. I did not think it would be
16 fruitful to argue anymore at that point. The Judge had
17 clearly decided he wasn't going to let it in at that
18 point.
19 Later in the trial -- I can't remember exactly when
20 it was. I don't think it was Ken Taylor. I think it
21 was another witness. I don't think it was Ken Taylor.
22 The cases were being tried together. It was one of
23 those situations where co-defendants were both pointing
24 fingers at each other.
25 We led up to, again, trying to get that statement

1 in, and the Judge shut it down again. Maybe I shouldn't
2 have tried again, but I was trying to get that statement
3 in at that time.
4 Q So you are very familiar with the phrase
5 "Protecting the record"; is that correct?
6 A I am.
7 Q So you understand the importance of preserving the
8 record, especially for appeals; is that correct?
9 A Sure.
10 Q So you would agree with me that basing on trying
11 to at least proffer an argument to the State's objection
12 with excluding that statement, that was an example of
13 not protecting the record for Mr. Clinton?
14 A No, ma'am. I wouldn't agree that. It wasn't my
15 objection. The State made the objection. I tried to
16 get the statement in, and the Judge ruled it
17 inadmissible.
18 I am still baffled by the Court of Appeals' ruling
19 and the Supreme Court not taking it up. As it was
20 stated in the brief by Appellate Counsel, I really don't
21 understand how I am supposed to object to something -- I
22 couldn't preserve an objection I didn't make.
23 MS. MINOR: I would ask the Court to take judicial
24 Notice of the Court of Appeal's opinion, which is
25 Appellate Case Number 2014-594.

1 I have a copy if the Court would like that.
2 THE COURT: All right.
3 BY MS. MINOR:
4 Q In the Court of Appeals' opinion, it was affirmed;
5 correct?
6 A It was.
7 Q The Court of Appeals stated several cases. One
8 stating that if a ruling and Motion in Limine is not
9 final unless an objection is made at the time the
10 evidence is offered and the final ruling procured that
11 the issue is not preserved for review.
12 They also further state in one of the cases that
13 the objection -- when the defendant failed to raise his
14 argument regarding the Trial Court's exclusion of
15 testimony or a proffer of what the witness' testimony
16 would have been had the witness been allowed to continue
17 testifying.
18 So you did not proffer an argument to what the
19 witness' testimony would have been had Ken Taylor been
20 allowed to testify; correct?
21 A I didn't proffer any further testimony. No.
22 Q So you would agree with me that the Court of
23 Appeals ruled that because you didn't do that --
24 MR. KEY: Objection, Your Honor.
25 MS. MINOR: What is the objection?

1 MR. KEY: Leading.
2 THE COURT: Rephrase your question.
3 MS. MINOR: He is a hostile witness, Your Honor.
4 THE COURT: True. Go ahead.
5 BY MS. MINOR:
6 Q So you would agree with me that based on this
7 ruling, the Court of Appeals is indicating that you did
8 not preserve the record for that particular issue for
9 Mr. Clinton; is that correct?
10 A I agree that that is what they are saying. I
11 disagree with their ruling. I don't know how I am
12 supposed to protect an objection that I didn't
13 make.
14 It was the State's Motion in Limine. The State
15 objected. I said it would come in under a hearsay
16 exception, and the Judge did not allow it.
17 I understand that that is what they ruled. That is
18 the law of the case, but I think they are wrong.
19 Q According to what they ruled, you failed to
20 preserve the record?
21 A That is what they said. This is not the first
22 time I have disagreed with one of their rulings either.
23 Q You would agree with me that the statement made --
24 had the jurors heard that statement, it could have been
25 potentially resulted in a different outcome?

1 A That is what I wanted to hear.

2 Q Did you read the Appellate brief that was submitted

3 on behalf of Mr. Clinton?

4 A Yes, ma'am. I read it.

5 Q Did you read the case State v. Sims (phonetic), a

6 Supreme Court case, Opinion Number 25398? It was filed

7 January 14, 2002?

8 A I don't think I read that one.

9 Q I will hand you a copy. Let me know when you are

10 done reading the overview of that case.

11 A Okay.

12 Q Would you say that that case is somewhat analogous

13 to Mr. Clinton's?

14 A I would.

15 Q You said you read the brief. This was a case that

16 was mentioned in the brief.

17 Had that record been properly preserved, the Court

18 of Appeals could have considered this case; correct?

19 A I don't know what they would have ruled.

20 Again, I disagree with their ruling. I disagree

21 with the Judge's ruling. I think the Judge should have

22 let it in at the trial level.

23 Q Let's talk about -- let's go back to your

24 investigation. Is it true that the crux of the State's

25 case was based on Mr. Wayne Blakeney's testimony?

1 A That is the way I recall it. I think that there
2 had been a prior incident. I am thinking it was a
3 robbery or a burglary -- something like that -- that Mr.
4 Clinton had been charged with that he pled to. They
5 started investigating him because of that into this
6 case.
7 They wanted to get some DNA samples from him. He
8 and I sat down and talked to law enforcement. It was
9 not a fruitful conversation, but we did go over there
10 and talk to them. It was clear in that conversation
11 that they were going to get a warrant and charge him
12 with murder. I believe that is what I told him as we
13 were walking back over to the jail.
14 Q Mr. Blakeney -- the State initially sought charges
15 on Mr. Blakeney; is that correct?
16 A That is what I recall. Yes, ma'am.
17 Q They were initially dropped; correct?
18 A I can't recall exactly what happened. I know he
19 was a cooperating witness. I believe he probably got a
20 good deal out of it. I think he testified that he
21 expected to receive nothing, which -- I mean, he was
22 charged with murder. He was testifying for the State.
23 It was pretty clear he expected to receive some kind of
24 benefit for cooperating.
25 Q You would agree with me that there were several

1 inconsistencies in Mr. Blakeney's testimony; correct?
2 A That is what I recall. Yes, ma'am.
3 Q Would you agree with me that there was no
4 conclusive DNA evidence linking Mr. Clinton to the crime?
5 A Absolutely.
6 Q There was no evidence that his DNA was present at
7 the home?
8 A That is what I recall. Yes, ma'am.
9 Q There was no evidence on the mobile home storm
10 door?
11 A The key evidence was, I think, Blakeney getting up
12 on the stand and saying stuff that he never said before,
13 like Mr. Clinton got in the car and said, "I killed
14 her." As I recall, he never said that before he got on
15 the stand.
16 Q Did you ever visit the crime scene?
17 A I don't think I did.
18 Q Why didn't you do that?
19 A I didn't do it in this case. I talked to Mr.
20 Clinton about the situation. I knew he was familiar
21 with the neighborhood. I think his grandmother lived
22 close. She might have even lived next door or close by.
23 I think I drove through -- it's off of Rider Road from
24 Winnsboro to here. It's off of 200. I think I drove
25 through the trailer park, but I didn't stop and look at

1 the trailer park.

2 Q Did you not think it would be prudent to do that?

3 A You can or cannot. I have tried cases where I

4 have. I have tried cases where I haven't.

5 Q Did you interview any potential witnesses in this

6 case, as far as --

7 A Any additional witnesses?

8 Q Yes. Any additional witnesses?

9 A No, ma'am. To clarify that. I don't think you

10 have ever had the pleasure of working with Solicitor

11 Barfield. He was extremely thorough in his cases. If

12 there was a name in there -- having tried many cases

13 with him, I knew he would call them all up as a witness.

14 He would put the good and the bad up.

15 So that affected my investigation sometimes,

16 because I knew all the witnesses would be present.

17 Q Your testimony earlier was that you did not try to

18 locate Shy's daddy to be interviewed or investigated

19 into that situation?

20 A I think I may have been in touch with him. I was

21 familiar with the name, and I think another attorney in

22 our office represented him.

23 Other than being aware that his name was mentioned,

24 no, I did not make contact with him.

25 Q Are you familiar with a forensic child interview?

1 A Sure.
2 Q It was a minor child who made the statement;
3 correct?
4 A Yes, ma'am.
5 Q Would you agree with me that with a forensic child
6 interview, it might have been helpful in this case?
7 A Possibly. Here is what I was dealing with: I had
8 a scene where the cops were getting on the stand and
9 talking about how these three children were traipsing
10 through all this blood of their mom.
11 I didn't like that visual to start with, but that
12 is what I had to deal with. Then I was faced with the
13 opportunity of cross-examining or examining the
14 five-year-old child who saw his mom laying there
15 bleeding. Then presumably, based on the statements,
16 seeing who did it and putting him on the stand in front
17 of a jury -- I didn't like the visual.
18 Q But you would agree with me that a forensic child
19 interview could have been helpful to the case?
20 A I don't know whether it would have been helpful or
21 not. I have seen plenty of forensic interviews.
22 Sometimes they are helpful; sometimes they are
23 not.
24 Q I believe it was mentioned that Mr. Clinton was at
25 some club during the night of the murder.

1 Did you ever go by that club?
2 A Did I go by it? No. It is not an unfamiliar
3 place, if you practice criminal law in Lancaster County.
4 We are all kind of familiar with that bad place. A lot
5 of things have occurred there.
6 MS. MINOR: Nothing further of this witness, Your
7 Honor. Thank you.
8 * * *
9 CROSS-EXAMINATION
10 BY MR. KEY:
11 Q Mr. Frick, the case cited by opposing counsel, do
12 you recall making that argument to the Trial Judge on
13 the Sims case?
14 A The Sims case? I don't remember arguing the Sims
15 case specifically. I see you have the transcripts, so
16 perhaps I did. I didn't go that far into the transcript
17 when I was looking at the case.
18 Q This is Pages 161 through 163 of the transcript.
19 A It does appear that I had that case.
20 Q So you did argue the Sims case?
21 A That is what the transcript tells me. Yes.
22 Q But, again, this was the State's motion?
23 A Yes. It was interesting. We were sitting here
24 doing pretrial motions. The defense counsel was seeking
25 to introduce this statement. Of course, the Solicitor

1 was aware that we would be trying to get this statement
2 in, and then the State made this Motion in Limine.
3 I thought it was very odd for the State to try to
4 keep a statement out like that.
5 Q From the Trial Court's ruling, did it appear that
6 you won the motion in Limine?
7 A I will be honest. I don't really know what he
8 ruled that day. It was unclear to me whether the
9 statement was truly going to come in or not.
10 I was willing to still attempt to get it in,
11 because there was a Motion in Limine. That is what I
12 attempted to do when Ken Taylor was on the stand.
13 I thought we had gotten to the point where I had
14 established that we had talked to the child. It was
15 soon after the incident.
16 I that we had established enough that he would let
17 it in with the hearsay exception. Then the Judge didn't
18 even let me go into saying, "Did someone tell you
19 anything?"
20 Q I believe the Judge's ruling is at 176 and 177 on
21 the issue.
22 A Okay.
23 Q Did the Judge rule in favor of the State in the
24 Motion in Limine?
25 A I don't believe he did. Basically, he thought the

1 foundation wasn't laid.
2 Q Did you feel like you laid a sufficient
3 foundation?
4 A To get hearsay and declare an unavailable, yeah, I
5 think I did.
6 Q When the Judge overruled and said "We are not going
7 to get into that," what else could you have done at that
8 point?
9 A I am on the stand, so I won't say exactly what I
10 am thinking, but I am not sure.
11 Honestly, I don't know what I could have done to
12 convince the Judge that he was wrong.
13 As I said -- again, I know it is in here. I don't
14 know exactly where it is. We, as defense counsel,
15 attempted again later in the trial to get it in. The
16 Judge still wouldn't allow it in.
17 He then started talking about it being third-party
18 guilt, which nobody had made any objection to before. It
19 wasn't brought up before, but I remember very
20 specifically Ms. Raney standing almost exactly where you
21 are standing now and the Judge saying -- was looking at
22 her and saying, "Are you attempting to get in
23 third-party guilt?"
24 It was quite apparent that he was not going to let
25 the statement in.

1 Q How old was the minor child who made the statement?
2 A I think he would have been five, maybe six, at the
3 time of the trial. I think about four at the time of
4 the incident.
5 Initially, there was a whole question by the Judge
6 about whether the child would be competent to testify.
7 It was getting murky and really just -- not wanting to
8 put that child on the stand, quite frankly, and I didn't
9 think that was going to go well.
10 I believed we were on good footing with the hearsay
11 exception. It was an excited utterance. I still
12 believe that to this day.
13 Q Would the only other thing you could have done
14 would be to call the child and put him on the stand?
15 A I suppose so. I probably could have jumped up and
16 down and stomped my feet, but that wouldn't have done
17 any good either.
18 Q Would you have put the child on the stand?
19 A I didn't want to put the child on the stand, for
20 the simple reason -- I didn't want to put a
21 five-year-old on the stand when there are pictures of
22 bloody footprints all over that scene. One of those
23 children -- I don't know if it was him or one of the
24 other younger siblings -- it was going to be displayed
25 all over the place. I did not see how that could be

1 helpful to Mr. Clinton.
2 Q Did you ever discuss with Mr. Clinton his version
3 of what happened, or if he was involved?
4 A I think he maintained he was not present, and he
5 did not go into the trailer.
6 Q Mr. Frick, I believe you testified that the State
7 had looked into Shy's dad in this case?
8 A Yes. I remember there being something in the
9 discovery. Law enforcement tracked down who that was.
10 It was -- Shy was Shortie Cake, was Rashad Johnson.
11 Either he had a pending charge in our office or he
12 had one previously. We were familiar with it.
13 I remember something in the discovery where -- they
14 talked to him, maybe. He said "I was with my
15 girlfriend."
16 They talked to the girlfriend. The girlfriend said
17 "He was home."
18 Then all of a sudden, there is no more Shy, Shortie
19 Cake.
20 Q In this situation or in this case, did you feel
21 that you needed to go and visit the crime scene?
22 A No. It was documented pretty well with
23 photographs. I think SLED may have processed the
24 scene. If they did not, the CSI unit, which was --
25 this may have been the first case that I had been

1 involved with them in Lancaster County.
2 They had taken a vast amount of photographs. I
3 didn't feel it was really necessary to go there later
4 and see this scene.
5 Like I said, I think I drove through the trailer
6 park. I didn't get out and walk around, and I didn't
7 take measurements or stuff like that. I relied on the
8 photographs that had been shown to me that showed me the
9 scene.
10 Q What was your strategy for trial?
11 A He didn't do it. That was my strategy. He wasn't
12 in the car. He maintained that he had never been the
13 vehicle. There was no DNA evidence that refuted that.
14 Yeah, he might have seen these people at the club
15 that night, but he didn't go over there and shoot them
16 or go into any activity at that time.
17 It was just a basic, "I didn't do it" defense.
18 The State didn't have a ton of physical evidence.
19 They had the statement of an alcoholic snitch. That is
20 what he was, basically. He was the co-defendant, and he
21 got on this very stand and then pointed his finger at
22 Devatee Clinton and said, "He came out of the house and
23 said 'I killed him.'"
24 Q Were you able to bring out the co-defendant's
25 inconsistencies on cross-examination?

1 A I am sure I did. Also, I talked about him having
2 the pending charge. I know the State said they had not
3 made any promises. Come on. That is not realistic. If
4 you get on the stand and testify for the State and you
5 are charged in the case, you have some expectation to
6 get something, even if it hadn't have been told to
7 you.
8 Q Mr. Frick, when you were cross-examining Officer
9 Taylor, did he testify at all about the child's
10 demeanor?
11 A Yes. I believe he did.
12 Q Did you recall what that testimony was?
13 A For some reason, it stuck in my mind. He called
14 the kid happy go lucky. I found that odd, but, okay.
15 That is what he described it as. So, yes, he did
16 describe the child's demeanor.
17 If I recall correctly, it was in the back of the
18 ambulance not long after law enforcement arrived on the
19 scene. That is why I thought then and continue to think
20 to this day; that that statement is admissible as an
21 excited utterance.
22 Obviously, if that is not an excited utterance, I
23 don't know what one is.
24 Q Did it enter into your mind to argue present sense
25 impression instead of excited utterance?

1 A It didn't. That is the honest truth. I was
2 thinking it was an excited utterance. I suppose you
3 could argue it was a present sense impression.
4 The fact of the matter is, I don't care what you
5 call it, I don't think the Judge was letting it in.
6 Q You picked excited utterance because it was what
7 you thought was the best argument?
8 A I thought it was the most appropriate one based on
9 my reading, based on what was before me.
10 Q And that was your decision?
11 A Yes.
12 MR. KEY: No further questions.
13 THE COURT: Ms. Minor?
14 MS. MINOR: Nothing further.
15 I would like to call Mr. Devatee Clinton.
16 THE COURT: Come around and be sworn.
17 * * *
18 DEVATEE CLINTON,
19 called as a witness by and on behalf of
20 the Defense to testify, being first duly
21 sworn was examined and testified as follows:
22 * * *
23 DIRECT EXAMINATION
24 BY MS. MINOR:
25 Q Mr. Clinton, you just heard Mr. Frick's testimony.

1 Is there anything else that you would like the Court to
2 be made aware of regarding his ineffectiveness as your
3 attorney?
4 A Yes, ma'am.
5 Q Would you let the Court know.
6 A Yes, ma'am. The prosecutor said it was someone
7 else's DNA at the crime scene. He didn't argue that it
8 was someone else's DNA, my co-defendant, at the crime
9 scene. My co-defendant never was charged.
10 Q So it's your testimony that he didn't sufficiently
11 bring that to the Court's attention?
12 A Yes, ma'am.
13 Q Do you have any other complaints of Mr. Frick's
14 ineffective assistance of counsel?
15 A No, ma'am.
16 MS. MINOR: Nothing further, Your Honor.
17 THE COURT: Mr. Key?
18 * * *
19 CROSS EXAMINATION
20 BY MR. KEY:
21 Q Mr. Clinton, the last allegation that you claimed,
22 could you clarify that for me? I didn't quite
23 understand.
24 A Frick and the prosecutor argued that another
25 person's DNA linked me to the crime scene. The person's

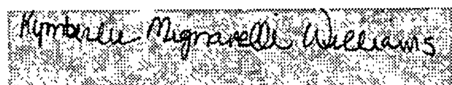
1 who DNA was submitted is my co-defendant's.
2 Why is he not charged with this? It leads him to
3 the crime scene.
4 MR. KEY: No further questions.
5 THE COURT: Anything else?
6 MS. MINOR: The Applicant rests, Your Honor.
7 THE COURT: You may step down.
8 (Whereupon, the witness exited the witness stand.)
9 THE COURT: Anything else from the State?
10 MR. KEY: Nothing from the State, Your Honor.
11 THE COURT: Anything else, Ms. Minor?
12 MS. MINOR: No, Your Honor.
13 THE COURT: All right.
14 Give me a chance to look through the documentation
15 here, and Mr. Gibson will be in touch with you in a few
16 days about any additional items we may need.
17 MR. KEY: Thank you.
18 * * *
19 - - -END OF TRANSCRIPT- - -
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Kymberlee M. Williams, Certified Shorthand Reporter/Registered Professional Reporter for the 6th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Lancaster County, South Carolina, on the 23rd day of January, 2019.

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

This, the 20th day of September 2019.



KYMBERLEE M. WILLIAMS, CSR/RPR

RECEIVED
AUG 02 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Devatee Tymar Clinton, # 317521,
Applicant,
v.
State of South Carolina,
Respondent.

Case No: 2018-CP-29-0110

ORDER OF DISMISSAL

FILED
CLERK OF COURT
2019 JUL 26 PM 2:0[illegible]
CLERK OF COURT
LANCASTER, SC

The matter before the Court is an action for post-conviction relief (PCR). Devatee Clinton (Applicant) commenced this PCR action on February 6, 2018. The State made its return on June 11, 2018. The Court held an evidentiary hearing January 23, 2019, at the Lancaster County Courthouse before the undersigned. Applicant was present and represented by Donae A. Minor, Esquire. Assistant Attorney General Samuel L. Key represented the State. Applicant testified on his own behalf at the PCR hearing. Applicant's trial counsel also testified. This Court had before it a copy of the records of the Lancaster County Clerk of Court regarding Applicant's convictions, the transcript from Applicant's trial, the PCR application, the State's Return, Applicant's records from the Department of Corrections, and Applicant's appellate records. After reviewing the record and evidence presented, for the reasons discussed below, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to relief and dismisses this action with prejudice.

I. FACTS & PROCEDURAL HISTORY

In March 2012, the Lancaster County Grand Jury indicted Applicant and Al Martinez Green for the murder of Jenika Jones. (2012-GS-29-616, -636). Applicant was represented by William P. Frick of the Sixth Circuit Public Defender's Office. Solicitor Douglas Barfield

prosecuted the case. Applicant's charge stems from an incident that occurred January 18–19, 2012.

In January 2012, Jones lived in a trailer park with her three minor children—ages four, two, and one. (Tr. 216; 218–19; 221–26; 264–65). Applicant lived with his grandmother in the neighboring trailer. On January 19, 2012, law enforcement responded to a reported home invasion at Jones's trailer. They found Jones's body on the couch in a pool of blood with a single gunshot wound to the head. She was dead upon law enforcement's arrival. Her children were still in the house. Applicant, Green, and two other co-defendants were ultimately arrested for murdering Jones.

Applicant and Green were tried together from March 10–14, 2014, before the Honorable R. Knox McMahon and a jury. The State moved pretrial to bar Applicant or Green from eliciting out-of-court statements by Jones's four-year-old son to the first responders. (Tr. 157–58). Trial counsel argued that after law enforcement arrived and was "still trying to assess what occurred," Jones's four-year-old son "spontaneously state[ed] to . . . Investigator Crump first and then to another officer and . . . maybe a third officer on the scene that 'Shi's daddy shot my momma.'" Later, the child stated "Shortycake shot my momma." (Tr. 158–59).

To further clarify the issue, trial counsel explained Jones's son was nicknamed Deuce, and his father was Antonio Lamont Truesdale. The nickname in Deuce's declaration, "Shortycake," was not the nickname of either Applicant or Green. Rather, it was the nickname of a Rashad Johnson, who is the father of another of Jones's children, "Shi." (Tr. 159–60). The State explained it verified Jones had a child nicknamed Shi, Rashad Johnson was Shi's father, and Rashad Johnson's nickname is "Shortycake." The State also acknowledged Deuce had made a statement to Crump. (Tr. 160–61).

Trial counsel clarified his argument was the child's statement was admissible as an excited

utterance under Rule 803(2), SCRE, to which the trial court stated, "I realize [under Rule] 803 [the] availability of a witness is immaterial but you have to determine the competency of the individual that made the statement. In this regard I'm dealing with a four-year old." (Tr. 161). The State indicated the child's competency was the basis for its objection. (Tr. 161–62).

Trial counsel then argued Deuce was four-years old at the time of the murder, but almost immediately after the shooting, Deuce:

> [Went] to the next door neighbor's house and ask[ed] for help. They called 911. The police respond within 15 minutes. Because it was cold, Deuce and his siblings were put in an ambulance. [Deuce] makes the comment Shi's daddy hurt my momma. Jamia's (phonetics) daddy hurt my momma. Jamia and Shi are the same person and 'daddy' they are referring to is Rashad Johnson. He makes this statement . . . to Investigator Crump. He makes it in the ambulance in front of some of first responders who are on the [State's] witness list, and Mr. Plyler and Mr. Hope and then he says it spontaneous[ly] to Christy Rogers who is a CSI officer that responds there on the scene.

(Tr. 162–63). Thereafter, trial counsel presented three cases to the trial judge supporting his argument the admissibility of this declaration under Rule 803(2) did not depend upon the competency of the out-of-court declarant, and he asked the trial judge to consider these cases before ruling on the issue. Specifically, trial counsel relied upon *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007) (the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness); *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002); and *In Interest of Smith*, 277 S.C. 187, 284 S.E.2d 586 (1981) (three year old victim's statements describing defendant's actions to mother immediately after the incident, while she was still crying and showing signs of pain, were admissible under *res gestae* exception to hearsay rule in case charging juvenile defendant with criminal sexual conduct in the first degree). (Tr. 163).

The trial court noted factual distinctions between those three cases and the instant case, and clarified the issue with the statement was the foundation, stating trial counsel needed to establish a "foundation of the personal knowledge of the hearsay declarant and then meet the three requirements within the rules." *See* Rule 602, SCRE. The trial court also observed that "[p]resence in the home doesn't mean observation of the fatal act. That's all I am saying.... That goes back to the [R]ule 600 or something." (Tr. 163–67). The trial court further stated, "I am not saying it is or isn't admissible. I am saying a foundation has got to be laid for its admissibility and . . . you all are welcome to do it in whatever manner you all so choose." (Tr. 168).

The following morning, the trial court re-stated Applicant did not have to show Deuce's competency "for purposes of asking those questions, but they do have to lay the foundation under the excited utterance." The child's competency or incompetency, however, could be presented to the jury. (Tr. 178–79).

On cross-examination of Investigator Taylor, Applicant established Taylor saw the children at the crime scene on the night of the incident; all three children had blood on their clothing; and Taylor seized the children's bloody clothing. (Tr. 499–501). Trial counsel then asked Taylor:

> Q Did you ever have any conversation with any of these children?
> A Yes.
> Q Which one?
> A Oldest child.
> Q Okay. Where did you have this conversation?
> A In the EMS truck.
> Q Do you recall about when you had this conversation? How long you [had] been on the scene?
> A I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.
> Q Do you recall the demeanor of this child?
> A He seemed -- he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep

[their] mind[s] off maybe their thoughts or whatever.
Q Okay. Did you take a statement from any of these children?
A No, I did not take a statement.
Q Was anything told to you?

(Tr. 501–02). The State immediately objected based on trial eliciting an out-of-court statement. Trial counsel responded, "I didn't ask what." The trial court sustained the State's objection. (Tr. 502).

Taylor later testified he had been in the ambulance with the children "[p]robably about ten minutes." (Tr. 517–18). Taylor also opined based upon the blood on the children's clothing, it appeared the children would have been physically close to the victim, and he stated Deuce was able to see the blood on his siblings' clothing while he was in the ambulance. However, Deuce appeared to be "happy-go-lucky" during the time Taylor was with him. (Tr. 518–21).

The jury convicted Applicant and Green as indicted. Judge McMahon sentenced both Applicant and Green to terms of life imprisonment without the possibility of parole.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense and Chad N. Johnson, Esquire, perfected the appeal. Applicant raised two issues on appeal, arguing:

1. The trial court erred in excluding the statements of [Jones's] four-year-old son to first responders that implicated someone other than [Applicant] and [Green] in the charged crime; and

2. The trial court erred in failing to direct a verdict in favor of [Applicant] where the evidence and testimony merely raised a suspicion that he was involved in a crime, but failed to meet the elements of the charged crime.

The court of appeals affirmed Applicant's conviction. *State v. Clinton*, 2016-UP-206 (S.C. Ct. App. May 11, 2016). Applicant petitioned our Supreme Court for a writ of certiorari; however, the Court denied Applicant's petition for certiorari on August 4, 2016, and remitted the case back

to the circuit court on August 23, 2017. Applicant timely commenced this PCR action on February 6, 2018.

II. ISSUES

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

1. Ineffective Assistance of Counsel by failing to properly preserve the evidence, allowed by the judge in ruling *in limine* and exculpatory to petitioner that another person actually committed the crime. Counsel made no objection or argument at all;
    a. Issue was raised and won in pretrial motion *in limine* during trial, counsel went to bring out the exculpatory testimony only to have the judge sustain the state objection and did not argue to apparent contradiction or properly preserve the issue whatever. They deficiency was highly prejudicial as testimony was exculpatory.

Applicant, through PCR counsel, amended his PCR application to allege the following:

1. Failure to properly preserve the record for Applicant's appeal regarding the issue of excluding testimony of exculpatory statements made by the victim's oldest minor child;
2. Failure to present Hearsay Exception, Present Sense Impression, Rule 803(1), SCRE, as an argument in response to the State's objection to the admissibility of exculpatory statements made to officers and first responders by the victim's oldest minor child;
3. Failure to investigate Applicant's case;
    a. Interviewing potential witnesses;
    b. Evaluating the veracity and authenticity of DNA evidence and other evidence sought against Applicant;
    c. Conducting an independent investigation of the crime scene; and
    d. Investigating the alleged suspect named by the victim's oldest minor child to the police and first responders as the person who shot his mother as part of Applicant's defense.

To the extent the allegations outlined in Applicant's original application constitute separate issues for relief, this Court finds those allegations are voluntarily waived and abandoned. As such, those allegations are hereby denied and dismissed with prejudice.

III. DISCUSSION

The Court has reviewed the record and observed the testimony at the PCR hearing. The Court has observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The test for determining if counsel's performance was deficient is "whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel was not deficient and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. There is a strong presumption trial counsel's decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). To prove prejudice, the applicant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Applicant asserts trial counsel was ineffective for: (1) failing to preserve issues regarding the trial court's exclusion of the Victim's four-year-old son for appellate review; (2) failing to argue the present sense impression hearsay exception in response to the State objecting to the victim's four-year-old son's statement coming into evidence; and (3) failing to investigate

Applicant's case. As discussed below, the Court finds trial counsel's representation was reasonable under prevailing professional norms, and Applicant has failed to show prejudice resulted from trial counsel's alleged deficiencies. Therefore, the Court denies relief and dismisses this PCR action with prejudice.

1. Failing to preserve issues regarding the trial court's exclusion of the Victim's four-year-old son's statement for appellate review.

Applicant alleges trial counsel was ineffective for failing to properly challenge and preserve issues regarding the trial court's exclusion of the Victim's four-year-old son's statement for appellate review. The Court disagrees.

Strickland v. Washington, requires that trial counsel must be given leeway to make reasonable strategic decisions. 466 U.S. 668 (1984). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland* at 688–89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. *Strickland* therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* Further, "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).

Hearsay is an out of court statement offered as a true statement. Rule 801(c), SCRE. Hearsay is generally inadmissible. Rule 802, SCRE. However, an excited utterance is an

exception to the general rule against hearsay. Rule 803(2), SCRE. An excited utterance is "[a] statement relating to a startling event . . . made while the declarant was under the stress of excitement caused by the event . . . ." *Id.* Whether the declarant of an excited utterance is available as a witness at trial is immaterial. Rule 803, SCRE.

Three elements must be met to establish a statement as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). "'Statements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule.'" *State v. Hill*, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998) (quoting 23 C.J.S. *Crim.Law* § 876 (1989)).

Trial counsel testified his strategy for eliciting the child's out of court statement was to get the statement into evidence through cross-examination of the first responders. Trial counsel stated he argued pretrial the child's statement was admissible as an excited utterance, and the trial court agreed, conditioning its pretrial ruling on whether Applicant could lay the proper foundation for the statement. Trial counsel felt as though he established the foundation for the child's out of court statement during his cross-examination of Taylor; however, trial counsel believed the trial court changed its mind when it sustained the State's objection to him asking Taylor if the children told him anything. Trial counsel explained he felt at that juncture, the only way to introduce the child's statement would have been to call the child to testify. Trial counsel then testified he did not proffer the child's testimony because the trial court instructed him to move on from the issue. Trial counsel testified that in hindsight he could have proffered the child's testimony, but at the time he

decided to move on with his cross-examination. However, trial counsel also testified that even in hindsight, he would not have chosen to proffer the child's testimony because the child had gone through a traumatic event, and he was unsure what the child would say when called to testify. Trial counsel admitted he did not consider pursuing the possibility of obtaining a child forensic interview. Trial counsel reiterated his strategy for getting the child's statement into evidence was through the excited utterance hearsay exception.

The Court finds trial counsel's strategy to elicit the child's out-of-court statement through cross-examination reasonable. *See 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."). The Court further finds trial counsel's decision not to proffer the child's testimony reasonable. While trial counsel arguably needed to proffer the child's testimony to preserve the issue for appellate review, the Court will not second-guess trial counsel's decision to move on with his questioning. *See Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003) ("[C]ounsel has wide latitude in deciding how best to represent a client . . . ."). Because trial counsel articulated reasonable trial strategy for attempting to elicit the child's out-of-court statement, the Court finds he was not deficient.

Therefore, the Court finds and concludes Applicant did not receive ineffective assistance of trial counsel for failing to preserve issues regarding the trial court's exclusion of the Victim's four-year-old son's statement for appellate review. The Court denies relief on this allegation and dismisses it with prejudice.

2. Failing to argue the present-sense impression hearsay exception in response to the State objecting to the victim's four-year-old son's statement coming into evidence.

Applicant alleges trial counsel was ineffective for failing to argue the child's statement was admissible as a present-sense impression which is an exception to the general rule against hearsay. The Court disagrees.

"[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531. "Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them." *Gentry*, 540 U.S. at 7.

As explained in the previous section, trial counsel testified his strategy for entering the child's out-of-court statement into evidence was to argue the statement was admissible under the excited-utterance exception to hearsay. Trial counsel testified when he was preparing the case for trial, he felt excited utterance was the most applicable hearsay exception and chose to pursue that argument at trial.

The Court finds reasonable trial counsel's strategy to argue the child's statement was admissible under the excited-utterance exception to the rule against hearsay. In fact, trial counsel was successful pretrial when the Court ruled it would allow questioning regarding the child's statement. However, during trial, the trial court changed its ruling in sustaining the State's objection. Because trial counsel articulated a reasonable trial strategy regarding the admissibility of the child's out of court statement as an excited utterance, trial counsel was not deficient for failing to argue the statement was admissible as a present-sense impression. Therefore, the Court denies relief on this issue and dismiss it with prejudice.

3. Failing to investigate Applicant's case.

Applicant asserts trial counsel was ineffective for failing to investigate Applicant's case. Specifically, Applicant claims trial counsel failed to: interview potential witnesses, evaluate the veracity and authenticity of DNA evidence and other evidence against Applicant, independently investigate the crime scene, and investigate the suspect named by Deuce as part of Applicant's defense strategy. The Court disagrees.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). However, "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." *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). The applicant must present evidence to show what counsel could have discovered had he more fully investigated. *Jackson v. State*, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003).

As for whether trial counsel was ineffective for failing to interview potential witnesses, the Court finds Applicant has failed to prove any prejudice resulted from trial counsel's alleged deficiency of failing to interview potential witnesses because Applicant presented no witness in support of his allegation at the PCR hearing. *See Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417 ("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."). Therefore, this allegation is denied and dismissed with prejudice.

Applicant alleges trial counsel was ineffective for failing to evaluate the veracity and authenticity of DNA evidence and other evidence sought against Applicant. Specifically, Applicant testified at the PCR hearing trial counsel was ineffective because the State said he was connected to the crime scene by DNA. The Court disagrees.

Trial counsel testified he reviewed the case file and all the witness interviews and statements with Applicant. Trial counsel recalled the State collecting Applicant's DNA through a DNA swab. However, trial counsel testified the State could not connect Applicant to the crime through DNA. Trial counsel recalled the State not have much direct evidence other than the statement of Wayne Blakeney, a co-defendant. Trial counsel recalled the crux of the State's case was Blakeney's testimony.

As for failing to investigate the DNA evidence, the Court finds credible trial counsel's testimony the State could not tie Applicant to the crime through DNA. Upon reviewing the record, trial counsel's strategy for attacking the DNA evidence is clear. Trial counsel thoroughly cross-examined the State's DNA expert and highlighted the high likelihood of the sample being someone's other than Applicant. (Tr. 609–15). Further, trial counsel highlighted the DNA results in his closing argument. Trial counsel pointed out the only DNA on the bullet shell casing was from Jones, Applicant was excluded from the DNA found on the storm door, and Applicant could not be included or excluded from the DNA found on the front door handle. (Tr. 927–28). Finally, trial counsel mitigated Applicant's possible DNA found on the jumpsuit by arguing the DNA did not help the State's case. (Tr. 928–29). The Court finds trial counsel had a strategy for attacking the DNA evidence in this case and employed that strategy at trial; therefore, trial counsel was not deficient for failing to investigate the DNA evidence in this case. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("[W]here counsel articulates a valid reason for employing certain strategy, such

conduct will not be deemed ineffective assistance of counsel.").

Applicant alleges trial counsel was ineffective for failing to conduct an independent investigation of the crime scene. Trial counsel testified at the PCR hearing drove around the trailer park but did not get out and look at the specific trailer where the incident occurred. Trial counsel explained he did not feel it was necessary to get out of the car to view the crime scene because Applicant was very familiar with the area and described it to him and because the scene was well documented in the photographs provided in the discovery. The Court finds trial counsel's investigation of the crime scene reasonable. Trial counsel credibly testified he drove around the trailer park where the incident occurred and felt he had a good idea of the crime scene from speaking with Applicant and from the pictures in discovery. Therefore, the Court finds trial counsel was not ineffective for failing to conduct an independent investigation of the crime scene.

Finally, the Court finds Applicant's allegation of ineffective assistance of counsel for failure to investigate the alleged suspect named by the victim's oldest minor child to the police and first responders as the person who shot his mother as part of Applicant's defense is without merit. Trial counsel testified law enforcement investigated who "Shi's daddy" was and talked to him. Trial counsel testified law enforcement's investigation of the person was provided in the discovery. It is clear from the trial transcript trial counsel tried using this information as part of his defense strategy. As mentioned above, trial counsel tried to get Deuce's statement into evidence through cross-examination. Trial counsel stated his defense strategy was Applicant was not there, and Applicant did not commit the crime. He stated the State did not have much physical evidence tying Applicant to the crime, and the case hinged on Applicant's co-defendant's testimony. Trial counsel attacked the co-defendant's credibility on cross-examination by

highlighting inconsistencies in the co-defendant's testimony and showing the co-defendant's possible bias due to his pending charges.

The Court finds trial counsel had a reasonable trial strategy in this case. Further, Applicant has not shown prejudice resulted from trial counsel's alleged failure to investigate a third-party guilt defense because Applicant did not present any evidence or witnesses trial counsel could have used at trial if he had investigated into the other person. *See Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417 ("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."). Therefore, the Court finds this allegation is without merit.

IV. CONCLUSION

Based on all the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. The Court finds trial counsel's representation was neither deficient nor prejudicial. Trial counsel articulated a reasonable trial strategy concerning his presentation of Deuce's out-of-court statement. While trial counsel arguably did not preserve his argument, he stated the only way he felt he could have gone further with the child's statement, from reading the trial court in the heat of trial, was to put Deuce on the stand to testify; however, the Court finds trial counsel's reasoning for not calling Deuce to testify reasonable because he was a young child and trial counsel did not know what he would say. Further, trial counsel reasonably investigated the case and formed a defense strategy based on his investigation. Therefore, the Court denies relief and dismisses the action with prejudice.

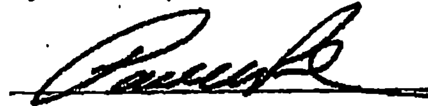
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate

review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.



PAUL M. BURCH
Presiding Judge
Sixth Judicial Circuit

July 19th, 2019.

WITNESSES

Catalano - LCSO #12-02271

f Adams

ARREST WARRANT NUMBER/DOA

M742583 (DOA-3-9-12)

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 6 March 2014

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

MAR 06 2014

DOCKET NO. 2012-GS-29-616

The State of South Carolina

County of Lancaster

FILED
OFFICE OF CLERK
OF COURT

2014 MAR -6 PM 2:24

CLERK OF COURT
LANCASTER, SC

COURT OF GENERAL SESSIONS

MARCH TERM 2014

THE STATE
vs.

Devatee Tymar Clinton

Amended
Indictment for

Murder

SC Code: §16-3-10
CDR Code: 0116
Class: Felony, EXM

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

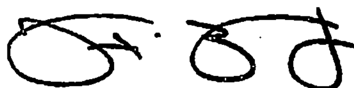
AMENDED INDICTMENT

At a Court of General Sessions, convened on March 6, 2014, the Grand Jurors of Lancaster County present upon their oath:

MURDER

That Devatee Tymar Clinton did at ████ Roseanna Lane, in Lancaster County on or about January 19, 2012, feloniously, willfully, and of his malice aforethought kill and murder Jenika Jaraya Jones by shooting the victim in the head and the victim did die as the proximate cause thereof then and there, in violation of Section 16-3-10 of the *Code of Laws of South Carolina.*

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



Douglas A. Barfield, Jr., SOLICITOR

WITNESSES

Catalano - LCSO #12-02271

&Crump

ARREST WARRANT NUMBER/DOA

M742583 (DOA-3-9-12)

ACTION OF GRAND JURY

TRUE

JUN 7 2012

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

Frick

DOCKET NO. **2012-GS-29-** 616

The State of South Carolina

County of Lancaster

2012 JUN -7 PM 12:24
LANCASTER, SC

COURT OF GENERAL SESSIONS

JUNE TERM 2012

THE STATE
vs.

Devatee Tymar Clinton

Wayne Blakeney, Jr. 607
Al Green 636

Indictment for

Murder

SC Code: §16-3-10
CDR Code: 0116
Class: Felony, EXM

STATE OF SOUTH CAROLINA	)	INDICTMENT
	)	
COUNTY OF LANCASTER	)	

At a Court of General Sessions, convened on June 7, 2012, the Grand Jurors of Lancaster County present upon their oath:

amd. 3/11/14

MURDER

That Devatee Tymar ~~Clingen~~ Clinton did at ███ Roseanna Lane, in Lancaster County on or about January 19, 2012, feloniously, willfully, and of his malice aforethought kill and murder Jenika Jaraya Jones by shooting the victim in the head and the victim did die as the proximate cause thereof then and there, in violation of Section 16-3-10 of the *Code of Laws of South Carolina.*

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

Douglas A. Barfield, Jr., SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

IN THE COURT OF GENERAL SESSIONS

STATE

VS.

Devatee Tymar Clinton

AKA:

Race: B Sex: M Age: 26

DOB: [redacted] SS#: [redacted]

Address: [redacted] Roseanna Lane

City, State, Zip: Lancaster, SC 29720

DL# SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

INDICTMENT/CASE#: 2012-GS-29 - 616

A/W#: M742583

Date of Offense: 1/19/12

S.C. Code §: 16-3-10

CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Murder

In violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[signature] 514

Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of LWOP days/months/years or ☐ under the Youthful Offender Act not to exceed — years and/or to pay a fine of $ — ; provided that upon the service of — days/months/years and or payment of $ — ; plus costs and assessments as applicable*; the balance is suspended with probation for — months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: $ ____ plus 20% fee: ____ $ ____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

PTUP

____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $ ____ Beginning ____

$ ____ Paid to Public Defender Fund

Other:

Item	Amount	$
*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk [signature]

Court Reporter: [signature]

Presiding Judge [signature]

Judge Code: 2145

Sentence Date 14 March 14

SCCA/217 (03/2011)

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Devatee Tymar Clinton, Appellant.

Appellate Case No. 2014-000594

Appeal From Lancaster County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2016-UP-206
Heard April 12, 2016 – Filed May 11, 2016

AFFIRMED

Chad Nicholas Johnston, of Willoughby & Hoefer, PA, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor Randy E. Newman, Jr., of Lancaster, for Respondent.

PER CURIAM: Devatee Clinton appeals his conviction for murder, arguing the trial court erred in (1) failing to find statements were admissible pursuant to the excited utterance or present sense impression exceptions to the hearsay rule and (2) denying his motion for a directed verdict. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in failing to admit hearsay statements: *State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); *State v. Hicks*, 330 S.C. 207, 216, 499 S.E.2d 209, 214 (1998) (holding matters not raised to or ruled upon by the trial court are not preserved for appellate review); *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))); *State v. Howard*, 384 S.C. 212, 219, 682 S.E.2d 42, 46 (Ct. App. 2009) (finding an exclusion of evidence issue unpreserved where the State objected to testimony, the trial court sustained the objection and asked the jurors to disregard the testimony, and the appellant made no objections or arguments regarding the trial court's instruction to the jury to disregard the testimony); *State v. Stokes*, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct. App. 2000) (holding an issue regarding exclusion of evidence was unpreserved, stating "the record reflects that this issue was only raised and ruled on *in limine*. Stokes never raised the issue again at any time during the trial. Merely raising an argument *in limine* does not preserve the issue for appellate review"); *State v. Simmons*, 360 S.C. 33, 45-46, 599 S.E.2d 448, 454 (2004) (finding an issue unpreserved where the State objected to a witness's testimony, the objection was sustained, and the defendant failed to raise his argument regarding the trial court's exclusion of the testimony or proffer what that witness's testimony would have been had the witness been allowed to continue testifying).

2. As to whether the trial court erred in failing to grant a directed verdict: *State v. Phillips*, Op. No. 27607 (S.C. Sup. Ct. refiled Apr. 20, 2016) (Shearouse Adv. Sh. No. 16 at 20, 24) ("In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight."); *id.* at 25 ("When the evidence presented merely raises a suspicion of the accused's guilt, the trial

court should not refuse to grant the directed verdict motion."); *id.* ("However, the trial court must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000))); *id.* at 46 (stating that when ruling on a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the State); *State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015), *reh'g granted*, (Dec. 23, 2015), *reh'g denied*, (Feb. 11, 2016) ("[O]ur duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was substantial circumstantial evidence from which the jury could infer [the defendant]'s guilt."); *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) ("Therefore, although the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."); *State v. Pearson*, Op. No. 27612 (S.C. Sup. Ct. filed Mar. 23, 2016) (Shearouse Adv. Sh. No. 12 at 13, 23) (reversing this court's reversal of the denial of a directed motion, finding this court "weighed the evidence and erroneously required the State, at the directed verdict stage, to present evidence sufficient to exclude *every* other hypothesis of [the defendant]'s guilt").

AFFIRMED.

HUFF, A.C.J., and KONDUROS and GEATHERS, JJ., concur.