

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Post Conviction Relief

APR 08 2020

S.C. SUPREME COURT

Honorable William H. Seals, Jr., Circuit Court Judge

Case No.: 2015-CP-22-01113

Tamar Yaron Bryant,

Petitioner,

vs.

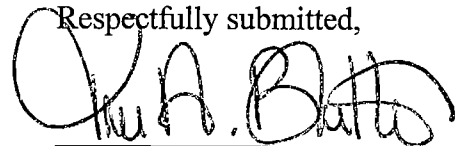
State of South Carolina

Respondent.

NOTICE OF APPEAL

Tamar Yaron Bryant, Petitioner, appeals the Order Denying Post Conviction Relief issued by the Honorable William H. Seals, Jr., on December 5, 2019, which was filed on December 20, 2019. Petitioner also appeals the Order denying Applicant's Motion Pursuant to Rule 59 (a) & (e), SCRCPP, which was issued via Form Four on March 6, 2020 and filed on March 9, 2020. Petitioner, through counsel, received notice of the entry of the latter Order on March 13, 2020.

Respectfully submitted,



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

April 8, 2020

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP-22-1113

Tamar Bryant, # 354710

State of South
Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: William H. Seals, Jr.

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- STAYED DUE TO BANKRUPTCY
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other _____

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

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

ORDER INFORMATION

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

FILED
ALBERTA Y. WHITE
CLERK OF COURT
2020 MAR -9 PM 3:50
GEOURGETOWN COUNTY, SC

INFORMATION FOR THE JUDGMENT INDEX

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

RECEIVED
APR 08 2020
S.C. SUPREME COURT

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

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

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


Circuit Court Judge

2157
Judge Code

3/6/2020
Date

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This matter comes before the Court on Applicant's Motion Pursuant to Rule 59(a) & (e). After careful and deliberate reconsideration of the arguments made at the evidentiary hearing, all evidence presented, the Court's Order denying and dismissing the application with prejudice, Applicant's Motion Pursuant to Rule 59(a) & (e), and all case law, the Court is hereby denying Applicant's Motion Pursuant to Rule 59(a) & (e).

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)
Tamar Yaron Bryant,)
S.C.D.C. No. 354710,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
) Case No.: 2015-CP-22-01113
) **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Tamar Yaron Bryant ("Applicant") on December 9, 2015. Respondent made its return on or about February 5, 2016. The Court convened an evidentiary hearing into the matter on Monday, March 25, 2019, at the Georgetown County Judicial Center in Georgetown, South Carolina. Applicant was present at the hearing and represented by Tricia A. Blanchard, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel Ronald W. Hazzard, Esq. ("Trial Counsel"), and appellate counsel David Alexander, Esq. ("Appellate Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Georgetown County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the pleadings, Applicant's amendment, and the exhibits introduced at the hearing. The Court finds as follows:

FILED
2019 DEC 20 AM 11:25
SALMA Y. WHITE
CLERK OF COURT
GEORGETOWN COUNTY, S.C.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the May 2011 term of the Georgetown County Grand Jury for murder (2011-GS-22-00495). Ronald W. Hazzard, Esq. represented Applicant, and Erin Bailey, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

On September 21, 2012, Applicant appeared before the Honorable Steven H. John for a hearing on Counsel's motions for a mental health evaluation pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) and M'Naughten's Case, 8 Eng.Rep. 718 (1843). After a brief hearing, Judge John orally denied the motions.

On December 17, 2012, Applicant appeared before the Honorable Benjamin H. Culbertson for a hearing on Counsel's motion to reduce bond, as well as new motions to evaluate Applicant for competency and criminal responsibility. After a hearing, Judge Culbertson orally denied the motions.

On March 18, 2013, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on March 20, 2013. Judge Hyman sentenced Applicant to imprisonment for a term of 35 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by David Alexander, Esq., who raised the following issue:

Whether the trial court's refusal to order a mental competency examination was erroneous because it was based on an improper consideration, a mistake of fact, and the State consented to the evaluation?

By unpublished opinion decided December 3, 2014, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Bryant, Op. No. 2014-UP-440 (S.C. Ct. App. filed Dec. 3, 2014). The Remittitur was issued on December 19, 2014.

Present Application

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

1. "Ineffective assistance of trial counsel."
 - a. "Failure to properly prepare Applicant prior to trial."
 - b. "Failure to call witnesses and utilize evidence."
2. "Ineffective assistance of appellate counsel."
 - a. "Failure to raise all meritorious issues on appeal."

By and through PCR counsel Blanchette, Applicant amended his application by filing on August 27, 2018, to raise the following allegations:

1. Ineffective assistance of trial counsel, in that:
 - a. Counsel failed "to properly advise Applicant regarding and utilize Applicant as a witness at the Jackson v. Denno¹ hearing."
 - b. Counsel was ineffective "For the handling of the witness, Shaquetta Holmes."
 - c. Counsel failed "to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C. 260, 785 S.E.2d 121 (2016)."
 - d. Counsel failed "to enter an objection or exception to the Court's comments, specifically, but not limited to comments regarding searching for the truth to the jury."
2. Ineffective assistance of appellate counsel, in that:
 - a. Counsel failed "to raise all meritorious issues on appeal, specifically, but not limited to: [t]he admissibility of Applicant's interrogation / confession."

Applicant requests relief as follows:

- "A new trial."

¹ Jackson v. Denno, 378 US. 368 (1964).

At the evidentiary hearing, Applicant proceeded forward on the allegations as set forth in the August 27, 2018, amendment.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Ineffective Assistance of Trial Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of

performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to

consider the totality of the evidence before the judge or jury.” United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Advise, Call Applicant as Witness in Denno Hearing

The Court finds Applicant has failed to meet his burden of showing ineffectiveness through his claim that Counsel was ineffective in failing to properly advise him regarding his right to testify at the Jackson v. Denno hearing, and in failing to call him as a witness. “A criminal defendant is deprived of due process of his conviction is founded, in whole or in part, upon an involuntary confession.” State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Denno, 378 U.S. at 377). “The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence.” State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008). In determining whether a confession was given voluntarily, the court must consider the totality of the circumstances surrounding the defendant’s giving the confession. Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (citing Schneekloth v. Bustamonte, 412 U.S. 218, 226 (1973)). “As the United States Supreme Court has instructed, the totality of the circumstances includes ‘the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use

of physical punishment such as the deprivation of food or sleep.” Id. “[N]o one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances.” Id. “Although courts have given confessions by juveniles special scrutiny, courts generally do not find a juvenile’s confession involuntary where there is no evidence of extended, intimidating questioning or some other form of coercion.” Id., 373 S.C. at 568, 647 S.E.2d at 165. “Once the trial judge determines that the statement is admissible, it is up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made.” State v. Miller, 375 S.C. 370, 383, 652 S.E.2d 444, 451 (Ct. App. 2007).

Trial

The parties promptly launched into a Denno hearing at the outset of trial. (Trial Tr. 6-31). Investigator James Clinton Busbee testified he arrested Applicant, then seventeen years of age, and took him into custody at around 3:30 A.M.; officers did not draw their firearms and verbally Mirandized Applicant on the way to the patrol vehicle. (Trial Tr. 6-8; Trial Tr. 18, ll. 2-4). Busbee told Applicant he was under arrest for murder. (Trial Tr. 20, ll. 12-25). Applicant and Busbee arrived at the station and waited outside for another officer to let them in. As they waited, Applicant smoked a cigarette, drank some water, and made initial statements to the effect of that “he was with those guys but he didn’t shoot that guy,” and that while he had a gun on his person, he did not shoot the victim, and that another person had been armed with a shotgun; Busbee noted to Applicant that the victim had not been shot with a shotgun. (Trial Tr. 8-10; Trial Tr. 15-17; Trial Tr. 21, ll. 1-8). Once inside, Applicant was additionally provided a written Miranda warning. (Trial Tr. 8, ll. 9-11; Trial Tr. 10-11). Applicant never expressed confusion or asked any questions regarding his rights. (Trial Tr. 21, ll. 9-24). Busbee initiated the recorded interview with Applicant around a little over an hour after arresting Applicant. (Trial Tr. 15, ll.

1-12; Trial Tr. 16, ll. 4-18). The interview inside the station lasted around 30 to 40 minutes. (Trial Tr. 11, ll. 16-18). Busbee testified that he did not threaten Applicant with physical harm, did not threaten Applicant's family, never drew his weapon, and did not physically assault Applicant. (Trial Tr. 11-12). Busbee recalled that Applicant was alert, appeared to be sober, and appeared to understand and respond to his questions. (Trial Tr. 12, ll. 9-23; Trial Tr. 22, ll. 13-25). Busbee did not deny Applicant access to restroom facilities, water, or the opportunity to smoke a cigarette. (Trial Tr. 12-13). The interview was then displayed; Applicant told Busbee in effect that he shot the victim in retaliation, as the victim had shot at him and others in Hemingway, South Carolina in 2007. (Trial Tr. 13-14; Trial Tr. 201, ll. 8-16). Busbee did not recall ever asking Applicant if he wished to speak to a parent or legal guardian, but did recall speaking to Applicant's mother at some point prior to the arrest. (Trial Tr. 18-19).

After a brief argument by the State that the statements were voluntarily given, with a citation to State v. Pittman, the court inquired if Trial Counsel intended to present any evidence in the Denno hearing. (Trial Tr. 23-24). Trial Counsel explained:

I've spoken with Mr. Bryant. Please stand up, sir. Spoken with Mr. Bryant regarding the protocol for a Jackson v. Denno hearing, I've informed him that he has the right to call witnesses on his behalf. He also has the right to testify with regard to the issues of whether or not there was any threat, coercion, promises, intimidation or force used to compel his statement. In speaking with him approximately an hour ago he indicated that he did not wish to testify in a Jackson v. Denno hearing. I ask the Court to confirm that with him for the record.

(Trial Tr. 24, ll. 4-13). Upon the trial court's inquiry, Applicant confirmed Trial Counsel's statements. (Trial Tr. 24, ll. 14-15). Applicant confirmed that he understood that if he testified in the Denno hearing it would not be heard by the jury, and again that he did not wish to testify. (Trial Tr. 24, ll. 16-21). Applicant further confirmed he had plenty of time to discuss the matter with Trial Counsel, and again confirmed he did not wish to testify. (Trial Tr. 24-25).

Trial Counsel thereafter argued the factors to be considered weighed in Applicant's favor: Applicant was young, lacked education, was of low intelligence, and suffered from mental health issues such that he did not properly understand the consequences of the waiver that was made and the rights he gave up. (Trial Tr. 25-26). Trial Counsel explained to the court that Applicant, at the age of twelve or thirteen, watched his father beat his mother nearly to death, and had been referred for clinical assessments on several occasions but was dismissed as a lack of discipline. (Trial Tr. 26-27). After the trial court noted Applicant's evident understanding during questioning by the court, Trial Counsel offered numerous citations² and argued the combination of Applicant's youth, his interrogation in an unfamiliar place, the lack of parent or guardian, and other stated factors provided that Applicant did not understand the consequences of his statements such that they were not intelligently and voluntarily given. (Trial Tr. 27-29). The trial court noted that the Miranda warnings included an admonition that anything Applicant said could be used against him, and Trial Counsel simply replied that the warnings did not necessarily reflect upon Applicant's capacity to understand the warnings. (Trial Tr. 29-30).

Judge Hyman found the statements were voluntarily given and provided extensive reasons for his finding on the record: it was a continuous interview in an unthreatening setting that lasted about forty-five minutes, and Applicant appeared on the video to be "very, very comfortable giving this statement or he appeared to be comfortable. In fact, he appeared to be almost nonchalant in, in giving this statement." (Trial Tr. 30-31). The trial court noted Applicant's lack of formal education, but opined he was "very street wise" and understood the criminal justice system from his prior experience with it. (Trial Tr. 31, ll. 2-15). Judge Hyman

² Application of Gault, 387 U.S. 1 (1967); State v. Smith, 268 S.C. 349, 234 S.E.2d 19 (1977); Withrow v. Williams, 507 U.S. 680 (1993); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

noted there were no misrepresentations made by law enforcement, nor promises made, and ultimately the statement would come in at trial. (Trial Tr. 31, ll. 15-20).

The video recorded statement was admitted into evidence during trial and played in open court before the jury over Trial Counsel's objections. (Trial Tr. 198-200).

PCR Evidentiary Hearing

At the evidentiary hearing, Trial Counsel testified he met with Applicant on fifteen occasions prior to trial, and that he reviewed with Applicant the video recording of Applicant's interrogation many times. Trial Counsel testified that he explained to Applicant that he had a right to testify and that there would be no jury present at the Denno hearing, but Applicant did not want to testify. Trial Counsel opined that Applicant's testimony at the Denno hearing would have been great, as he could have established that he was under the influence of both drugs and alcohol at the time of his statements to law enforcement.

On cross-examination, Trial Counsel explained that he arranged to transport Applicant on November 30, 2012, to an otherwise empty Courtroom 3B at the Georgetown County Judicial Center and discuss the statement with him in the courtroom in an effort to impress upon him the severity of the situation, but Applicant simply would not grasp the gravity of his situation. Counsel recalled he asked Applicant how to deal with the statement, to which Applicant offered the simple and bewildering answer that he had told the cops he did it, so he would just tell the cops he didn't do it. Counsel testified during the same meeting he reviewed with Applicant his right to remain silent, and that Applicant would not entertain plea offers extended by the State. Counsel testified he next met Applicant on December 4, 2012, at which time he attempted to discuss with Applicant his prior convictions, but Applicant was not forthcoming. Applicant indicated he did not wish to testify, but Counsel nonetheless "coached" him on how to testify

during a trial. Counsel testified he again met with Applicant on December 17, 2012, when they appeared before Judge Culbertson, where Applicant again indicated he did not wish to testify. Counsel testified that he once again discussed Applicant's options regarding testifying and calling witnesses on March 1, 2013, and Applicant again indicated he did not wish to testify and further did not wish to call witnesses. Trial Counsel explained that Applicant was a pleasant client and never argumentative, but otherwise refused to discuss or acknowledge the case against him. Applicant's detachment was so great that Trial Counsel sought to have Applicant mentally evaluated, but his motions were rejected by both Judges John and Culbertson.

Applicant testified he only met Trial Counsel six or seven times, and that he could not remember reviewing the video recording of his statements to law enforcement in the courtroom. Applicant denied Counsel ever discussed testifying or not testifying during the Denno hearing. Applicant claimed he did not know he could testify during the Denno hearing, and then not testify during trial. Applicant testified that when he told the trial court that he did not wish to testify, he did not understand the scope of the court's questions. Applicant agreed he and Trial Counsel "had a disconnect" throughout representation, and explained it was due to remarks made by Trial Counsel about bond early in the representation.

Applicant testified to his recollection of events at the time of his arrest and interview by law enforcement. Applicant recalled that when he was arrested he denied involvement and laughed, which angered the police. The police took him into a room, but did not say anything about recording him. Applicant testified that he fabricated a statement to the police that he did not know why he shot the victim. Applicant emphasized that he made the whole thing up, and that he fabricated further answers because the police continued to ask questions when he said he didn't know anything. Applicant testified he gave information he knew to be false. Near the end

of the interview, one officer gave him a business card, such that Applicant thought the police did not believe him. Applicant testified he told the police whatever they wanted to hear in order to get it over with and move on. On cross-examination, Applicant admitted that he was aware of his rights, including his right to remain silent.

Appellate Counsel also remarked upon Applicant's statement in the context of considering which issues to raise on appeal. Appellate Counsel recognized the Denno issue and watched the videotaped statement. Appellate Counsel described Applicant as flat in affect, and not serious in his demeanor. Appellate Counsel also noted Applicant was mirandized on the recording. Appellate Counsel described the statement as a "problem," but opined he did not believe he could prevail on the issue given the record available.

Findings

Applicant has failed to demonstrate either deficiency on the part of Counsel, or any conceivable prejudice from the deficiency alleged. First, the Court finds Applicant fully understood his right to testify at the Denno hearing, and that his testimony would not be exposed to the jury. Both Trial Counsel and the Court repeatedly endeavored to impress the fact upon him and could do no more to explain it. While Applicant's age is a factor to be strongly considered in the abstract in determining if he understood Trial Counsel's advice, he was seventeen years old at the time of the incident and merely two months away from his eighteenth birthday. Applicant never expressed any confusion prior to trial to his attorney or at trial regarding his right to testify at the hearing. Applicant's arguments that he did not fully comprehend every aspect and consequence of his decisions is little more than the same argument rejected by the trial court, redressed for post-conviction relief. Trial Counsel performed within the scope of reasonably effective assistance in advising Applicant of his rights.

Second, Applicant himself repeatedly refused to testify, despite efforts by both Trial Counsel and the trial court to fully appraise him of his right to testify at the Denno hearing. Knowing his rights, Applicant himself chose not to testify, and Trial Counsel could not make him do so.

Third, even if taken as true, Applicant's testimony at the evidentiary hearing does not provide any information to establish that his statement was not voluntarily given. To the contrary, Applicant asserts he knowingly and deliberately gave a statement to law enforcement—he merely asserts that it was a fabrication. Applicant's admitted effort to deceive law enforcement reflects conscious intent to make the statement on his part, however self-destructive the statements may have been, and not any confusion as to whether he had the right to remain silent. Applicant himself admitted to understanding he had the right to remain silent. As such, to whatever extent Applicant's testimony could be relied upon as true, had it been given at the trial Denno hearing would not have changed the outcome of that hearing, such that his confession would have been excluded at trial.

Fourth, the Court does not find credible Applicant's testimony that he was lying to law enforcement during his recorded confession. In a fashion comparable to the descriptions of Applicant's demeanor in the recorded statement as relaxed, nonchalant, and not serious, this Court is struck by Applicant's similar demeanor in the course of his testimony at the evidentiary hearing. Trial Counsel also testified to Applicant's cavalier attitude toward the truth, as evidenced by Applicant's offered strategy that he could deny involvement with the killing as readily as admit to it. Applicant's detached admissions of prior dishonesty do not compel this Court to conclude he was previously dishonest, but only that his testimony at the evidentiary hearing is not to be afforded credible weight. Had Applicant provided the same testimony at the

Denno hearing, this Court can only conclude the self-destruction of his own credibility would have more likely harmed his chances of prevailing upon the motion to suppress.

The Court finds Trial Counsel performed as capably as could be expected given an uncooperative and dishonest client. Even if Trial Counsel had done anything different so as to elicit Applicant's testimony during the Denno hearing, the testimony would not have changed the outcome of the hearing. Accordingly, Applicant has failed to establish either deficiency on the part of Trial Counsel, or that but for the deficiencies alleged there was a reasonable probability of a different outcome at trial. Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Adequately Cross-Examine Witness Shaquetta Holmes

The Court finds Applicant has failed to meet his burden of showing Trial Counsel was ineffective in his handling of the witness Shaquetta Holmes. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. Rule 801(d)(1), SCRE. "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement." Rule 613(b), SCRE. "[I]f a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible." Id.

Trial

At trial, Shaquetta Holmes was called as the State's second witness. (Trial Tr. 121-41). Holmes testified she was present at the Plantersville club with her uncle Lavern Holmes and

cousin Deon Myers, the victim, on March 15, 2011. (Trial Tr. 121-22). Holmes testified right to the point:

What happened from the incident that happened in the club to my knowledge is whenever my uncle came in the club he did have a big gun, and with him having the gun I was at the bar. With me being at the bar I felt as though I wasn't going to sit there and just let him do nothing stupid. So I went in the bathroom behind him and told him he need to leave him alone and go. So me telling him that, he left, but with him leaving Tamar in the bathroom.

(Trial Tr. 123, ll. 5-13). After clarifying Lavern was armed with large-bore long gun, Holmes continued:

When I went in the bathroom [the victim] was just against the wall and my uncle was holding the door and with him being behind the door my thing was for him to leave him alone and go or whatever. So me stating that, I was holding Deon then and with me holding him down that's when Tamar came in and I was telling him that they had guns.

(Trial Tr. 124, ll. 9-14). After clarification that the door to the bathroom was open, and the victim was behind the open door in the bathroom, Holmes explained Applicant's appearance:

Okay, with my uncle leaving out Tamar came in, with him coming in he was saying Deon was good, I was telling Deon no because he didn't have a gun and they had guns and he was like, "Yeah, he good," let him go see what they talking about. He insisted on leaving. With him leaving before he got to the front door, with Tamar leaving out first and before Deon got to the door whatever happened with the gunshot that's what.

(Trial Tr. 125, ll. 17-23). Holmes denied seeing the fatal shot, but only heard it. (Trial Tr. 125, ll. 24-25). Holmes further testified Applicant had been armed with "a little black gun." (Trial Tr. 126, ll. 11-12). Holmes returned to the bathroom after hearing the gunshot. (Trial Tr. 126, ll. 13-14). Applicant was not in the bathroom, and Holmes clarified that Applicant had been the first to exit the restroom, followed by the victim, followed by herself. (Trial Tr. 126, ll. 17-24).

On cross-examination, Trial Counsel walked Holmes through her testified version of events in somewhat clearer fashion: she arrived at the club sometime before 10:30 p.m. alongside Mark and Jonathan Greer. (Trial Tr. 127-28). While at the club, her uncle Laverne

PCR Evidentiary Hearing

At the evidentiary hearing, Trial Counsel testified he and Applicant discussed Applicant's version of what occurred the night of the killing. Applicant admitted to Trial Counsel he was present at the club on the night of the killing, and that he had been in the bathroom with Holmes, two other women, and the victim. Applicant told Trial Counsel that Holmes would be able to confirm that Applicant was not in the restroom at the time of the shooting. Trial Counsel recalled that Holmes gave two statements to law enforcement. Holmes' first statement neither confirmed nor denied Applicant shot the victim. Trial Counsel directed a private investigator in the employ of the public defender's office, F. Jerome Randall, to separately interview Holmes, which occurred on December 11, 2012. Randall reported to Trial Counsel:

Ms. Holmes states that on the night of the incident at the club in Plantersville she was in the bathroom with the victim Mr. Myers and Tamar Bryant. Ms. Holmes states that Tamar and the victim had a conversation inside the bathroom; however it was not a hostile meeting. She cannot remember what was said exactly. She does remember telling the victim to calm down and just be cool, because she knew the guys did not run up in there for NO reason. She knew or suspected that they all had guns. She knew that Tamar had a gun from being in the bathroom with him. Mr. Myers and Tamar walked out of the bathroom ahead of Ms. Holmes and as soon as she reached the door the shots rang out. She cannot said who did the shooting, she remain inside the restroom until things calm down.

(Applicant's Exhibit #1). Holmes' second statement to law enforcement and the prosecution in March 2013, however, unequivocally confirmed Applicant shot the victim. (Applicant's Exhibit #2). Trial Counsel conveyed the substance of the statements to Applicant and discussed them with him. When asked why he did not confront Holmes with Randall's affidavit, Trial Counsel noted that Holmes did not state that Applicant committed the crime. Trial Counsel additionally noted the affidavit was a synopsis of what Holmes told Randall, and not her own sworn statement. Trial Counsel explained that he would have needed to call Randall as a witness in

entered the building toting the long gun alongside Cameron Green and quickly moved towards the victim and the restroom; the sight of the gun alarmed those who saw it. (Trial Tr. 128-30). Myers and two women with him retreated into the restroom and Laverne followed. (Trial Tr. 132-34). Holmes testified she heard Laverne question Myers over threats he supposedly made to Laverne's family; Myers denied any such threats. (Trial Tr. 130-31; Trial Tr. 132-33). Holmes told Laverne to leave Myers alone. (Trial Tr. 132, ll. 2-4). Laverne complied, and departed, leaving Myers, Holmes, and the two women³ in the restroom when Applicant entered with his own gun. (Trial Tr. 135-36). Holmes recalled that Myers wanted to follow Laverne and talk out the dispute, but Holmes warned him about the guns. (Trial Tr. 136, ll. 11-14). Applicant entered the restroom and indicated all was good; Myers indicated he knew Applicant and Holmes let him exit the restroom. (Trial Tr. 136-37). Myers was shot before he reached the front door. (Trial Tr. 136-37). Trial Counsel inquired if Holmes gave a statement to law enforcement, and she initially denied doing so. (Trial Tr. 138, ll. 6-13). When Trial Counsel pressed her on the subject, Holmes explained she never told any police officer that she knew Applicant or that she saw him with a gun, but rather:

When I was on the phone with the 911 people all I could think was it was my uncle that shot him and with me screaming that someone else was like he didn't shoot him, it was the other boy and the 911 call the lady was saying that they were on their way or whatever and she was trying to calm me down because, I mean I just couldn't sit there, but ---

(Trial Tr. 138, ll. 17-23). Trial Counsel followed up, and Holmes reaffirmed that she had been screaming that she thought her uncle Laverne shot the victim. (Trial Tr. 138-39).

On redirect examination, Holmes testified she did not know who shot Myers, but had heard others exculpate Laverne and inculpate Applicant. (Trial Tr. 139-40).

³ Holmes muddled this point in subsequent testimony, indicating the two women departed with Laverne. (Trial Tr. 137, ll. 9-14).

order to get the affidavit in for a very small gain, and in the process would have lost the right to the final closing argument.

On cross-examination, Trial Counsel testified that during his March 1, 2013, meeting with Applicant, Applicant indicated he did not wish to call witnesses in his own defense. With respect to Holmes, Applicant opined that he did not want her due to her connections to the victim. On redirect examination, Trial Counsel acknowledged that Holmes testified no ill words were exchanged between Applicant and the victim prior to the shooting.

Applicant testified that Holmes could have testified that Applicant was not present at the club at all. Applicant recalled he told Trial Counsel to cross-examine Holmes and clarify that she did not see him, and that he was not the shooter. Applicant denied ever discussing Holmes' statements with Trial Counsel.

Findings

The Court finds Applicant has failed to meet his burden of showing ineffectiveness. Applicant's claim appears to take two forms: failure to adequately cross-examine Holmes with her prior statements, and failure to elicit from her more favorable testimony. As to Trial Counsel's use of Holmes' first statement to authorities, he did confront Holmes with her initial statements to first responders, which she ultimately admitted, such that he could not have introduced any extrinsic evidence of the first statement. As to Trial Counsel's use of Holmes' statement to the private investigator, Holmes testimony was largely consistent, such that her prior consistent statement would have constituted hearsay. Additionally, Trial Counsel articulated a valid strategic reason to not introduce the statement to the private investigator—it was of limited value to his client and would have cost him the final argument. As to Trial Counsel's use of Holmes' second statement to authorities, the summation provided to Trial

Counsel inculpated his client *more* than Holmes' trial testimony, where she never identified Applicant as the shooter, such that any attempt to bring it in would have doubtlessly harmed Applicant's defense. As to Trial Counsel's failure to elicit more favorable testimony, attorneys cannot choose the facts available to them or make a witness testify in a particular fashion. Holmes testified in a reasonably consistent manner that Applicant was present at the club on the night of the shooting, was armed with a gun, and was in the proximate vicinity of the victim. There is nothing before this Court to suggest she was ever a potential alibi witness. Assuming for the sake of argument that Holmes repeatedly fabricated a story and could today provide Applicant an alibi, she did not testify at the evidentiary hearing as would be necessary for Applicant to meet his burden of proving so. Finally, it is difficult to discern how *any* change in Holmes testimony, realistic or fantastic, could have changed the outcome at trial where the other evidence which would have been unaffected conclusively pointed to Applicant's guilt: Cameron Green testified Applicant confessed to shooting Myers while being assailed by Lavern, Applicant himself confessed to law enforcement, and the bullet recovered from the victim was of the same caliber as the revolver identified by Applicant as the one he used in the killing. For all of these reasons, the Court finds Applicant has failed to demonstrate any deficiency in Trial Counsel's handling of Holmes' as a witness, or any reasonable possibility that but for the deficiencies alleged the outcome at trial would have been different, and his request for relief by way of this allegation is **DENIED**.

3. Failure to Object to Malice Instruction

The Court finds Applicant cannot show ineffectiveness on the part of Trial Counsel for failing to object to the exclusion of the "general permissive inference instruction" from the trial court's jury instructions regarding malice. In State v. Elmore, 279 S.C. 417, 803 S.E.2d 781

(1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991), the Supreme Court of South Carolina held that the trial court's instruction on malice as it related to the use of a deadly weapon constituted a mandatory presumption, and set forth a jury charge consistent with the Due Process Clause for trial courts to utilize in the future:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would simply [be] an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Elmore, 279 S.C. at 421, 308 S.E.2d at 784. The Elmore Court firmly advised the bench "that hereafter only slight deviations from this charge will be tolerated." Id.

The Supreme Court returned to the inference of malice from the use of a deadly weapon more than 25 years later in State v. Belcher, and held that the first sentence of the above charge could not be instructed to juries where the record contained evidence to reduce, excuse, mitigate, or justify a homicide or assault and battery with intent to kill. 385 S.C. 597, 685 S.E.2d 802 (2009). The Court distinguished the remainder of the charge as the "general permissive inference instruction," and noted that it remained valid. Id., 385 S.C. at 612, n. 9, 685 S.E.2d at 810, n. 9.

A few years later, in Gibson v. State, the Supreme Court reversed a denial of post-conviction relief where the trial court charged the inference of malice from the use of a deadly weapon, but failed to include the remainder of the Elmore charge. 416 S.C. 260, 785 S.E.2d 121 (2016). Gibson was decided in simple fashion, without briefing or oral arguments, based on the very reasonable observation that total omission of the general permissive inference language was no "slight deviation" from the Elmore charge, in clear disregard for Elmore's admonition.

At trial, the trial court provided a standard instruction on malice which concluded that malice “may be inferred from conduct showing a total disregard for human life.” (Trial Tr. 316-17). The trial court did not instruct the jury on the inference of malice from the use of a deadly weapon.

At the evidentiary hearing, Trial Counsel could not think of any reason to request any further jury instructions regarding the inference of malice.

The Court finds Applicant cannot show deficiency on the part of Trial Counsel by way of this allegation. The general permissive inference of malice portion of the Elmore is only necessary and required as part of a complete instruction on the inference of malice from the use of a deadly weapon,⁴ and there had never been any requirement to charge the language in a stand-alone fashion. The language of the Elmore charge is specifically tailored to deal with the perceived and real dangers in instructing the jury that inference may be inferred *from the use of a deadly weapon*, and represents a solution to the then-recurring problem of jury instructions which provided for burden-shifting presumptions in violation of the United States Constitution. The second part of the Elmore charge serves as a cautionary restraint on the first part, and is of little instructional value standing alone. Standing alone, the instruction demanded would be confusing. Additionally, the Court notes that the trial court’s charge appears comparable to that approved of in State v. Cottrell, which similarly only instructed “that malice could be inferred from conduct showing a total disregard for human life.”^{421 S.C. 622, 643-44, 809 S.E.2d 423, 434-35 (2017)}. Furthermore, even if the Supreme Court subsequently holds that the general permissive inference instruction was required in every case involving malice aforethought, the absence of any clear precedent to that effect at this time and at the time of trial provides that

⁴ Though not terribly relevant to this Court’s analysis, it bears acknowledgment that the Supreme Court of South Carolina has since consigned the “inference of malice from the use of a deadly weapon” charge to the dustbin of history. State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

Counsel could not have possibly known to demand the language, or object to its exclusion. For all of these reasons, Applicant cannot show any deficiency on the part of Counsel by way of this allegation.

As to prejudice, even if the charge were required, the Court cannot conceive of how Applicant was prejudiced by the absence of the general permissive inference instruction. In the absence of the implication of malice from the use of a deadly weapon, the instruction demanded says little more than what is already instructed to the jury: that they may use evidence and give it such weight as they determine it should receive. (Tr. 309, ll. 18-22). The Court finds there is no reasonable probability the outcome of trial would have been different if only Counsel had requested, and the trial court had charged the jury with a naked general permissive inference instruction. Thus, Applicant cannot meet his burden of showing Strickland prejudice.

For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

4. Failure to Object to Truth-Seeking Instruction

The Court finds Applicant has failed to meet his burden of showing Trial Counsel was ineffective in failing to object to the trial court's opening remarks to the jury regarding the "search for the truth." "Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they 'run the risk of unconstitutionally shifting the burden of proof to a defendant.'" State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998)); see also State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (notwithstanding lack of preservation of issue, advising trial courts to not instruct any jury that their duty is to return a verdict that is "just" or "fair" to all parties); State v. Beaty, 423 S.C. 26, 32-34, 813 S.E.2d 502, 505-06 (2018)

(instructing courts not to use "search for the truth" language in opening remarks to the jury, but finding no prejudice from the error). "Truth seeking" instructions may be entirely harmless where they are provided in a context distinct from the burden of proof, such as instructions on determining witness credibility. *Id.*, 343 S.C. at 28-29, 538 S.E.2d at 252-23. "[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *Id.*, 343 S.C. at 27, 538 S.E.2d at 251 (citing *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994)).

At the outset of the trial, Judge Hyman addressed the jury:

It seems that every time we turn on the TV there is a trial going on of some sort of TV show or movie, and every one of those trials seem to be the most riveting and exciting things that you can imagine. In reality that's not necessarily how a trial really goes. *The search for the truth is often tedious, repetitive and slow* and that's as it should be for we have here at stake this, this day, this week is not only the right of the State to punish those that it feels has or have violated the laws of this state, but also we have the liberty of this Defendant at stake and he has plead not guilty to the indictment that I presented to you earlier, and again, I want to make sure that you understand that this indictment is not evidence in this case, it is just the document by which he is charged.

(Trial Tr. 74-75) (emphasis added). Later in the opening remarks, Judge Hyman discussed judging witness credibility with the jury:

At the end of the case you and you alone will determine or say what happened, what transpired during this event. You as jurors will judge the credibility or believability of every witness who testifies in this trial. In doing so you can apply just about any test that you in your experience have determined to be a fair and reasonable and responsible way of *determining what the truth is*.

(Trial Tr. 76, ll. 1-7) (emphasis added). The trial court's ultimate instructions charged the jury, repeatedly, that Applicant was presumed innocent unless and until the State proved his guilt beyond a reasonable doubt. (Trial Tr. 310-11; Trial Tr. 312, ll. 15-17; Trial Tr. 315, ll. 2-9; Trial Tr. 316, ll. 3-6; Trial Tr. 317-18; Trial Tr. 319, ll. 21-22).

At the evidentiary hearing, Trial Counsel simply remarked that he did not object to Judge Hyman's remarks about the search for truth, and that the trial was before the Supreme Court's most recent admonition against using truth-seeking language in remarks to the jury.

The Court finds Applicant has failed to show any deficiency on the part of Trial Counsel or any prejudice from the deficiency alleged. Judge Hyman's remarks did not impress upon the jury any impression that their duty was to seek the truth, but rather (1) explained that real trials were much more time intensive than those reflected on television, and (2) that jurors had wide discretion in making credibility determinations. The "truth seeking" language employed by Judge Hyman appears to be precisely of the kind held to be acceptable in Aleksey, and substantially less concerning than the comments addressed in Beaty, which affirmatively described a trial as "a search for the truth in an effort to make sure that justice is done." Beaty, 423 S.C. at 32, 813 S.E.2d at 505. If the comments at issue in Beaty were not sufficient to prejudice the defendant, the comments at issue here absolutely do not prejudice Applicant. Accordingly, the Court finds no deficiency on the part of Trial Counsel by way of this allegation, nor prejudice therefrom, and Applicant's request for relief is **DENIED**.

B. Ineffective Assistance of Appellate Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather, appellate counsel has a professional duty to choose among potential issues according to

their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy”)).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

At the evidentiary hearing, Applicant testified he believed Appellate Counsel should have raised the voluntariness of his statement to law enforcement and the denial of his motion to suppress under Jackson v. Denno.

Appellate Counsel testified he recognized the Denno issue and watched the videotaped statement. Appellate Counsel described Applicant as flat in affect, and not serious in his demeanor. Appellate Counsel also noted Applicant was mirandized on the recording. Appellate Counsel described the statement as a “problem,” but opined he did not believe he could prevail on the issue given the record available. Appellate Counsel opined the denial of the Denno

motion could have been raised as a companion issue to the denial of Trial Counsel's motion to have Applicant's mental health evaluated, but would not have meaningfully bettered his argument.

The Court finds Applicant has failed to meet his burden of showing ineffectiveness on the part of Appellate Counsel. The issue insisted upon by Applicant is not clearly superior to that raised by Appellate Counsel. Appellate Counsel did not overlook the issue, but actively reviewed the evidence, considered the possibility of raising the Denno hearing on appeal, and opted instead to pursue the denial of the request for a mental health evaluation as the strongest issue available. As this Court has similarly found there is nothing in the record to support a finding that Applicant's statement was not voluntarily given, so too does this Court agree in Appellate Counsel's judgment that raising the issue on appeal would not have borne fruit. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

[Conclusion and signature on following page]

III. CONCLUSION


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

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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 day of December, 2019.


WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit



_____, South Carolina