**VOL. II OF II**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

**May 13 2020**

S.C. SUPREME COURT

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Certiorari to Spartanburg County

J. Mark Hayes, Circuit Court Judge

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JEREMY JEROME KNIGHT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001474

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# APPENDIX

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Q. Or potential charges. Now, isn't it true this is, you thought, there was a possibility that the facts that came out in Mr. Knight's statement gave some rise of some possibility, some evidence of voluntary manslaughter and involuntary manslaughter?

A. Correct.

Q. And on page 325 and 326, you request a voluntary manslaughter and involuntary manslaughter on the jury instructions, right?

A. Yes, ma'am.

Q. And that's because you felt that there was no evidence whatsoever from which a jury could form an opinion as to -- or could find voluntary manslaughter/involuntary manslaughter?

A. It was our hope.

Q. Now, and if you thought there was no hope of that, would you have told the applicant that?

A. Yes. We had -- are you talking about the lesser included charges?

Q. Yes.

A. Yes. We had that discussion for the first time that appears in my notes, I believe that was -- I apologize. Yeah. Yes, we did have that discussion. It looks like in my notes we had a significant discussion on that in our meeting on June 26th as far as

definitions of voluntary, involuntary and what it carries. And it would have been my normal practice to discuss the elements of those that would have to be met and what facts, if any, we would try to meet those lesser included's.

Q. And did you ever inform Mr. Knight at that time when you were reviewing that, that there was no evidence of voluntary or involuntary manslaughter in his case?

A. I don't have that specifically noted in my notes, but it would have been mine and Mr. Bartosh's usual practice to give our opinion on what we think the likelihood is of getting certain charges, jury charges of suppression motions and, and all of that. We would give our opinions to the defendant, but as to the charges that would be -- I'm sorry, did I answer that?

Q. Yes. So your common practice would be to give your opinions. Do your notes reflect that you ever said to Mr. Knight at that time, there was no evidence of voluntary or involuntary manslaughter in your case?

A. My notes do not reflect that. They do reflect that we discussed those two lesser included's and with -- and it would have been with the facts of the case in our opinions.

Q. Okay. And with the facts of the case there were, as you argued in the transcript, I believe it's page 325

and 6 where you made your argument, there was the broken necklace and the scratches on Mr. Knight, correct?

A. Correct.

Q. And as the State argued, some parts of the broken necklace were underneath the victim, suggesting that she was still alive when the necklace broke, I guess. She was sitting up and somehow turned over on the beads.

A. Um...

Q. Or was that the facts of the case that maybe some beads were under, underneath her body?

A. There were beads underneath. I don't have a specific recollection. And if it's in the transcript. I will -- if you can direct me to it, but I'm not sure that -- can you repeat the question, please.

Q. I guess the question was going to as far as any evidence whatsoever of voluntary manslaughter there was a broken necklace in this case, and the applicant, Mr. Knight, had been scratched on his face as the -- and the DNA showed that it was the victim who scratched him.

A. Correct. The theory being it was, it was a fight that was taking place.

Q. Correct. And that's the argument essentially that you made for voluntary manslaughter.

A. Okay.

Q. Now, the judge denied that argument, correct?

And then denied any instruction on voluntary before and voluntary manslaughter?

A. Correct.

Q. And in that denial, I refer you to -- I beg the Court's indulgence.

I believe it's page 327, lines -- excuse me, line [sic} 328, starting at line 3. The judge states, after reviewing both the statements on line four, it says I was trying to tell her that her actions didn't look good. I tried to set her up from behind. And then he goes on to say, in other words he's making physical contact with her, not she with him.

Now at that point did you make any argument that that statement could be ambiguous; that a jury could infer that that did not mean any kind of assault or touching?

A. I don't believe I did because I'm not sure that that's what I would have understood that to mean.

Q. Okay. Well, did the record reflect that you made any argument that the statement could be interpreted by some evidence whatsoever that, that statement did not mean any kind of assault?

A. I, I do not see that I made any further comments before he made his ruling on that two paragraphs later.

Q. Okay. And then on page -- and you had no

exception to the jury charge on page 372. So you did renew your objection to failing to give the voluntary and involuntary?

A. I did.

MS. ROSS: Beg the court's indulgence. I've got no further questions.

THE COURT: Any redirect based on what she went into?

MR. ISENBERG: Just a couple of questions, Your Honor.

REDIRECT EXAMINATION

BY MR. ISENBERG:

Q. When you advised Mr. Knight on June 26th about voluntary manslaughter, you had the DNA evidence or the DNA results in your discovery?

A. What I had was that I had the verbal and the e-mail information about what the findings were, but I did not yet have the formal --

Q. Right.

A. -- SLED report, which didn't say anything different than the information that I'd already been given by Rusty or Barry.

Q. And the e-mail information included the, the DNA from collected under her fingernails and from the necklace beads?

A. And from the sweater. No.

Q. From the sweater?

A. Just no beads.

Q. Okay. And so her DNA was found on his sweater, correct?

A. Correct. It was a mixture.

Q. And then his DNA was found on under her fingernails, correct?

A. Correct.

Q. And that ---

A. He was the primary contributor or the primary.

Q. Yeah. And I just want to be clear that you had that information when you were discussing voluntary manslaughter and whether there was some physical altercation?

A. Correct:

MR. ISENBERG: Okay. I have no further questions, Your Honor.

THE COURT: All right. Thank you, ma'am. You may step down.

THE WITNESS: Thank you.

THE COURT: Any reason why the witness cannot be excused?

MS. ROSS: No, Your Honor.

THE COURT: All right, you may be excused.

THE WITNESS: Thank you, sir.

THE COURT: Will lawyers approach a moment? Can lawyers approach?

(Bench conference was held off the record.)

MR. ISENBERG: Your Honor, Ms. Quimby can be excused, right?

THE COURT: Yes.

(Witness leaves witness stand and courtroom.)

MR. ISENBERG: Your Honor, the State would call Mr. Savitz.

THE COURT: Sir, just come right up here and I'll swear you in. Place your left hand on the Bible and raise your right. (Complies.)

Do you solemnly swear the testimony you're about to give the Court will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, sir, I do.

THE COURT: Thank you. Watch your step, but step up and have a seat in the red chair.

THE WITNESS: Thank you.

THE COURT: And pull that red chair up to the microphone.

JOSEPH L. SAVITZ,

having been duly sworn, testified at follows:

DIRECT EXAMINATION

BY MR. ISENBERG:

Q. Good morning, Mr. Savitz.

A. Good morning, how are you?

Q. Thank you for joining us. Appreciate it.

A. Good to be here.

Q. Appreciate you taking the time to drive up here. We'll go through this in a timely manner.

A. No rush.

Q. When you -- first of all, you were assigned to the appellate case for Jeremy Knight, correct?

A. Yeah. Yeah. I was working at appellate defense at the time and I did about half of the murder cases or, actually, half the homicides, and I just received his case. It was my turn, so I got his case.

Q. And how long did you work in appellate defense?

A. Twenty-six years.

Q. Okay. And how many times did you come across, and if you can ballpark it, issues of voluntariness of confessions, *Jackson* hearings in a case?

A. Any time there was a confession or statement, unless it was favorable somehow, you would have a Jackson v. Denno hearing, so they were routine. I mean, you would see them typically in homicide cases. You would see them in just about 90, you know plus percent.

Q. Right.

A. I mean, whether or not it was, you know, there was even grounds for suppression, it was just something the trial attorneys did. They moved to suppress the confessions. Like in this case, for example, the statements had been confessed. It would have been outcome determinative, basically, in the case, so there's no reason not to move to suppress it.

Q. And what was your custom or policy in regards to deciding whether to brief a *Jackson* issue or to not brief a *Jackson* issue?

A. Yeah. I mean, it was raised so often, you really had to have some reason. The defendant had to have been misled or tricked or, you know, like denied, like food is a good example. Like, you know, not having slept for a long time. Being on drugs. There had to be some reason the confession was involuntary. We didn't raise every Jackson v. Denno hearing.

Q. Right.

A. A lot of them, they're just, you know, I mean confessions and statements are routine and the procedures involved in them are rarely, you know, are usually, you know, routine. So a lot of them we didn't raise. A majority of them is -- in this case we didn't raise, you know, an appeal unless we had some reason that the -- usually -- the best ones were where the

defendant was somehow misled or tricked or something like that.

Q. Right. So in this case -- you might have said it and I didn't catch it. In this case why did you decide not to brief it?

A. I just, to me this was just one of those run-of-the-mill Jackson v. Denno hearings. The defendant said I was tired, I hadn't had any sleep, I hadn't had anything to eat. The police officer said, you know, the opposite. And so the judge basically had a factual dispute that he had to resolve, and he resolved it in favor of the State that the confession was voluntary.

I didn't see anything. I mean, in most cases you're gonna have a defendant who was tired and hungry when he gives a confession. If that's all you had to say I was tired and hungry when I confessed, no confessions would get in. So to me it was just a routine Jackson v. Denno hearing.

Q. Right.

A. That, that's the only part. While we're talking about it, that's the only part of this. I don't really have any independent recollection of --

Q. Right.

A. -- having handled this case. I don't want to

make it sound like I remember what I decided at the time. I have reviewed the Jackson v. Denno hearing in this case. Y'all sent me a copy. And, and having reviewed it, I mean, to me is just, you know, it's the kind of Jackson v. Denno hearing that we saw routinely. And I can see why it was important to, you know, get the statement suppressed --

Q. Right.

A. -- but that would have been a big deal if they could have done that, I understand.

Q. Right.

A. But I didn't see any basis to suppress it.

Q. And just to be clear, when you were reviewing hearings and you heard people talk about -- or, I mean, you saw that they were, the defendant said that they were tired and hungry --

A. Yeah.

Q. -- would you look to see if they requested food or sleep?

A. I mean, you would look. The thing about a -- it's kind of a totality of the circumstances. You look to see what, what was happening. I mean, had they eaten? When was the last time they ate? Had they gotten sleep? Did they appear to anybody else to be tired? Hungry? Was there any -- I mean, it has to

appear that their will was overborne somehow and the confession was -- I mean, what you're looking for is voluntariness.

Q. Right.

A. Is the confession voluntary? Did the lack of sleep, lack of food lead to him ---

Q. Right.

A. You know, like if you confess we'll give you food and let you sleep. Now, that's a different, you know, it's a different issue than like I'm hungry and I'm tired.

Q. So if -- and this is the last question. So it would have impacted your decision if the only thing in the record request wise was the applicant or defendant's request to smoke?

A. Yeah. Yeah. I mean, if he -- unless he said, listen, I am so hungry I am hallucinating. That would have been -- you know, if I just went, man, I'd like a break for a smoke, you know, that's, that's not the same thing.

MR. EISENBERG: Okay. No further questions of this witness, Your Honor.

CROSS-EXAMINATION

BY MS. ROSS:

Q. In reviewing that on the Jackson V. Denno --

A. Yes.

Q. -- was it common for the applicant or the defendant not to have written out his own statement, to have law enforcement write it for him?

A. Would that have made a difference to me?

Q. Yeah.

A. I, I don't remember that having happened. If that, if that is what happened, not necessarily. I mean, if this -- I mean just asking -- I mean, that happened a lot too where the cops -- I mean, I probably in most cases the police wrote out the statement. And, I mean, you have a lot of defendants that could not write their own statements out for whatever reason. And the police usually ended up writing them out anyway.

Q. Yeah. And in this one there was no evidence that defendant couldn't write or anything like that you recall?

A. I -- my recollection in this case is very, very sketchy at best.

Q. And was it common for those statements not to be recorded in any way?

A. At the time very few of them were recorded probably, would be my guess. But it is just a guess. I think the practice now is they're starting to head toward recording them, you know, more often. But back

then I don't think we got tapes of very many. I mean, it depends. This is, you know, this is one of the larger. I mean, in smaller cities no they didn't record them. Like somewhere like Spartanburg, Greenville, Columbia, Charleston.

Q. Okay. And so but at the end of it you did not brief the Jackson v. Denno issue?

A. No, I did not.

Q. Now, you did brief the failure to charge voluntary manslaughter.

A. Yes.

Q. And you did not brief failure to charge involuntary manslaughter.

A. That's correct.

Q. Now, just -- I refer you -- do you have a copy of your final brief?

A. I don't have anything. I have nothing. I'm sorry. I don't have access to any of my files anymore.

Q. No, that's fine. Does that look like that could be your final brief in Mr. Knight's case?

A. Seems kind of short but, yes, that is it.

Q. Going to that, what -- can you approximate your caseload or the time you spent on either --

A. Yeah.

Q. -- each of the cases at that time?

A. Yeah. I'm glad you brought that up. At the time this was -- we had very few attorneys in the office. And me and another guy, Bob Dyke, were doing all of the murder cases, all of the homicide cases and all of the capital cases, a good many of the drug cases. And we were basically writing a brief just about every day or so. And when you have a case -- our caseload was massive, and we didn't receive a whole lot of help from the Supreme Court, and we were trying to some up the way to reduce our caseload. And, you know, we also had -- we had direct appeals, PCR's. We had to come to go to other hearings where he can shrug. I mean, it was just a lot of stuff going on.

And we were -- not just me, but everybody there was overworked and we were just cranking these things out. And could I have done a better time in this case? If I had more time, I would have written a longer or better brief probably. I'm not sure that I would have -- that the issues would have been any different, but that is my one regret is that our caseload was so massive during this time.

I mean, I'm not saying I'm perfect. I have missed issues in cases before because of the caseload. I mean, I -- there may be an issue in this case I missed because of the caseload.

Q. All right. Now ---

A. I hope, I hope that answered your question. I'm not sure it did.

Q. Well, it answers the question about the caseload.

A. Yeah.

Q. So you were feeling like you didn't really have adequate time to spend on --

A. No.

Q. -- each and --

A. No.

Q. -- every case and do --

A. No. Well, I mean --

Q. -- a full murder transcript and --

A. -- like look at --

Q. -- try to brief it in a day.

A. -- this brief, you know? This is a murder case. Look how long this brief is. It's very short. And I'm not saying that if I'd had more time I would have run this case or I would have raised a different issue, but I would have done a better job for him if I -- and maybe I would have, you know, found something to add to this brief that would have made a difference because I felt like the voluntary manslaughter issue was pretty good and that we should have won, but, you know... and maybe if I had more time we would have.

Q. All right. And when you, when you briefed the issue, you just, looking in your brief, did you ever refer specifically to the judge's basis for his ruling? There was no evidence whatsoever of voluntary manslaughter?

A. Yes.

Q. And I'd just refer you to page 328, line 6 of the trial transcript where he lays out that reasoning.

A. Yes. I don't remember. I mean, I don't remember a lot about this case. I don't remember having seen that. It's definitely not in here in my brief.

Q. Okay.

A. I don't remember it. I don't even remember thinking about it until, you know, you mentioned it to me, so...

Q. And objectively looking at those words "I set her up from behind", can you, just looking at that, is it an automatic determination that that meant putting hands on her?

A. Well, I mean, you're talk -- well, what basically the judge said is reading that, that he, himself provoked the altercation, is what he's saying basically. The way he understands the statement is there was -- that he provoked her scratching him or whatever.

Q. There was physical contact?

A. Yeah. He's basically making a determination. There's no evidence, though, of voluntary manslaughter here because he provoked whatever happened. And, and I'm not sure that that would be the only way to interpret that. If I were the defense attorney and ---

Q. And isn't the standard any evidence in the record --

A. Yeah. Yeah.

Q. -- whatsoever that could reduce for the jury?

A. Yeah. If any juror -- if there's evidence from which a jury could have found that he was provoked sufficiently with provocation?

Q. And isn't that a factual determination to say the words "I set her up from behind" means physical contact?

A. Well, I mean, judges have to make determinations about what evidence is in the case all the time. And in a sense that is factual determination. I, I don't remember having reviewed this. And I don't remember the State having made that as an argument. If they, if they had, I probably would have responded to it. I just don't remember that. I don't remember seeing that.

Q. Okay. And there were no exceptions made to the, the malice and structure or any kind of inferred malice instructions that you couldn't ---

A. I mean, I heard y'all talking about that, but I

don't remember if there was or not.

Q. If there had been, you would have looked at that as an issue --

A. Well, yeah --

Q. -- to put up on appeal --

A. -- it's not like we --

Q. -- as an issue?

A. -- had a bunch of issues, you know? So, yeah, anything that's, that we could -- I mean, a good malice or a bad malice instruction is always good, good on appeal.

Q. Okay. I've got no further questions.

A. Okay.

THE COURT: Any redirect limited to what she went into?

MR. ISENBERG: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. ISENBERG:

Q. Ms. Ross just asked you about the quote from the judge.

A. Yeah.

Q. "I tried to set her up --

A. Yeah.

Q. -- 'from behind." Would you agree that that goes to the issue that you did brief in instructing

manslaughter?

A. I mean, it's kind of -- I guess the argument is could I have made a better argument about voluntary manslaughter ultimately. And if I had put that section in there, if it had made a difference. If it would have made a difference. I don't know if it would have, but if it would have then, then I missed it. I don't know -- looking at that, I don't, I don't know.

I just, I mean, I don't know what to make of that actually and what he said. I mean, to me he denied the voluntary manslaughter and that's, that's where we were. I thought the statement supported voluntary manslaughter. And that's, that's what I was focused on. And why -- how he got there really.

Q. Right. The core issue of why you briefed --

A. Yeah.

Q. -- voluntary manslaughter is because you thought there were facts in evidence --

A. Yeah.

Q. -- that led to provocation.

A. Yeah. And how he arrived at his conclusion. The conclusion he arrived at was the mistake, not how he arrived at the conclusion. If it would have helped for me to say, hey, here's how he made that mistake, then, you know --

Q. Right.

A. -- that, that would have helped, but that's -- I'm not sure that's what I would have thought having seen that.

Q. Right. And Ms. Ross also brought up audio recordings --

A. Yeah.

Q. -- back in 2002.

A. Yeah.

Q. And in regards to their impact on whether you would, you know, include a *Jackson* hearing in the brief.

A. Yeah.

Q. Would it impact your decision to brief a *Jackson* hearing if the defendant chose not to report it?

A. Yeah. I mean, well, it's -- a recording is, you know, just, you know, just, you know, people talking about what the defendant said and writing it down. It's just as good as a recording. When there is a recording it's the best evidence --

Q. Right.

A. -- of what happened. But -- and if you had the police officer destroying a recording, which I have had, of a Jackson v. Denno hearing, then that's something else.

Q. Right.

A. But just the, the fact that they didn't record or he didn't request or didn't want a recording really wouldn't make any difference.

Q. Right.

A. I can't see.

Q. And what about the fact that the defendant or a defendant shows for the police to write a statement?

A. That happens routinely, so I didn't -- I mean, if the defendant wanted to write his own statement and the police officer says, no, I've got this and wrote it out, that would be some -- I mean, there are facts that, yeah, it would have made a difference, but just the mere fact that the police officer wrote the defendant's statement is not dispositive of anything.

Q. Right.

A. Because that happens all the time.

MR. ISENBERG: No further questions, Your Honor.

THE COURT: All right. Thank you very much. And let the record -- I don't believe the witness was introduced. It's Joseph L. Savitz; is that correct?

THE WITNESS: Savitz, S-A-V-I-T-Z.

THE COURT: Any reason why the witness cannot be excused?

MR. ISENBERG: No, sir.

MS. ROSS: No, sir:

THE COURT: Thank you, sir. You may be excused.

THE WITNESS: Thank you, Judge.

THE COURT: Yes, sir.

(Witness leaves witness stand and courtroom.)

All right. We're going take a lunch break. We'll resume at 1 o'clock. I do not see that I have the brief in the packet of materials, so we'll take a break.

MR. ISENBERG: Thank you, Your Honor.

(A lunch recess was had from 11:39 a.m. - 12:59 p.m.)

THE COURT: All right. I've got, someone has handed me a remittitur from the Court of Appeals dated March the 10th, 2012; the opinion State versus Jerome Knight, as well as the final brief of appellate in the State versus Jerome Knight. So I will -- I assume y'all want me to make that part of the record.

MR. ISENBERG: Yes.

MS. ROSS: Yes, Your Honor.

MR. ISENBERG: Yes, Your Honor.

THE COURT: All right. I'll make that part of my record.

MR. ISENBERG: Your Honor, the State's next witness indicated to me last night through e-mail that he would be here right at one. I just request that we have maybe five or ten more minutes to get here.

THE COURT: Okay. Did -- now, when we were at the bench you made an objection. I'm not sure that went on the record. Do you want that as part of the record?

MS. ROSS: Yes. I'll go ahead since we've got some time.

THE COURT: Okay.

MS. ROSS: I'll just put it on the record. Judge, my understanding is the State wants to call Trey Gowdy, who was the solicitor who prosecuted this case. My initial understanding is it's going to the issue of whether there was a plea offer conveyed. That, while I did put that in my amended application, after talking to Mr. Knight, Mr. Knight saying that Ms. Quimby or Hatcher in fact did convey the plea offer to him, that is no longer an issue in this case. So I would object to the testimony of the solicitor because I don't think he can provide any testimony applicable to this application for PCR.

MR. ISENBERG: Your Honor, if I may?

THE COURT: (Nods head up and down.)

MR. ISENBERG: Your Honor, there's several bits of testimony from the applicant about the lack of knowledge he had on trial strategy and the lack of knowledge he had on discovery and what the general strategy was going into the *Jackson* hearing. And also

the fact that after the *Jackson* hearing he would have accepted a plea. I intend to call the solicitor to testify that he had a discovery policy that was open. And so when trial counsel went and reviewed those documents, she would have had access to pretty much everything. And so even though it's not in her notes, when she went back and met with the applicant, she would have had all documents necessary to compile a trial strategy.

And it's the solicitor's strategy in regards to plea offers that after they expire that they are not offered at trial or anything in regards to that. So, even if the applicant wanted to take a plea at trial after these statements came in, the solicitor would have never offered it anyway.

That was his testimony earlier, and I just wanted the record to be complete and clear that he would not have received a plea offer and he had all those documents available to him through the solicitor's office and through counsel to review before the hearing and trial.

MS. ROSS: A lot of what was discussed there goes to what Ms. Hatcher and her client would know, and the solicitor would have no direct knowledge of any of that.

THE COURT: All right. We'll I'm, I'm going to

allow the witness to testify out of just an abundance of precaution. We are handling a 2002 case. So while I might substantively agree with the applicant's position as to the value or weight of the testimony, I think it's probably -- let's error on the side of making a complete record in this case so that we can be sure that we have -- bring closure for everybody involved in the case. With that, I'll allow it.

MR. ISENBERG: Thank you, Your Honor. And with that the State will call Trey Gowdy to the stand.

THE COURT: Just come right up here and let me swear you in. Place your left hand on the Bible and raise your right hand. (Complies.)

Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, sir, Your Honor.

THE COURT: Thank you. Watch your step and step up and have a seat in the red chair and pull the red chair up to the microphone.

HAROLD WATSON GOWDY, III

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ISENBERG:

Q. Good afternoon.

A. Good afternoon.
Q. Could you please state your name for the record.
A. My name is Harold Watson Gowdy, III, and go by Trey.
Q. Thank you. And, Trey, where do you currently work?
A. Right now I work for a law firm in Greenville, Nelson, Mullins, Riley and Scarborough. I work with a television station doing some legal commentating, and work for a speaker's bureau called Premier Speaker's Bureau out of Tennessee.
Q. And how long have you been practicing law?
A. I graduated law school in 1989 and was sworn in in the fall of that year.
Q. And with that years of practice, how much of that was in the criminal realm or in the criminal law area?
A. Well, I worked for the United States Attorney's Office from April of '94 until January of 2000, and I left to run for solicitor and was the solicitor from January of 2001 until December of 2010.
Q. And during your term as solicitor, that would have been when you got Mr. Knight's case?
A. That's correct.
Q. And with Mr. Knight and with other defendants while you were the head solicitor, what was your

discovery policy?

A. Well, discovery policy when I worked for the solicitor's office I tried to mirror the discovery policy at the United States Attorney's office, which was an open file policy. The person who taught me to be a prosecutor is a man by the name of David Stevens. And the expression he had was that he played face-up poker. He wanted the defense attorney to see all the cards that the government had. And so when I became the solicitor in 2001, we had an open file policy, which means we will make the file in its entirety available to defense counsel.

Q. So if the defense counsel requested to come look at the documents you had available, they would have had access to everything that y'all had?

A. They would have had access to everything. There's also, of course, an ongoing responsibility to augment or supplement the file. I don't mean to suggest that, that the file is complete from day one. There's an ongoing responsibility, as we get information, whether it's from SLED or from a law enforcement agency or witness interview that we augment or supplement the file.

Q. And, yes. So, sort of, quote/unquote, new discovery would have been put in the file as it was

received?

A. Yes. That, that was the policy for all the cases, not just this one. This was a public defender case, so they're another governmental entity, so from a, from a copying standpoint, I think that we would make the copies for the public defender's office; whereas, private counsel it would be a different arrangement in terms of how to pay for it. But this was a public defender case and the file would have been made available. And the copy and costs would have either been diminutus or not.

Q. And counsel indicated earlier that an individual by the name of Cookie would copy the files for any defense counsel who came in and needed them.

A. Yeah. That would be Sharon Peeler, who her nickname was Cookie. She was my administrative assistant, and she remains the administrative assistant for Solicitor Barnette.

Q. And so, when y'all got new discovery you would let defense counsel know?

A. Yes. Well, we have an obligation to let defense counsel know. And it does no one any good to have an incomplete file.

Q. Right. Okay. And just sort of shifting gears here, I wanted to get into discovery and now I'll get

into the plea offer policy. What was your policy when you were the Seventh Circuit Solicitor in regards to plea offers?

A. Well, obviously there's different kinds of -- there are different categories of cases. There are cases that involve victims that are easily identifiable. Personal injury cases. There are drug cases where the victim is a little more difficult to identify. The victim would be the State. My policy was I'd like to consult with law enforcement. And if there was a victim that was living, obviously you consult with the victim.

Q. Right.

A. If there is a victim that is not living in a homicide case, it was my policy in the cases that I handled that I'm gonna have that conversation with the victim's family about the merits of the case, the strength of the case, the reasonable outcomes that are possible, what's likely. And that would be a collaborative decision whether or not to make -- and, again, this is my policy. Other homicide prosecutors may have had different policies.

Q. Right.

A. But I remember the very first time I met Miranda's father. Despite the fact it was 17 years ago, it left an indelible impression on me. And there would

have been no offers made that would have been discussed with him.

Q. Right. And when it comes to your plea offer policy in general if you did make an offer, there would be a set expiration date?

A. Yes. The reason I'm hesitating is I did not make many offers in homicide cases.

Q. Right.

A. If there were an offer, then obviously you have to let the court know at some point whether or not this should be scheduled for plea or trial.

Q. Right.

A. And it's not fair to anyone involved, from the Court to the defendant to the victim to the law enforcement to not have a sense of predictability. So if there were an offer made, that offer would come with an expiration date. I don't recall an offer in this case.

Q. Right. Well, and with your policy, after this expiration date, with any plea offers you would have given, you would not re-offer the plea, would you, at trial or anything like that? I can rephrase that question.

What kind -- what pleas were available to the defendant after they rejected a plea offer or if they

let the expiration date come without excepting?

A. Well, it's something of an open legal question whether or not you have the right to plead guilty. I don't know that you can stop a defendant who wants to on the morning pleading to the indictment. There's a minority opinion on that, but let's say the majority opinion is right, if someone wants to come in on the morning of trial and tells the court they would like to change their plea from not guilty to guilty, there's nothing, I don't think, a prosecutor can do to stop someone from pleading to the indictment and allowing the judge to sentence within the legal sentencing frame. There would be no re-issuance of an offer that had expired.

Q. Right.

A. So if your question is whether or not you can get the benefit of an earlier offer on the eve of trial, the answer is no.

Q. Right.

A. If the question is, can you plead to the indictment on the eve of trial, I think most prosecutors would tell you, you can't stop someone from doing that.

Q. Right. And I didn't mean to confuse you. My question was leaning towards, you would not re-offer the defendant at trial, would you, generally?

A. I cannot think of ever doing that.
Q. Okay.
A. And did not in this case.
MR. ISENBERG: Okay. I have no other questions for the witness, Your Honor.

CROSS-EXAMINATION

BY MS. ROSS:
Q. And to clarify, in this case you don't recall making any plea offer at all?
A. I do not. In part because of the conversation I had with Miranda's father was, and still is to this day, inevitably imprinted in my mind. So, no, I do not recall making any offers.
MS. ROSS: Thank you. No further questions.
MR. ISENBERG: I don't have any other questions.
THE COURT: Thank you, sir, you may step down. Any reason why the witness cannot be excused?
MR. ISENBERG: No, Your Honor.
MS. ROSS: No, Your Honor.
THE WITNESS: Thank you, Your Honor.
THE COURT: Thank you very much.
(Witness leaves witness stand and courtroom.)
MR. ISENBERG: And, Your Honor, with that the State rests its case.
THE COURT: Does the applicant intend to call any

in reply?

MS. ROSS: No, Your Honor.

THE COURT: All right. I will ---

MS. ROSS: Can I make a very brief --

THE COURT: Sure.

MS. ROSS: -- post-hearing argument? I set the main body of the argument out before the hearing, but I would just turn your attention. I had mentioned, I thought I'd mentioned *Belcher*, which I understand is a 2009 case, 685 S.E.2d 802. And then in that case the court references Glenn v. Maryland. And that's 68 Maryland Appellate Court 379. That's a 1986 case. And it talks about half truths and sort of the instructions that can confuse and mislead a jury.

And with the two pages of 367 through 368 and 9 of the jury instructions, it talks about many different areas where malice can be inferred. And given the reasoning of that case and some older cases. I saw State v. Gardner cited, which is a 1951 case, 64 S.E.2d 130. That's a little different. That's going into what makes up a provocation, legal provocation to manslaughter and it talks about reasonable provocation.

And I'd just reference the Court to those cases for a general argument that although there was no objection to the jury instruction itself on the record

and applied to trial counsel and because appellate counsel did not specifically reference the Court to the judge's reasoning as to why voluntary manslaughter, he didn't feel like it applied. That, in essence, decreased the burden of the State and misled that jury and was confusing to them.

So that, along with what I put in just prior to the hearing is my argument for Mr. Knight. I just wanted to add those cases.

THE COURT: All right. And so that would be the argument that if it had gone on appeal that he should have raised it?

MS. ROSS: Yes. And that the malice argument and the inferred malice, that was not objected to, so that couldn't have been raised on appeal, so that should have been objected to. And while in appeal, Mr. Savitz did argue voluntary manslaughter should have been instructed, he did not bring out that specific reasoning of the judge, which I think was improper.

I think while I concede that a judge has to think about the facts in determining whether the law can allow a charge, here he's interpreting what facts in this statement that was written by the police offer meant. And he's overstepping that by inferring that the -- she got set up to mean that he pushed her and started

assaulting. And that basis, I think, is improper.

And just very quickly, you know, in Pitman and everything there just needs to be any evidence whatsoever in the record that can reduce the crime from murder to manslaughter.

MR. ISENBERG: Your Honor, if I may, I'll first address the appellate issue that counsel brought up about, I think, quote, tried to set her up from behind. And I'll point you to page 329, line 13 through 14. This quote that continues to be brought up and addressed by opposing counsel was made in the decision not to give an instruction on any voluntary manslaughter. And though I understand that she believes that it should have somehow been factored into the voluntary manslaughter charge that the judge denied to give to the jury, the judge's specific decision and specific reason for bringing this quote up or saying this was based upon his decision not to instruct involuntary manslaughter.

And counsel has not alleged here today that appellate counsel should have briefed involuntary manslaughter. So I believe that this statement is irrelevant to what he should have and could have briefed on the denial of the voluntary manslaughter. And I'm looking at page 328, line 6, "I tried to set her up from behind." A quote that continues to be repeated.

MS. ROSS: And, Judge, I'd just refer you to 328, line 19 through 23. "Therefore, based on the lack of evidence of heat of passion, I find that the request of instruction for voluntary manslaughter should be denied." So that's clearly talking about, if you read closely page 328, that's clearly talking about voluntary manslaughter.

And then on line 24 he says: "With respect to involuntary manslaughter", then he goes on with that.

MR. ISENBERG: Well, I apologize for that, Your Honor. And with that, I will bring up my earlier argument that this was briefed and counsel was not -- he talked about why he briefed what he did. He pointed out the fact that he thought there was evidence in the record of voluntary manslaughter because of the provocation and he wrote about it. It's not prejudicial to not bring up one tiny, one half-line aspect of the trial in his brief in regards to what he submitted to the appellate court.

Now, with the malice argument that counsel's making, I mean, the malice inference came from the bench book, so that would have been the set of law on malice in 2002. The rule of clairvoyance is pretty simple.

THE COURT: Rule of what?

MR. ISENBERG: The clairvoyance rule for

counsel --

THE COURT: Okay.

MR. ISENBERG: -- is simple in that if there was some subsequent change in law or something that counsel feels was improper with malice that would change after the fact, then trial counsel was not -- she was not tasked with sort of having a crystal ball of what malice could have been.

I'm unclear on what the argument is with malice. It seems that the instructions given were straight from the bench book. But even if there was something changed and something would have been improper currently with malice in there today that would not have been back then, as I said, the clairvoyance rule makes it to where trial counsel would not have had a duty to have a crystal ball to see if the malice law would have even changed, so I'm sort of unclear why the malice inference instructions were improper and should have been objected to, which it makes the State -- it would be the State's contention that there was no prejudice in these instructions.

THE COURT: It is, you know, factually this is a 2002 case and this is now, today is 2019, and so there's been many changes in the law since 2002 to 2019. Do I apply the law as it was in 2002? Did you tell me that

appellate counsel made an error?

MR. ISENBERG: Appellate counsel?

THE COURT: Or trial counsel.

MR. ISENBERG: Sure. You apply the law for 2002 because with the clairvoyance rule it basically says that trial counsel is only tasked with knowing the law settled at that time. So if the law subsequently changed, then trial counsel had no duty to sort of predict that or, like I said, have a crystal ball to know that was going to happen. So she was only tasked with knowing the settled law at the time and making objections based upon potential legal errors based upon settled law at the time. And the malice inferences instruction given by the judge appear to be straight from a bench book from 2002. There doesn't seem to be any clear 2002 legal merits, which, as I said, the State would contend there would be no prejudice.

THE COURT: The State's position is not that -- is the State's position that the charge given is incorrect under 2019 law?

MR. ISENBERG: No, Your Honor. I'm -- the State's contention is even if for some reason it was incorrect under 2019 law, that it was correct under 2002 law, so counsel had no duty to object, that she would have no duty to predict that.

THE COURT: Okay. All right. Briefly, yes, ma'am.

MS. ROSS: Briefly, Judge. As to involuntary, I did not put that in my amended application, but I do believe in my arguments I mentioned involuntary manslaughter a couple of times, so I would ask that that just not -- that that be considered, though I understand I didn't put it in the application, which was my error.

As to the clairvoyance of the rules of law, I did attempt to talk about the State v. Gardner, the 1951 case, which is still good law and it talks about reasonable provocation leading to manslaughter as opposed to legally sufficient provocation.

And then there's also, while it's Maryland case law, in Glenn v. Maryland, which is from 1986 that talks about sort of decreasing -- I believe what it's referring to is decreasing the State's burden by sort of half truths that can confuse the jury. And that's where I'm getting at with the inferred malice argument. I mean, jury instructions.

THE COURT: All right. Anything else?

MS. ROSS: No, Your Honor.

THE COURT: Well, thank you all very much. I will let you know.

MR. ISENBERG: Thank you, Your Honor.

THE COURT: Thank you.

(Hearing concluded at 1:31 p.m.)

--- THIS ENDS REQUESTED TRANSCRIPT ---

COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Cendroski, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court OF Common Pleas for Spartanburg County, South Carolina, on the 14th day of May, 2019.

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

s/Julie A Cendroski
Julie A. Cendroski
Circuit Court Reporter
Seventh Judicial Circuit

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|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG | IN THE COURT OF COMMON PLEAS<br>FOR THE SEVENTH JUDICIAL CIRCUIT |
| Jeremy Jerome Knight,<br>S.C.D.C. No. 283089,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | Case No.: 2005-CP-42-00520<br><br>**ORDER OF DISMISSAL** |

This matter comes before the Court by way of an application for post-conviction relief filed February 23, 2005. The State made its Return to the application on July 22, 2005. This Court presided over an evidentiary hearing on September 18, 2006 in Spartanburg County, South Carolina. Applicant was represented by his appointed counsel C. Kevin Miller. Respondent was represented by S. Prentiss Counts and Paula Magargle of the South Carolina Attorney General's Office. Following the end of testimony at the hearing, the record was left open to allow for the deposition of appellate counsel. As of today, the matter remains open.

Applicant's appointed counsel, C. Kevin Miller, was disbarred from the practice of law in South Carolina, effective March 7, 2012. In the Matter of C. Kevin Miller, Appellate Case No. 2013-002345, Filed January 2, 2014. On August 22, 2018, Jordan A. Cox, of the South Carolina Attorney General's Office indicated that based upon Mr. Miller's disbarment, Applicant required the appointment of new counsel to resolve his outstanding application for post-conviction relief. On August 27, 2018, the Court signed an order that both relieved Miller and required new counsel be appointed for Applicant. Susannah Ross, Esq. was appointed to represent Mr. Knight

on September 14, 2018. On January 28, 2019, Applicant moved for a *de novo* evidentiary hearing to be held. Respondent opposed this motion and requested a final ruling based upon the record. On February 24, 2019, the Court ordered a *de novo* evidentiary hearing should be scheduled in fairness to all parties.[1] On May 7, 2019, Applicant filed an amended application for post-conviction relief.

On May 14, 2019, this Court presided over an evidentiary hearing at the Spartanburg Court Courthouse in South Carolina. Applicant was represented by Susannah Ross. Respondent was represented by Jacob A. Isenberg and Johnny James of the South Carolina Attorney General's Office. Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Karen Hatcher ("Trial Counsel") testified on behalf of Respondent. Also, Applicant's appellate counsel, Joseph Savitz ("Appellate Counsel") testified on behalf of Respondent. Finally, the Seventh Circuit Solicitor who prosecuted Applicant, Trey Gowdy, III, ("Congressman Gowdy") testified on behalf of Respondent. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, appellate records, and records of the Horry County Clerk of Court regarding the subject convictions. After a thorough review of all the evidence and testimony in the record, this Court finds Applicant has not met his burden of establishing any constitutional deprivations or other grounds entitling him to relief and denies and dismisses this application with prejudice.



[1] Judge Doyet A. Early based this order on the following facts: 1) Applicant is serving life in prison for murder; 2) Original PCR Counsel presented one issue at the 2006 evidentiary hearing and failed to address the matter before being disbarred six years later; 3) the Court had no independent recollection of the 2006 PCR hearing or witness testimony; and 4) the Court's impending retirement would not allow time to follow through on the matter.

## I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the April 2002 term of the Spartanburg County Grand Jury for murder (2002-GS-42-1401).

Beginning on July 8, 2002, Applicant sat for trial based upon the charge of murder. At trial Applicant was represented by Karen Quimby and Michael Bartosh. The State was represented by Solicitor Trey Gowdy, III, and Assistant Solicitor Susan Olmert. On July 10, 2002, the jury found Applicant to be guilty of murder. Later that day, Judge Derham Cole sentence Applicant to life in prison without the possibility of parole.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Deputy Chief Attorney, Joseph Savitz, III, from the South Carolina Office of Appellate Defense. Appellate Counsel raised the following issue:

> Whether the Judge erred in refusing to instruct the jury on a voluntary manslaughter charge.

By unpublished opinion decided on February 18, 2004, the South Carolina Court of Appeals affirmed Applicant's convictions. 2004-UP-105. The Remittitur was issued on March 5, 2004.

## II. 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 review discovery and trial strategy with applicant
    b. Failure to convey plea offer
    c. Eliciting and failure to object to investigator's testimony as to the ultimate issue when he said that only the murderer could tell what happened and he did; (Tr. 256, L. 23)
    d. Failure to advise the applicant to testify
    e. Failure to take exception to the jury instruction on murder (Tr. 367)

2. Ineffective Assistance of Appellate Counsel
    a. Failure to brief the argument that the Applicant's statements were improperly admitted
    b. Failing to argue that Judge Cole's reasoning that the ambiguous statement attributed to the Applicant that he "tried to set her up from behind" meant that he initiated a physical assault or restraint was an improper judgment of the facts.

Applicant requests relief as follows:

- New Trial

At the evidentiary hearing, Applicant proceeded forward on all allegations except failure to convey a plea offer. Instead, Applicant's Counsel notified the Court he knowingly and voluntarily withdrew this claim.

## III. SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

### *Applicant*

Applicant testified on his own behalf at the evidentiary hearing. Applicant testified he briefly reviewed the case with Trial Counsel. He further testified to not being satisfied because they only met once before trial. Applicant testified he did not return to Spartanburg from SCDC until it was time to prepare for trial. Applicant testified there was very little discussion of his thirty year plea offer. He testified Trial Counsel did not give an opinion about his chances at trial.



Applicant testified Trial Counsel reviewed the details of a pre-trial voluntary statement hearing with him. He could not recall whether she reviewed specific case law with him. Applicant testified he could not remember whether they reviewed options after losing the pre-trial hearing based upon a confession.

Applicant testified Trial Counsel did not review voluntary manslaughter with him beyond the minimum and maximum sentencing range. He further testified they never discussed

involuntary manslaughter. Applicant testified he would have pled if he had known voluntary manslaughter would not be charged to the jury. He further testified he would have pled guilty if they had discussed the offer more.

Applicant testified he discussed the pre-trial hearing with Appellate Counsel. Applicant further testified he believed the statements coming in at trial were damaging.

Applicant testified he did not recall agreeing he spent a good amount of time with Trial Counsel at his original PCR hearing. However, Applicant agreed his current testimony is inconsistent with his opinion of Trial Counsel at the original PCR hearing.

Applicant acknowledged he had an opportunity to sleep on the day he gave his first confession. Applicant acknowledged he had an opportunity to sleep the night before giving a second confession. However, Applicant claimed he could not sleep based upon doing cocaine sometime that day.

Applicant testified it was his decision not to testify at trial. However, Applicant did not recall telling the trial court he reviewed all discovery with Trial Counsel. Applicant testified he had not reviewed the transcript. Applicant further testified he could not remember talking to the trial court seventeen years ago. However, Applicant testified he did remember his necklace being found next to the victim.



Applicant testified he did not remember anything between being arrested and giving the first statement. Applicant testified he remembered giving the first statement. He claimed his first statement was based upon just agreeing with law enforcement. However, they were not satisfied so they wanted a second statement. Applicant did not remember whether he requested food, water, or sleep between giving statements. He did not know why the statements should have been considered involuntary.

***Trial Counsel***

Trial Counsel testified on behalf of Respondent at the evidentiary hearing. Trial Counsel testified the Public Defender's Office took Applicant's case on the same day he made his second confession. A day later, an employee in the Public Defender's Office interviewed Applicant in jail. Trial Counsel was assigned the case sometime within a week.

Trial Counsel testified she first met Applicant March 4, 2002. She brought two investigators from her office to this meeting. At the meeting, Trial Counsel went over both statements with Applicant. She had a copy of the second statement, but not the first. Trial Counsel further reviewed Applicant's record, drinking, willingness to do polygraph, general background information, preliminary hearing rights, and bond hearing details. She further gave Applicant the opinion that his bond would likely be revoked. Additionally, she reviewed information Applicant had about the victim which included getting a list of mutual friends with Applicant. Finally, Trial Counsel got Applicant's parental contact information so she could inform them about the details of his case.

Thereafter, Applicant was relocated to Kirkland. Trial Counsel received discovery on April 9, 2002. At this point, she had a copy of both confessions given by Applicant. Shortly after, Applicant was moved to McCormick. Trial Counsel testified it was difficult to meet with Applicant because he was housed in SCDC.

On May 16, 2002, Trial Counsel received an email from Congressman Gowdy. The email contained information that a thirty year offer would probably be the best he could give Applicant. Trial Counsel testified Congressman Gowdy followed up sometime later asking if Applicant would have been willing to accept this offer.

Trial Counsel testified she was notified by the Seventh Circuit Solicitor's Office that DNA test results were coming in June 2002. On June 14, 2002, Trial Counsel was given advance notice about the results of the DNA test. On June 21, 20002, Trial Counsel received official results of the DNA test. The results showed this victim's DNA was on Applicant's sweater. Furthermore, Applicant's DNA was found under the victim's fingernails.

On June 26, 2002, Trial Counsel met with Applicant. They went over the benefits and consequences of going to trial as opposed to taking a plea offer, results of the DNA test, Emergency Medical Services report, and material phone records. Additionally, Trial Counsel testified they reviewed trial strategies, taking a plea offer, alibi defense, elements of murder, elements of voluntary manslaughter, elements of involuntary manslaughter, and the burden of proof for a guilty verdict. She testified Applicant rejected taking a plea offer. At the conclusion of this meeting, Trial Counsel and Applicant agreed the focus should be on suppressing the two confessions.

On June 27, 2002, Trial Counsel asked Congressman Gowdy for full access to review Applicant's file. Congressman Gowdy has an open door policy which provided Trial Counsel full access to anything needed in discovery. Trial Counsel went and reviewed the file. To the best of her knowledge, Trial Counsel would have had anything needed after reviewing the entire file. On the same day, Trial Counsel met with Applicant. She testified they would have went over anything not previously reviewed. She further testified Applicant again rejected taking a plea offer.



On July 1, 2002, Trial Counsel met with Applicant. Trial Counsel testified Applicant still wanted to go to trial instead of taking a plea offer.

Trial Counsel testified she would have customarily warned her clients of their chances at each stage of the case. In this case, Trial Counsel testified she would have warned Applicant of his chances of suppressing both confessions. Furthermore, Trial Counsel testified she would have warned Applicant of his chances of securing a lesser included offense jury charge at trial.

Trial Counsel testified she notified the Solicitor's Office Applicant desired to reject the plea offer. On July 2, 2002, Trial Counsel received final discovery. Trial Counsel testified nothing was introduced at trial that she did not have access to in final discovery.

After plea rejection, Trial Counsel spent the following week preparing for trial. She met with witnesses as well as the investigators from her office.

Trial Counsel testified her strategy was to suppress the two confessions. Trial Counsel testified she notified Applicant there was not much else to go on. Trial Counsel testified she met with Applicant to prepare for the pre-trial suppression hearing. She testified they were same page with a timeline of events. She further testified they went over what questions would be asked as well as other witnesses to expect.

Trial Counsel testified she remembered the confessions being ruled admissible at a pre-trial hearing. Trial Counsel testified her custom in this situation would be to consult with the client about a change of heart. Trial Counsel testified she would ask if they wanted to plead straight up in these situations. However, Trial Counsel testified Applicant wanted to proceed with trial.



***Appellate Counsel***

Appellate Counsel testified on behalf of Respondent at the evidentiary hearing. Specifically, he worked at the Office of Appellate Defense for 26 years. Appellate Counsel testified half of the cases he took were homicides.

Appellate Counsel testified, based upon experience, about ninety percent of cases with confessions in evidence also had Jackson Hearings in transcript. Appellate Counsel testified a person would need to have been misled, tricked, denied food, denied water, or on drugs for the confession to be inadmissible. He further testified Jackson Hearings are a run of the mill issue to raise on appeal. Appellate Counsel elaborated by saying defendants are always tired and hungry. Therefore, raising it based upon being tired or hungry was not meritorious. Appellate Counsel further stated he had to look at the totality of circumstances standard when assessing this issue.

Appellate Counsel testified it was not unusual, based upon experience, Applicant did not write his own statement. Based upon experience, Appellate Counsel testified defendants routinely asked law enforcement to write their statement. Appellate Counsel further testified the failure to record this confession made no difference on appeal. Appellate Counsel testified he purposefully did not brief the Jackson Hearing. Instead, Appellate Counsel testified he only briefed the failure to charge involuntary manslaughter issue. Appellate Counsel testified he would not have changed, added, or subtracted any issues concerning this brief. However, Appellate Counsel testified he would have spent more time on the issue briefed.

Appellate Counsel testified he does not remember anything about the malice instruction. Appellate Counsel further testified he did not remember why he forgot to put certain items from the transcript in his brief. Specifically, Appellate Counsel testified he did not remember why he decided not to include a comment from the Trial Judge concerning Applicant provoking the confrontation. Appellate Counsel testified he did not know if this would have made a difference.

***Congressman Gowdy***

Congressman Gowdy testified on behalf of Respondent at the evidentiary hearing. Congressman Gowdy testified he worked at the United States Attorney's Office for six years before becoming the Seventh Circuit Solicitor in 2001.

Congressman Gowdy testified he had an open file discovery policy. He further testified this was identical to his practice at the United States Attorney's Office. Specifically, he testified this policy allowed opposing counsel access to everything. He further testified his office would supplement discovery as needed, give notice of new discovery, and make copies for anything opposing counsel required.

Congressman Gowdy testified his plea offer policy centered upon the victim in the crime. Congressman Gowdy testified he would figure out whether there was an easily identifiable victim or not. Thereafter, Congressman Gowdy testified he would consult the family on a plea offer for homicide cases. Based upon track record, Congressman Gowdy opined he did not make many offers for homicide cases. Congressman Gowdy testified his policy was usually not to stop a defendant from pleading straight up. Finally, Congressman Gowdy never re-offered earlier plea when the case got to trial.

In this case, Congressman Gowdy testified he remembered meeting the victim's father. He further did not recall making an offer to Applicant.

## IV. 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). 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 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. "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 review discovery and trial strategy***

Applicant contends Trial Counsel failed to adequately review how the lesser-included offenses of voluntary manslaughter and involuntary manslaughter applied to his case.

Here, Trial Counsel credibly testified she reviewed all discovery with Applicant before getting his final answer on the plea offer. In this meeting, Trial Counsel testified to going over voluntary manslaughter, involuntary manslaughter, and trial strategies with Applicant. That same day, Trial Counsel credibly recalled reviewing the file at the Seventh Circuit Solicitor's Office.[2] Trial Counsel credibly assessed she would have reviewed anything outstanding with Applicant at their meeting documented the following day. Trial Counsel credibly testified she told Applicant the best strategy would be to attempt to suppress the two confessions. She credibly recalled preparing Applicant for the pre-trial suppression hearing. Counsel remembered losing the hearing. She credibly testified her custom would be to ask if a client wanted to proceed with trial or plea straight up. Trial Counsel testified her custom was also to evaluate her client's chance at each stage of the case. She credibly recalled Applicant wanting to move forward with trial as planned.

On the other hand, Applicant testified he was not satisfied because they only met once before trial. Applicant testified they only reviewed the sentencing range of voluntary manslaughter. He testified they reviewed nothing about involuntary manslaughter. Finally, Applicant could not recall whether they discussed case law on admitting confessions.

Accordingly, Applicant has failed to provide consistent testimony. Applicant testified at his original evidentiary hearing that Trial Counsel spent a "good bit of time" with him. (PCR Tr. 7, L. 17-9). This is inconsistent with his current position that they only met once which included a brief conversation. On the other hand, Trial Counsel provided a detailed explanation about meeting three times in one week. Among those meetings, Trial Counsel reviewed all discovery as well as finalized a trial strategy. After the suppression hearing, Trial Counsel re-evaluated the

[2] Congressman Gowdy credibly testified his custom was to make all documents in evidence available in the file for opposing counsel.

situation with Applicant. This Court finds Trial Counsel to be more credible on the issue of discovery and trial strategy review. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient for failing to review discovery and trial strategy with him.

*2. Failure to convey plea offer*[3]

Applicant contends Trial Counsel did not give an opinion about his chances at trial during their brief discussion about a thirty year plea offer. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145 (2012); see also Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance"). When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant "must demonstrate a reasonable probability that: (1) he 'would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;' (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of

[3] PCR Counsel withdrew this allegation after Applicant and Trial Counsel testified. For cautionary reasons, this Court will make meritorious findings of fact and conclusions of law on the allegation.

intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"). If an applicant is able to meet the requirements set forth above, the appropriate relief is to require the State to re-extend the previous plea offer to Applicant. Lafler, 566 U.S. at 174. ("The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.")

**Communication of Plea Offer**

Here, it is undisputed Trial Counsel made Applicant aware of a thirty year plea offer. The dispute lies in just how much this offer was discussed before it went off the table. Applicant indicated in his testimony the conversation about this plea with Trial Counsel was too brief. He further testified they only met one time before trial. Applicant felt Counsel wronged him by not offering an opinion on the plea. Specifically, Applicant felt Counsel should have compared it to the potential consequences of going to trial.

On the other hand, Trial Counsel credibly recalled going over the plea offer in multiple meetings with Applicant. Trial Counsel credibly recalled Applicant rejected the plea multiple times. Trial Counsel credibly reasoned Applicant wanted to focus on suppressing the two confessions. Trial Counsel also credibly proffered she would customarily warn clients of their trial chances as well as chances at each stage of the case.

Accordingly, Applicant has failed to provide consistent testimony. Applicant testified at his original evidentiary hearing that Trial Counsel spent a "good bit of time" with him. (PCR Tr. 7, L. 17-9). This is inconsistent with his current position that they only met once which included a brief conversation about the plea offer. It is also inconsistent with Trial Counsel's version of events who recalled discussing the plea multiple times with Applicant. In those discussions, her

custom was to warn clients about their chances with each stage of the case including suppression hearings and lesser-included offense convictions. She concluded Applicant rejected multiple times with the instruction to stay focused on suppressing his confessions. The plea offer was formally rejected on or before July 2, 2002. The pretrial suppression hearing was not until July 8, 2002. There is no evidence the offer was made available after the trial court ruled both confessions were admissible. Therefore, this Court finds Counsel provided testimony consistent with the record. Additionally, this Court finds Applicant has failed to provide sufficient evidence to overcome the burden to prove he would have accepted the plea offer with effective assistant from Trial Counsel.

**Entering Plea without Solicitor interference**

Applicant must prove the prosecution would not cancel the plea offer if he had accepted it. Applicant testified he would have pled if he had known the confessions were admissible. Applicant also testified he would have pled if he had known voluntary manslaughter would not be charged to the jury at trial.

Additionally, Congressman Gowdy credibly testified his custom was to never re-offer a plea after the expiration date.

Trial Counsel testified she reviewed the plea offer with Applicant three times in the week leading up to the expiration date. Trial Counsel credibly testified Applicant rejected the offer each time. Trial Counsel testified she also reviewed the probability of success for each upcoming stage of the case. This included a discussion about confession suppression and voluntary manslaughter. Subsequently, Trial Counsel credibly testified she formally rejected the offer on the expiration date. Thereafter, Trial Counsel testified she spent the next week preparing for

trial. Trial Counsel testified Congressman Gowdy did not make a plea offer after the expiration date.

Accordingly, Applicant has failed to provide evidence the material information would have been available in a timely manner. First, Applicant believes he would have pled knowing the confessions were admissible. However, the plea offer clearly expired before the trial court ruled on this issue. Applicant has not alleged he was unaware this pre-trial hearing would fall after expiration. Second, Applicant believes he would have pled knowing voluntary manslaughter would be disallowed from jury consideration. However, the motion to prevent a voluntary manslaughter instruction was not made until after all the evidence was presented in trial. (Tr. 323). Congressman Gowdy testified he did not customarily extend the plea offer to these two stages in the case. Trial Counsel testified there was no plea offer available during these two stages of the case. The information Applicant required to plead guilty was simply unavailable before the offer expired. Congressman Gowdy was under no duty to extend it again in either circumstance. Therefore, this Court finds Congressman Gowdy would not have followed through with the plea offer at either stage of the case Applicant would have accepted it.

**Entering Plea with approval from Court**

Additionally, Applicant must prove the court would have accepted his plea agreement. The alleged offer was to plead guilty to voluntary manslaughter. "Voluntary manslaughter" is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence. State v. Norris, 253 S.C. 31, 39, 168 S.E.2d 564, 567 (1969).

Here, the trial court ruled as follows:

> In this case from both of the statements given by the defendant there is no evidence from which you could reasonably find that any any heat of passion, if it did exist, was based upon sufficient legal provocation.

(Tr. 327). Thereafter, the trial court reasoned as follows

> Whether he had good intentions or bad intentions, it doesn't matter. A person has a right to be free from assault and restraint, and a person has an absolute right to resist an assault or a freedom of their restraint. And the exercise of legal right can never be considered as sufficient legal provocation to justify an assault or taking a life.

(Tr. 328). The South Carolina Court of Appeals affirmed the trial court with the following analysis:

> Considering either version of events as stated by Knight, no facts exist indicating Knight and Aull were fighting. Rather, the evidence indicates Knight attempted to physically and verbally restrain Aull, while she attempted to defend herself. This evidence, without more, is insufficient to establish facts or inferences demonstrating a legal provocation for reducing the crime from murder to voluntary manslaughter. Thus, the circuit court did not err by denying Knight's motion to charge the jury on the law of voluntary manslaughter.

Accordingly, this Court finds the evidence in the record suggests the facts were perceived, at the time, as appropriate for voluntary manslaughter. Applicant has failed to provide evidence any material evidence in rebuttal. Therefore, this Court finds Applicant has not overcome the burden to prove a court would have accepted the facts and circumstances being appropriate for a voluntary manslaughter plea.[4]



***3. Eliciting and failure to object to testimony on the ultimate issue***

[4] Accordingly, this Court declines to address whether the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Applicant contends Trial Counsel failed to object to an opinion on the ultimate issue after eliciting the testimony. To prove prejudice when challenging a conviction, the question is whether there is a reasonable probability that, absent the errors, the jury would have had a reasonable doubt respecting guilt. Brown v. State, 383 S.C. 506, 514, 680 S.E.2d 909, 914 (2009). "Reasonable probability" is identified as probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 329, 642 S.E.2d 590, 596 (2007). The testimony at issue is as follows:

> Q: Well, what do you think it was?
>
> A: I don't have an opinion on what the truth is. I wasn't there and didn't commit the murder. Only the person that did could tell me that, and he did.

(Tr. 256, L. 22-5).

Here, the testimony came during the cross examination of Steve Denton by Applicant's other trial lawyer, Michael Bartosh.[5] Denton was the investigator who conducted a meeting with Applicant leading to the second confession. This testimony came during a line of questioning about Denton's interrogation techniques. (Tr. 255). Initially, Denton testified he could not identify any manuals or textbooks to support his technique for interrogation. (Tr. 255, L. 10-2). Thereafter, Denton testified he wanted to conduct a subsequent interrogation after identifying inconsistencies with the first confession. (Tr. 256, L. 10-4). This led to question at issue. However, the testimony immediately after that is as follows:

> Q: So you had no idea what it was you were going to ask him or tell him that you felt were inconsistencies.
>
> A: I knew what the inconsistencies were as far as what I saw on the body and the first statement.



[5] Bartosh is now deceased.

(Tr. 257, L. 1-4). It appears Bartosh decided to stick with his line of questioning on the Denton's identification of inconsistencies. It would have be unusual for Bartosh to object to a question he elicited. Instead, a motion to strike along with a curative instruction would have been the more practical route. However, this may have brought unnecessary attention to the testimony. The jury had the confession, recorded by Denton on behalf of Applicant, in evidence. The Assistant Solicitor only mentioned Denton in closing arguments to reiterate Applicant understood his legal rights before signing the confession in evidence. (Tr. 342, L. 17-23). Accordingly, Denton's importance to this case was merely to reflect the confession was voluntary. Therefore, this Court finds there is no reasonable probability a jury would have doubted guilt if the singular opinion had been struck from the record. As a result, Applicant has failed to overcome the burden to prove he suffered prejudice based upon the failure to object to the comment by Denton.

***4. Failure to advise to testify at trial***

Applicant contends Trial Counsel was deficient for failing to advise him he should testify at trial. A defendant's knowing and voluntary waiver of statutory or constitutional right must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both. State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 175 (1993). The trial court handled this issue as follows:

| | |
|---|---|
| Court: | Mr. Knight, do you understand that when you are charged with a criminal offense that you – when your case comes to trial you have an absolute right to remain silent. |
| Defendant: | I understand. |
| Court: | No one can require that you take the witness stand; not your lawyers, not the prosecutors, not the Court, not anyone. If you wish to take the witness stand and testify, that's a decision that you can make. And you have the right to testify if you wish to, but |

no one can require that you do so. Do you understand that nobody can make you testify?

Defendant: Yes, sir, I understand that.

Court: Do you also understand that if you wish to testify, now is the only opportunity that you will have to do so? And by that I simply mean that you can't wait until after the jury has reached a decision and if it does not go to suit you, then you say, well, I'd prefer to tell the juror or give them facts or evidence or testimony. So you have to make your decision when the time comes for you to make your presentation. Do you understand that this is the only opportunity that you will have to testify if you wish to?

Defendant: Yes, sir, I understand.

Court: And have your lawyers discussed with you the advantages and disadvantages of testifying or not testifying?

Defendant: Yes, they have.

Court: And do you understand what those advantages and those disadvantages are?

Defendant: Yes, I do.

Court: Have you made a decision as to whether or not you will testify?

Defendant: Yes, I have.

Court: And what is your decision?

Defendant: I do not wish to testify.

Court: And the fact that you do not wish to testify, is that decision that you made of your own free will and accord?

Defendant: Yes, it is.

Court: Did anyone suggest that decision to you?

Defendant: No, they didn't.

(Tr. 321, L. 12-25) (Tr. 322, L. 1-25) (Tr. 323, L. 1-4).

Here, Counsel credibly testified she customarily advised a client about the benefits and consequences of testifying on their own behalf. In this case, Counsel credibly recalled it was always Applicant's final decision. However, Applicant testified he never had a conversation with her about the benefits of testifying at trial. This is inconsistent with the record. Therefore, this Court finds Counsel provided credible testimony on this issue. Accordingly, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient for failing to advise him about the benefits of testifying on his own behalf.

Additionally, Applicant contends he was prejudiced based upon not understand his rights when he waived the right to testify. However, this completely contradicts his above-mentioned colloquy with the trial court. Therefore, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced by any alleged failure to advise him to testify.

***5. Failure to object to jury instruction on murder***

Applicant contends Trial Counsel should have objected to a jury instruction given about permissible inference of malice with murder. Counsel is not required to be clairvoyant or to anticipate changes in the law that were not in existence at the time of trial. Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), overruled, on other grounds, by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). The South Carolina Supreme Court held malice may not be inferred from use of a deadly weapon where evidence was presented to mitigate, excuse, or justify the homicide. State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009), overruled by State v. Burdette, No. 2017-001990, 2019 WL 3437783 (S.C. July 31, 2019). However, The S.C. Supreme Court specifically held did not apply to convictions challenged on post-conviction

relief. Belcher, 385 S.C. at 613, 685 S.E.2d at 810. In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution. Battle v. State, 382 S.C. 197, 204, 675 S.E.2d 736, 740 (2009). A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense. Lowry v. State, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). The instruction at issue is as follows:

> Court: You may also infer the existence of malice from proof of the intentional commission of an act which is inherently dangerous to human life.

(Tr. 368, L. 2-4).

Here, Applicant argues this instruction reduced the burden on the Assistant Solicitor. However, Applicant fails to provide substance to support the assertion this argument burden shifts. However, this instruction was given with a large set of instances where the jury was permitted to infer malice. (Tr. 267-8). For cautionary purpose, this Court extends the analysis to the instruction on malice inference as a whole. The Belcher decision did not happen until seven years after this trial took place. Moreover, it did not extend to convictions challenged on post-conviction relief. Therefore, this Court finds Counsel had no duty to object to the permissible malice inference instruction based upon not knowing the law would change seven years later. Accordingly, Applicant has failed to prove he suffered prejudice when Counsel failed to object.

**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), SCRCP; 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)).

*1. Failure to brief argument about improperly admitted statements*

Applicant contends Appellate Counsel failed to brief a material issue in the trial court's decision to admit both confessions in a pre-trial hearing.

Here, Applicant testified he wanted Appellate Counsel to raise the issue that his confessions were involuntary. On the other hand, Appellate Counsel credibly recalled he believed the voluntary manslaughter issue was the only one worth briefing. Appellate Counsel credibly testified involuntary confession issues were fairly ordinary so he came across them a lot. Appellate Counsel credibly testified he purposefully did not brief this issue in Applicant's case. Appellate Counsel credibly assessed a person would need to be misled, tricked, denied food or water, or intoxicated for a confession to be inadmissible. He credibly reasoned this case was similar to many others where individuals are merely tired or hungry when they carry out a confession statement. Appellate Counsel credibly assessed this was not enough to make the confession involuntary. He further credibly recalled routinely reading cases where law enforcement wrote the confession for somebody. Appellate Counsel also credibly assessed the failure to record a confession with audio or video did not make it inadmissible.

Accordingly, Appellate Counsel reviewed involuntary confession issues several times based upon the totality of circumstances. He strategized not to raise based upon routine situations where the individual was tired, hungry, not recorded, or did not write the statement. Instead, Appellate Counsel chose to raise it in more extraordinary circumstances like denial of food, denial of water, coercion, or intoxication. In this case, Appellate Counsel assessed Applicant was simply tired and hungry after reviewing the record. Accordingly, this Court finds Appellate Counsel used reasonable professional judgement when he decided not to brief this

issue. Therefore, Applicant has failed to overcome the burden to prove Appellate Counsel was deficient for a failure to brief alleged involuntary confessions.

To prove prejudice, Applicant must prove the issue would have been successful on appeal. A defendant's confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by exertion of improper influence. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990). A trial court's determination of whether the statement was knowingly, intelligently and voluntarily made, requires examination of totality of circumstances surrounding waiver. Rochester, 301 S.C. at 200, 391 S.E.2d at 247. On appeal, conclusion of trial judge on issues of fact as to voluntariness of confession will not be disturbed unless so manifestly erroneous as to show abuse of discretion. Id. Finally, Applicant is only entitled to a new trial where the result of the appeal would have been different based upon appellate counsel's deficient representation. Ezell v. State, 345 S.C. 312, 315, 548 S.E.2d 852, 854 (2001)

According to the record, Applicant had a twelve hour window to eat or sleep before being detained by law enforcement. (Tr. 52). After detainment, Applicant was Mirandized twice before giving the first statement. (Tr. 15, 16). Applicant admitted he remembered being read his rights at the station. (Tr. 39). He did not make any material requests, outside of a smoke break, while giving this statement.[6] (Tr. 23). Applicant admitted this statement was in his own words. (Tr. 43). Thereafter, he was sent to a designated sleeping area. (Tr. 46). In the morning, Applicant was Mirandized again before giving the second statement to Denton. (Tr. 29). Applicant did not make any material requests after being offered food and water by Denton. (Tr. 34). The record does not indicate noticeable improper influence, promise, threat of violence, or

[6] His request for a smoke break was granted.

failure to accommodate material requests. Moreover, the record is clear that law enforcement Mirandized him before both confessions. Therefore, this Court finds Applicant would probably not be successful in appealing the voluntariness of his confession based upon the facts in the record. This Court further finds the result would not have been different even if Counsel would have briefed the issue. Accordingly, Applicant has failed to overcome the burden to prove he suffered prejudice in an alleged failure to brief the issue of voluntariness of both confessions.

***2. Failure to brief argument about improper finding of fact at trial***

Applicant contends Appellate Counsel failed to brief a material argument based upon an improper finding of fact by the trial court. In a murder prosecution, the defendant is entitled to an instruction on voluntary manslaughter unless "it should clearly appear that there is no evidence" whatsoever to reduce the crime from murder to manslaughter. Casey v. State, 305, S.C. 445, 446, 109, S.E.2d, 391, 392 (1991).

Here, the trial court's conclusion at issue occurred during a decision on whether to charge voluntary manslaughter to the jury. (Tr. 328). Specifically, Applicant argues the trial court improperly concluded Applicant initiated a physical assault based upon dialogue from his confession. (Tr. 328). The trial court based this conclusion upon Applicant stating he "tried to set her up from behind." (Tr. 328). Appellate Counsel does not remember the reason he did not include this specific finding in his brief about the failure to charge voluntary manslaughter. He did credibly testify the failure to charge voluntary manslaughter was the only issue he would have briefed. In that brief, Appellate Counsel argued the trial court erred in refusing to instruct the jury on voluntary manslaughter because there was evidence to support it. (BOA. 7). He cited and submitted both confessions to support his argument. (BOA. 5). He also cited to the trial court finding that both statements indicated Applicant first assaulted the victim. (BOA. 6).

Accordingly, Applicant believes Appellate Counsel should have focused on the finding instead of the facts. However, Appellate Counsel argued on the factual issue which had a compelling standard that any material evidence of voluntary manslaughter in a murder trial constitutes entitlement to the instruction. Appellate Counsel contended there was evidence of voluntary manslaughter, and submitted both confessions in their entirety for review. Therefore, Appellate Counsel exercised reasonable professional judgement in submitting all potentially favorable evidence to meet the burden for entitlement to a voluntary manslaughter charge. Therefore, this Court finds Applicant has failed to overcome the burden to prove Appellate Counsel was deficient for not briefing the improper finding of fact issue.

Applicant contends he would have been successful on appeal if Appellate Counsel briefed the trial court's improper finding of fact. He is only entitled to a new trial where the result of the appeal would have been different based upon appellate counsel's deficient representation. Ezell v. State, 345 S.C. at 315, 548 S.E.2d at 854.

Here, Appellate Counsel actually argued the trial court erred in refusing to instruct the jury on voluntary manslaughter. (BOA. 7). However, the S.C. Court of Appeals affirmed the trial court's decision not to charge the jury on voluntary manslaughter. In doing so, it reasoned as follows:

> Considering either version of events as stated by Knight, no facts exist indicating Knight and Aull were fighting. Rather, the evidence indicates Knight attempted to physically and verbally restrain Aull, while she attempted to defend herself. This evidence, without more, is insufficient to establish facts or inferences demonstrating a legal provocation for reducing the crime from murder to voluntary manslaughter. Thus, the circuit court did not err by denying Knight's motion to charge the jury on the law of voluntary manslaughter.

Accordingly, the Court of Appeals agreed no facts in the record suggested there was legal provocation. Moreover, the trial court made the finding of fact outside the presence of the jury. (Tr. 323-8). Therefore, it is difficult to differentiate the current argument from the one already briefed. Applicant failed to offer any guidance to distinguish the arguments. Therefore, this Court finds briefing an issue based upon the trial court's finding of fact on initiating physical contact would not have provided a more favorable result. Accordingly, Applicant has failed to overcome the burden to prove he suffered prejudice based upon the failure to brief this issue.

## 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 remain in the custody of the South Carolina Department of Corrections.

**AND IT IS SO ORDERED this** 23rd **day of** August, **2019.**

J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

573

DOCKET 02-GS-42-1401

## WITNESSES

William R. Gary, Investigator
Spartanburg County Sheriff's Office

1. CRIMINAL RECORD ☐
2. REPORT ENDORSED ☐ Computer
3. CARD PULLED ☐
4. INDICTED ☐
5. CHECKED WARRANTS ☐
6. CHECKED SIGNATURE ☐
7. ASSESSMENT AND STATE CARD NUMBER ☐
8. TRAFFIC VIOLATIONS COPY ☐

## ARREST WARRANT NUMBER

H-178269

## ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: 4/11/02

## VERDICT

Guilty of Murder

Foreperson of Petit Jury
Date: July 10, 2002

# The State of South Carolina

County of Spartanburg

*Trey Gowdy, Solicitor*

## COURT OF GENERAL SESSIONS

APR 15 2002 TERM

THE STATE
vs.

JEREMY JEROME KNIGHT

Indictment for

**MURDER**

SC Code 16-03-0010, 0020
CDR Code 116
Class FEL-EXM

STATE OF SOUTH CAROLINA )
)
COUNTY OF SPARTANBURG )

INDICTMENT

At a Court of General Sessions, convened on APR 11 2002, the Grand Jurors of Spartanburg County present upon their oath:

## MURDER

That Jeremy Jerome Knight, did in Spartanburg County on or about February 25, 2002, feloniously, willfully, and with malice aforethought, kill one Miranda Aull, by strangling her, and that the victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *The South Carolina Code of Laws*, (1976, as amended).

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

Barry Barnette
DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA )
COUNTY OF SPARTANBURG )
STATE VS. )
Jeremy Jerome Knight )
AKA: )
Race: B Sex: M )
DOB: [redacted] Age: 22 )
SSN: [redacted] )
DL#: )
SID#: )

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
02 -GS- 42 - 1401
A/W#: H-178269
Date of Offense: 2/25/02
S.C. Code § : 16-3-10
CDR Code #: 01116

SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: MURDER (30 Years - Life)
in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 01116
☐ NON-VIOLENT ☑ VIOLENT ☐ SERIOUS ☑ MOST SERIOUS ☐ 17-25-45
The charge is: ☑ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | Defendant | Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections,** ☐ **County Detention Center** for a determinate term of LIFE ~~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.

☐ The Defendant is to be given credit for ____ days/months jail time.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: ____

**SPECIAL CONDITIONS:**

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered
Total: $____ plus 20% fee $ ____
Payment Terms: ____
☐ set by SCDPPPS ____
Recipient: ____

*Fine: ..... $ ____
§ 14-1-206 - Assessments 100% ..... $ ____
§ 14-1-211 - Surcharge ..... $ ____
(Exceptions: See § 14-1-211)
§ 56-5-2995 (DUI) ..... $ ____
County (3%) ..... $ ____
TOTAL ..... $ ____

PTUP ____
____ days/hours Public Service Employment
Obtain GED ____
Attend Voc Rehab. or Job Corps ____
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: ____

Clerk of Court/Deputy Clerk Mark Hammond
Court Reporter: Linda Moffitt

PRESIDING JUDGE ____
Judge Code: 101513
Sentence Date: July 10, 2002

White - Clerk | Green - Corrections | Canary - Probation | Pink - Defendant

SCCA/217 (1/99)