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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
D. Craig Brown, Circuit Court Judge

Case No. 2015-CP-38-00298

Julian Young, #352043 Respondent,

v.

State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable D. Craig Brown’s order granting post-conviction relief filed May 20, 2020. The State received the filed order on May 26, 2020. A copy of the order is attached hereto.

June 19, 2020

Respectfully submitted,

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STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Julian Young, #352043,

2015-CP-38-00298

Applicant,

Order Granting Post-Conviction Relief

v.

State of South Carolina,

Respondent.

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Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the April 2014 term of the Court of General Sessions for Orangeburg County for Murder (2011-GS-38-1833). Applicant was represented by Virgin P. Johnson, Esq. and Korey L. Williams, Esq. (hereinafter "Trial Counsel" and "Co-Counsel" respectively). The State was represented by Donald N. Sorenson, Esq. (hereinafter "Solicitor Sorenson") as lead chair and now-retired Harrison Bell ("Solicitor Bell") as second chair. On August 14, 2012, Applicant proceeded to trial before the Honorable Edgar W. Dickson. Applicant was found guilty on August 16, 2012. Judge Dickson sentenced Applicant to thirty-five (35) years' imprisonment for Murder.

Applicant filed a timely notice of appeal and filed a Final Brief of Appellant on December 17, 2013. On June 18, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming the ruling and conviction. Applicant filed a Petition for Writ of Certiorari on September 24, 2014, which was denied by the South Carolina Supreme Court on December 18, 2014.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons (hereinafter "Allegations"):

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1. Trial Counsel was ineffective in advising the jury during his opening argument that, although the evidence would not prove that Applicant had been in the possession of a gun, they could infer that he had a gun.
2. Trial Counsel was ineffective for neglecting to adequately cross-examine co-defendant, Ricky Gipson, concerning what deals he had reached with law enforcement in the Solicitor's Office in exchange for his testimony.
3. Trial Counsel was ineffective for neglecting to question witness, Ricky Gipson, concerning the penalties for dealing in the quantity of drugs admittedly involved in the transaction he set up between Austin and the Bailey.
4. Trial Counsel was ineffective for cross-examining witness, Ricky Gipson, concerning "felony murder" where said cross examination was inconsistent with South Carolina law and could readily have mislead the jury into believing that Applicant's involvement in a felony drug deal made him responsible for murder in connection with any death occurring in the course of said felony.
5. Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his potential sentencing exposure for murder in connection with the death of the Bailey had the state elected to pursue the charge of murder against him under the concept of accomplice liability.
6. Trial Counsel was ineffective for failing to cross-examine witness, Ricky Gipson, concerning the amount of marijuana involved in the drug deal he allegedly set up between the Bailey and Applicant and his friends.
7. Trial Counsel was ineffective for failing to adequately cross-examine Applicant concerning the potential advantages and disadvantages of testifying in his own defense.

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8. Trial Counsel was ineffective for neglecting to advise Applicant concerning the law as it relates to the defense of self-defense.

9. Trial Counsel was ineffective for neglecting to advise the Applicant thoroughly concerning the law as it relates to the lesser included offense of voluntary manslaughter.¹

10. Trial Counsel was ineffective for neglecting to advise the Applicant adequately concerning the law in South Carolina concerning the defense of accident.

11. Trial Counsel was ineffective for neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in State v. Belcher and the potential impact of that decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon in the homicide for which Applicant was charged.

12. Trial Counsel was ineffective for failing to adequately explain to Applicant the fact that jury charges on the law as it relates to self-defense, voluntary manslaughter, and accident would not be given unless there was some evidence before the Court which tended to support those jury instructions.

13. Trial Counsel was ineffective for neglecting to adequately explain to the Applicant the fact that, absent testimony from him there would be no evidence on the record to support a request for jury charges concerning voluntary manslaughter, self-defense or accident inasmuch as the testimony presented during the State's case in chief did not provide evidence supporting those theories of the case.

¹ Applicant's allegations of ineffectiveness do not assert that Trial Counsel failed to advise Applicant of the law concerning Involuntary Manslaughter. However, PCR Counsel questioned Trial Counsel, without objection from the State, about Involuntary Manslaughter and whether he explained such to Applicant. Therefore, the court will address the application of Involuntary Manslaughter as a potential lesser included offense as it relates to Applicant. (PCR Hr'g Tr. p. 159, ln. 12-20); (PCR Hr'g Tr. p. 187, ln. 9-18); and, (PCR Hr'g Tr. p. 241 ln. 22-23).

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14. Trial Counsel was ineffective for neglecting to cross-examine witness, Ricky Gipson, concerning what if any discussion he heard between Applicant and the Bailey.

15. Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that he could have been charged with attempted armed robbery and was not.

16. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he was not charged with murder when under the State's theory of the case he could have faced that charge under the theory of accomplice liability.

17. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he had not been charged with any drug crime in connection with his admitted involvement in the conspiracy to purchase marijuana from the deceased.

18. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could have been charged with attempted armed robbery under at least one interpretation of the evidence presented by the State.

19. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that the State's failure to charge him with certain potential offenses in connection with this case constituted a benefit in exchange for his testimony.

20. Trial Counsel was ineffective for neglecting to cross-examine Hilliard Pinckney concerning the fact that he could still be charged with a number of other serious offenses in connection with this incident if the State elected to prosecute him under a theory of accomplice liability.

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21. Trial Counsel was ineffective for neglecting to cross-examine State witness, Ricky Gipson, concerning the fact that the State had not charged him with a number of serious offenses for which he could have been prosecuted under a theory of accomplice liability.

22. Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his knowledge that the State could still elect to prosecute him for multiple serious felonies at some future date should they elect to prosecute him under a theory of accomplice liability.

23. Trial Counsel was ineffective for continuing to cross-examine State witness, Ricky Gipson concerning whether he had seen Applicant with a weapon during the incident in question after this witness had clearly testified that he had not seen Applicant with a weapon on that date.

24. Trial Counsel was ineffective for continuing to cross-examine Ricky Gipson concerning whether or not he had ever informed law enforcement that he saw Applicant with a weapon on the day in question where in one statement given to law enforcement, which was available to Counsel in the discovery process, Gipson claimed that either Applicant or his friend with him had a gun, and consequently Counsel's continued cross-examination on this point resulted in publication of testimony and evidence that was prejudicial to Applicant.

25. Trial Counsel was ineffective for failing to object to the State's characterization of witness Ray Anthony Austin's prior criminal record as "just a little bit of trouble in the past" where said characterization was intended to minimize the impact of this witness's prior record on the jury's determination of his credibility.

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26. Trial Counsel was ineffective for failing to cross-examine Ray Anthony Austin concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges.

27. Trial Counsel was ineffective for neglecting to adequately cross-examine Ray Anthony Austin concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date.

28. Trial Counsel was ineffective for neglecting to adequately cross-examine witness Ray Anthony Austin concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for his testimony.

29. Trial Counsel erred in neglecting to object to a portion of the State's closing argument in which the prosecution violated the Applicant's Sixth Amendment right to be fully heard in his defense by improperly commenting on the strategies employed by Defense Counsel.

30. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution essentially argued that there was no legal basis for the position of defense that witness Gipson could have been charged with murder and other offenses.

31. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence by arguing that there was evidence that Applicant pulled the trigger and was trying to steal from Bailey.

32. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument in which the Solicitor stated that witness Gipson would not have taken "them"

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over there to buy marijuana if he had known Applicant had a gun where there was nothing in evidence establishing that Applicant in fact had a gun.

33. Trial counsel was ineffective for neglecting to object to the manner in which a law enforcement officer was questioned concerning the chronology between when other State's witnesses were arrested, cooperated with an interview and then gave statements where the method in which the officer was questioned concerning each of the State's witnesses, following by the same testimony concerning Applicant which did not reference cooperation and the giving of a statement, amounted to an improper comment on Applicant's exercise of his right to remain silent.

34. Trial Counsel was ineffective for failing to cross-examine Maurice Thompson concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted on each of those charges.

35. Trial counsel was ineffective for neglecting to adequately cross-examine Maurice Thompson concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident before the Court at some future date.

36. Trial Counsel was ineffective for neglecting to adequately cross-examine witness Maurice Thompson concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a consequence of his cooperation in exchange for his testimony.

37. Trial Counsel was ineffective for failing to object to a closing argument made by the State in which the prosecution argued that witness Gipson ran from the scene because he

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didn't have a gun on him where said argument addressed matters not in evidence and as such was highly improper.

38. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument wherein the Solicitor argued that "we know it's not a contact" in arguing that any suggestion that the Bailey shot himself with his own gun "makes no sense" where said argument was erroneous and not consistent with the testimony of the State's own expert witness, the pathologist, in this case.

39. Trial Counsel was ineffective for neglecting to use readily available evidence, disclosed to the defense in the discovery process, to impeach the State's witnesses and challenge the State's theory of the case.

40. Trial Counsel was ineffective for failing to clearly refute the State's position that a key witness for the State was Applicant's cousin.²

41. Trial Counsel was ineffective for failing to adequately argue that the statements made by the deceased did not have the degree of reliability typically afforded a dying declaration where the evidence before the Court verified that the description of the circumstances under which he was shot as a robbery was in fact suggested to him by the law enforcement officer questioning him.

42. Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the grounds that his attempt to conceal his identity from law enforcement by lying about his name provided direct evidence that he was not operating under the belief that his demise was imminent.

² This allegation was not argued before the Court during the PCR hearing and was referenced by PCR Counsel that it was her intention to withdraw this allegation. Therefore, it was not preserved and will not be discussed in this Order. (See PCR Hr'g Tr. p. 70, 71, 80).

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42(A). Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his identity from law enforcement, by refusing to provide his name, constituted direct evidence that he had the capacity for reflective thought at the time of the "utterance."

43. Trial Counsel was ineffective for failing to adequately investigate any plea negotiations between the State and witnesses appearing for the prosecution at Applicant's trial.

44. Trial Counsel was ineffective for neglecting to adequately discuss potential plea negotiations with the State prior to Applicant's trial.

45. Trial Counsel was ineffective for neglecting to object to testimony from SLED agent Richard Johnson in which he testified that in the course of their investigation "everyone said he didn't carry a weapon" in response to a question concerning whether there was any evidence that the deceased carried a weapon for defense.³

Statement of Facts

Kendra Williams, a sergeant with the South Carolina State University (SC State) Police Department, was dispatched to 2195 Russell Street on the night of April 15, 2011. (Trial Tr. p. 82, ln. 3 - p. 83, ln. 5). Williams was called to the property around 11:14 p.m. because a vehicle had hit the building at 2195 Russell Street, which held offices for SC State. (Trial Tr. p. 83, ln. 6-25).

Williams arrived at the scene at 11:20 p.m. (Trial Tr. p. 83, ln. 6-12). When Williams arrived, she observed that a green car had struck the front of the building at 2195 Russell Street. (Trial Tr. p. 84, ln. 13-22). Williams observed "a lot of car pieces and a lot of bricks everywhere."

³ PCR Counsel, in her proposed order previously forwarded to this Court, adds Allegation 45 as an additional allegation of ineffective assistance of counsel which was not alleged in Applicant's first, second, or third amended Application. However, this Allegation was argued at the PCR hearing and was not objected to by the State. See *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 98, 594 S.E.2d 485, 496 (Ct. App. 2004).

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(Trial Tr. p. 84, ln. 19-20). There were already a number of public safety officers and an ambulance at the scene. (Trial Tr. p. 84, ln. 13-21).

Williams found the former occupant of the wrecked vehicle, a man named Jonathan Bailey, who is the Bailey in this case, in the ambulance. (Trial Tr. p. 87, ln. 11-22). Williams got in the back of the ambulance with Bailey and observed that he had a gunshot wound to the right chest area and another wound to the left chest area. (Trial Tr. p. 88, ln. 3-13). Williams observed that Bailey "was frantic, he was scared, terribly scared." (Trial Tr. p. 88, ln. 14-17). Bailey was rolling back and forth on a stretcher and complaining of the pain he was in. (Trial Tr. p. 88, ln. 14-21). According to Williams, he kept saying, "get me to the hospital, I'm going to die." (Trial Tr. p. 89, ln. 2-4).

Williams asked Bailey his name and if he was a student at SC State, but Bailey would not answer. (Trial Tr. p. 88, ln. 22 - p. 89, ln. 2). Bailey gave few audible responses. (Trial Tr. p. 93, ln. 22-23). Williams testified that she:

asked him if he was Queen's Village, he said he—well, he shook his head, yes. I asked him if he had been robbed, he shook his head, yes. I asked him if, how many, and he stuck his hand up and showed me four fingers. I asked him if he saw the weapon, he shook his head, yes. I asked him if it was a revolver, he shook his head, yes. When I asked him if he saw the color of the weapon, he just shook his head, no. He just kept saying he was in pain, get me to the hospital. It wasn't real easy to get anything out of him.

Trial Tr. p. 89, ln. 6-14.

The ambulance ultimately took Bailey to the helipad at The Regional Medical Center of Orangeburg where he was then transported to another hospital. (Trial Tr. p. 89, ln. 19-25). Bailey died later that night from his injuries. (Trial Tr. p. 90, ln. 1-3).

After getting information from Bailey, Williams contacted her supervisors and then a number of officers from the SC State Police Department responded to 2195 Russell Street and

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Queen's Village. (Trial Tr. p. 91, ln. 13 - p. 92, ln. 14). At this point, the two crime scenes consisted of the Queen's Village area, where Sergeant Williams believed the shooting had occurred based on the information she obtained from Bailey, and the Russel Street location where the ambulance had responded to treat Bailey due to the traffic accident report. Law enforcement secured both locations and began looking for evidence. (Trial Tr. p. 92, ln. 1-14).

Dustin Johnson, an officer with the SC State Police Department (hereinafter "Officer Johnson"), responded to Queen's Village the night of April 15, 2011, in response to a call that there had been a shooting in Queen's Village, which was part of the South Carolina State campus, and was debriefed by Sergeant Williams and the responding police Commander upon his arrival. (Trial Tr. p. 100, ln. 4-10). By the time Officer Johnson arrived, the crime scene had already been secured. (Trial Tr. p.100, ln. 11-16). Officer Johnson then started to look around, investigate, and do the initial processing of the crime scene. (Trial Tr. p. 100, ln. 20-24). As he was performing his crime scene investigation at the Queen's Village area, Officer Johnson found and collected what he believed to be evidence, two bags of a green leafy substance that appeared to be marijuana and a fifty dollar bill. (Trial Tr. p. 100, ln. 24 – p. 101, ln. 8). Officer Johnson also photographed an area that had—what he perceived to be—fresh, tire skid marks. (Trial Tr. p. 101, ln. 8 - 12). Officer Johnson did not find any bullets or shell casings in the area. (Trial Tr. p. 107, ln. 11-17).

Officer Johnson then went to process the second crime scene, which was a short distance away on Russell Street. (Trial Tr. p. 107, ln. 23 - p. 108, ln. 14). While observing the wrecked car at the crime scene, Officer Johnson noticed a marking on the arm rest of the driver side door that appeared to be blood spatter, so he began looking for a bullet projectile. (Trial Tr. p. 109, ln. 2 - p. 110, ln. 24). He found a bullet projectile about eighteen inches from the side of the car, right under the driver side door. (Trial Tr. p. 111, ln. 4-11). In the passenger side of the car, he found

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another fifty dollar bill, along with five, twenty dollar bills and another bag of a green leafy substance that appeared to be marijuana. (Trial Tr. p. 114, ln. 8 - p. 115, ln. 20). Johnson then secured the vehicle with evidence tape and had it towed to a secure location. (Trial Tr. p. 115, ln. 21 - p. 116, ln. 7).

Once police learned that Bailey had died from his injuries, the South Carolina Law Enforcement Division (SLED) was called in to take over the case. Karl Kenley, a crime scene special agent with SLED, responded to the crime scene and lifted two latent prints from outside of the passenger door of Bailey's vehicle, one from the top of the window and one from the door, near the key entry. (Trial Tr. p. 292, ln. 22 - p. 294, ln. 23). The latent print from the window was identified as belonging to Ray Anthony Alston. (Trial Tr. p. 315, ln. 13 - p. 316; p. 325, ln. 15-19). The other print could not be identified at first, but eventually it was identified as belonging to Applicant. (Trial Tr. p. 317, ln. 9 - p. 318, ln. 14; p. 325, ln. 20-24).

SLED Agent Richard Johnson (hereinafter "Agent Johnson") came to Orangeburg on April 16, 2011, to begin his investigation. (Trial Tr. p. 336, ln. 14-24). As part of SLED's investigation, Agent Johnson obtained Bailey's phone records. (Trial Tr. p. 338, ln. 8-17). From those records, Agent Johnson identified Ricky Gipson as someone who had been in "constant contact" with Bailey before his death and who had sent two text messages to Bailey shortly after the 911 call was made regarding Bailey's accident. (Trial Tr. p. 338, ln. 17-25). Agent Johnson contacted Gipson and took his statement about what happened the night of April 15th. (Trial Tr. p. 340, ln. 3-8). Agent Johnson showed Gipson a photograph of Alston, and Gipson identified Alston as someone who was present the night Bailey was shot. (Trial Tr. p. 340, ln. 9-17).

Thereafter, Alston was arrested for murder and Alston identified the other individuals that were present the night Bailey was shot. (Trial Tr. p. 340, ln. 18 - p. 341, ln. 22). Alston also

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identified Applicant, who goes by the nickname Gouda, as one of the individuals present the night Bailey was killed. (Trial Tr. p. 341, ln. 8-24).

At trial, Alston testified that, on the night of April 15, 2011, he was hanging out with Applicant and others at a friend's house. (Trial Tr. p. 198, ln. 8 - p. 199, ln. 4). Alston decided he wanted to get some marijuana. (Trial Tr. p. 202, ln. 3-8). Alston testified that he talked to Applicant about making arrangement for Alston to buy marijuana. (Trial Tr. p. 202, ln. 17 - 19). Alston testified that Applicant then made some phone calls and set something up. (Trial Tr. p. 202, ln. 20 - p. 203 ln. 3). Thereafter, Alston, Applicant, Hilliard Pinckney, and Maurice Thompson drove to the SC State campus in a silver Buick. (Trial Tr. p. 199, ln. 1-4; p. 199, ln. 9-13; p. 200, ln. 1-23). Thompson drove, and Pinckney sat in the passenger seat. (Trial Tr. p. 204, ln. 21 - p. 205, ln. 4). Alston and Applicant sat in the back seat. (Trial Tr. p. 205, ln. 5-24).

Once on the SC State campus, the group picked up Gipson, who had been contacted by Applicant earlier in the day about purchasing marijuana. (Trial Tr. p. 130, ln. 16 - p. 135, ln. 4). Because Gipson did not have as much marijuana as Alston wanted to buy, Gipson arranged for Bailey to sell to Alston. (Trial Tr. p. 131, ln. 16 - p. 132, ln. 20). Gipson sat between Alston and Applicant in the back of the car, but Applicant was the only one there who knew Gipson. (Trial Tr. p. 132, ln. 18 - p. 136, ln. 16; p. 205, ln. 25 - p. 206, ln. 4).

Gipson testified that he had arranged to meet with Bailey at the marriage housing area. (Trial Tr. p. 134, ln. 18 - p. 135, ln. 4). Gipson and the group arrived before Bailey, so they reversed and parked in a parking space and waited for Bailey to arrive. (Trial Tr. p. 138, ln. 8-21; p. 176, ln. 4-24). When Bailey arrived, Bailey pulled into a parking spot such that his passenger side was closest to the passenger side of the Buick. (Trial Tr. p. 138, ln. 21 - p. 139, ln. 11; p. 207, ln. 25 - p. 208, ln. 21). Gipson, Alston, and Applicant went to Bailey's car, and Gipson got in the

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passenger seat to facilitate the transaction. (Trial Tr. p. 140, ln. 1-13). Alston and Applicant began complaining to Bailey because they were not happy with the quality of the marijuana that Bailey had to sell to them. (Trial Tr. p. 140, ln. 4-13; p. 209, ln. 13 - p. 210, ln. 7). Gipson then got out of Bailey's car, as Alston and Applicant were communicating with Bailey, because at that point "it didn't have anything to do with [him]." (Trial Tr. p. 141, ln. 21 - p. 142, ln. 7). After Gipson had gotten out of Bailey's car and walked away, another silver car pulled up to the general area and Gipson spent about fifteen seconds observing this silver car because he did not know who the car belonged to. (Trial Tr. p. 142, ln. 8-15). When Gipson turned back around towards Bailey's car, he saw Applicant and Bailey "tussling in the car. . . ." (Trial Tr. p. 142, ln. 12-14). Gipson could not tell what Applicant and Bailey were fighting over. (Trial Tr. p. 143, ln. 22-24). Gipson observed that the passenger side door of Bailey's car was open and Applicant was leaning in the car while this tussling was occurring, and while all this was occurring, Bailey's car was simultaneously going into reverse. (Trial Tr. p. 142, ln. 10-16). Gipson testified that the tires of Bailey's car began to "spur out" as it was going to reverse and that he heard a "pop" after he heard the tires 'spurring out.' (Trial Tr. p. 142, ln. 16-18). Gipson ran away after hearing the "pop." (Trial Tr. p. 142, ln. 18-21). Gipson testified that he never saw anyone with a gun. (Trial Tr. p. 143, ln. 25 - p. 144, ln. 2). Gipson also observed that Alston was standing away from the car at the point that Bailey's car had begun to go into reverse. (Trial Tr. p. 144, ln. 11-19). After Gipson began to run away from the scene, he looked back and saw that Bailey's car had left the parking spot so Gipson continued to run away. (Trial Tr. p. 142, ln. 21-25).

Alston also testified at Applicant's trial. He testified that: he walked away from Bailey's car and Applicant went up to the passenger side window of Bailey's car (Trial Tr. p. 210, ln. 21-25); it looked like Applicant and Bailey were just talking at first, and then Bailey's car went into

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reverse with Applicant "inside the car" (Trial Tr. p. 210, ln. 25 – p. 211, ln. 2); when the car started to go into the reverse with Applicant leaning into the car, Applicant was "getting dragged by it, somewhat getting dragged by it" when Alston heard a "pow" sound (Trial Tr. p. 212, ln. 5-11); and, he heard this "pow" sound, which Alston believed to be a gun shot, and then Applicant got back into the silver Buick the group arrived in. (Trial Tr. p. 211, ln. 2-3; p. 212, ln. 12-14). Alston asked Applicant "if he was alright, and then [Alston] asked if he shot the guy, but [Applicant] never answered." (Trial Tr. p. 211, ln. 3-6; p. 214, ln. 1-7).

Standard of Review

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1976).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 669).

Strickland does not guarantee perfect representation, only a "reasonably competent attorney." 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)). Representation is constitutionally ineffective only if it "so undermined the proper functioning of

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the adversarial process” that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. at 689.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, an applicant must prove that counsel’s performance was deficient. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (quoting Strickland, 466 U.S. at 668). The proper measure of performance is whether an 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. (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Where trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective. McKnight v. State, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness based thereon. Where counsel articulates a strategy, it is measured, on a claim of ineffective assistance, under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002). When evaluating the reasonableness of counsel's conduct for purposes of claim of ineffectiveness assistance, the "court should keep in mind the counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a

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particular case." Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (quoting Strickland, 466 U.S. at 690).

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 687).

In assessing prejudice under Strickland, the question is whether it is "reasonably likely the result would have been different absent the errors." Strickland, 466 U.S. at 696 (emphasis added). The likelihood of a different result must be substantial, not just conceivable. Harrington, 562 U.S. at 112 (citing Strickland, 466 U.S. at 693).

Courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions. See Wiggins v. Smith, 539 U.S. 510, 526-528 (2003). However, there is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Harrington, 562 U.S. at 109. Strickland, however, calls for an inquiry into the objective

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reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 110 (citing Strickland, 466 U.S. at 688).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. See Strickland, 466 U.S. at 689-690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. Id. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Strickland, 466 U.S. at 689; see also Bell v. Cone, 535 U.S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (internal citation omitted). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.

INTRODUCTION

Prior to this Court's analysis of Applicant's allegations, this Court believes that it is necessary to discuss Trial Counsel's theory of the case. Trial Counsel testified throughout the PCR hearing that: he wanted to establish that Applicant did not take the gun to the car and therefore could not have been the one that did the shooting (PCR Hr'g Tr. p. 23, ln. 18-21); his theory was

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that Applicant had nothing to do with the gun (PCR Hr'g Tr. p. 35, ln. 10-11); "[s]omebody could have take [sic] the gun, somebody could have moved the gun, but I can tell you who I know didn't touch the gun. Julian Young didn't touch the gun. That was my theory" (PCR Hr'g Tr. p. 35, ln. 14-17); his theory was to show that the gun came from Bailey (PCR Hr'g Tr. p. 101, ln. 7-8) & (PCR Hr'g Tr. p. 112, ln. 10-11); and his position was Bailey got mad because of the failed drug deal, and that Bailey drew the gun that belonged to him out of anger because no one else saw Applicant with a gun. (See PCR Hr'g Tr. p. 114, ln. 11-13).

Co-Counsel confirmed this theory at the PCR hearing when he testified that no witness could show that Applicant had a gun and that it was possibly a third party that shot the Bailey. (PCR Hr'g Tr. p. 197-198, ln. 14-25 & ln. 1). When Co-Counsel was asked if there was any kind of "insinuation or implication that he [Bailey] was maybe shot somewhere else, in another location, by another person," Co-Counsel responded saying, "I don't think we ever put that in," (PCR Hr'g Tr. p. 198, ln. 17-20). Co-Counsel's only implication "was that there were not just one scene, . . . , but possibly two because of where they located – and I think the fragment -- . . . , was found outside of the car," (PCR Hr'g Tr. p. 199, ln. 4-8).

Trial Counsel's theory of the case was based upon him asking Applicant if the gun used in this incident would ever be found and Applicant telling him that it would not. Trial Counsel further stated that if they could never find the gun, then there was no way to connect Applicant with the shooting at all. (PCR Hr'g Tr. p. 33, ln. 16-23). Trial Counsel also testified that the only thing Applicant told him was that the gun would not be found and that was what he (Trial Counsel) used in forming his defense. (PCR Hr'g Tr. p. 48, ln. 17-23). Based upon Applicant telling Trial Counsel that the gun would not be found, Trial Counsel inferred that Applicant had the gun and, therefore, that he wanted to "keep [Applicant] out of harm [sic] way" due to Trial Counsel's fear

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of what would happen "if [Applicant] took the stand." (PCR Hr'g Tr. p. 34, ln. 7-10). Trial Counsel also testified, based solely upon Applicant telling him that the gun would not be found, that he had no question in his mind that the gun did not come from Bailey but rather from Applicant. (PCR Hr'g Tr. p. 46, ln. 17-20). Trial Counsel never asked Applicant if he brought the gun. (PCR Hr'g Tr. p. 216, ln. 21-22). Trial Counsel stated that all he asked Applicant was, "Do you think this gun will ever be found." (PCR Hr'g Tr. p. 47, ln. 10-11).

Co-Counsel also testified to this issue stating that he did not recall asking Applicant whether or not he brought the gun or where it came from. (PCR Hr'g Tr. p. 191, ln. 3-4). However, he believed that Applicant had possession of the gun at some point and disposed of it. (PCR Hr'g Tr. p. 191, ln. 4-7). Co-Counsel acknowledged the fact that Applicant may have had possession of the gun at some point did not establish that it was Applicant's gun, that he was the one that had the gun, or that he took the gun to Bailey's car. (PCR Hr'g Tr. p. 200, ln. 23 – p. 201, ln. 1). Furthermore, Co-Counsel stated that he did not remember ever knowing who brought the gun or remember Applicant telling them who brought the gun. (PCR Hr'g Tr. p. 203, ln. 15-17).

This Court believes that Trial Counsel's theory of the case was deficient from the outset. In measuring Trial Counsel's conduct under prevailing professional norms, this Court concludes that Trial Counsel's representation fell below the range of competence required in a criminal case. This Court further believes, which will be discussed below, that Trial Counsel's strategy and/or theory was unreasonable under an objective standard of reasonableness in that he failed to make the adversarial testing process work in this case. Because Trial Counsel's strategy and/or theory was not objectively reasonable based upon that which will be discussed below, Applicant was prejudiced in that "but for" Trial Counsel's deficient performance there is a substantial likelihood that the result of the trial would have been different.

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INEFFECTIVE ASSISTANCE OF COUNSEL ALLEGATIONS ANALYSIS

Trial counsel was ineffective in advising the jury during his opening argument that, although the evidence would not prove that Applicant had been in the possession of a gun, they could infer that he had a gun. (Allegation #1)

An opening statement serves to inform the jury of the general nature of the action and defenses involved in the case so they will be better prepared to understand the evidence presented. State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981). The solicitor's comments in opening and closing statements must be confined to the facts presented and the reasonable inferences therefrom. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (citing State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). The scope of the opening statement is within the discretion of the trial judge, whose decision will stand absent a showing of an abuse of discretion and prejudice to the complaining party. State v. Harris, 275 S.C. 463, 466, 272 S.E.2d 636, 638 (1980). Any error in the solicitor's opening statement defining a point of law can be cured by the trial judge's charge defining it properly. State v. Jones, 298 S.C. 118, 122, 378 S.E.2d 594, 596 (1989) (internal citation omitted).⁴

Solicitor Bell, in his opening statement at trial, told the jury that: "Implied malice means you have to look at the circumstances. The use of a deadly weapon you can imply, or the fact that during the commission of a crime, another crime - - - ." (Trial Tr. p. 72, ln. 6-9). Trial counsel immediately informed the Trial Court that he had a motion to make outside the presence of the

⁴ Opening statement to a jury is not an argument, rather it is opportunity to identify issues and to outline facts which attorney expects to establish in the course of trial. State v. Bernier, 486 A.2d 147, 149 (Me. 1985). It is improper for an attorney to refer to any testimony or to assert any facts in his opening statement unless, in good faith, he reasonably believes that supporting evidence will be offered and admitted at trial. Id.

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jury. (Trial Tr. p. 72, ln. 10-14). After the jury exited the courtroom, Trial Counsel moved for a mistrial stating:

Mr. Bell just said that it can be implied from a deadly weapon. That is not the case law. The jury just has been told they can be implied that there was a deadly weapon involved that you can find him guilty of murder and that creates malice. It does not create malice, and if there's any other, if – the law is if there's any other evidence at all you cannot imply or infer malice from a deadly weapon, and they just have been told that you can infer malice from a deadly weapon, and I don't think you can cure that.

Trial Tr. p. 73, ln. 2-10.

Solicitor Bell argued in response that the Trial Court "cannot charge that implied malice, or malice can't be implied from the use of deadly weapon." (Trial Tr. p. 73, ln. 16-20). Solicitor Bell went on to state that "there's nothing that prevents the State from arguing the use of a deadly weapon can imply malice. Id. Trial Counsel responded, citing to State v. Belcher (385 S.C. 597, 685 S.E.2d 802 (2009)), stating that "[t]he implication of malice is there is not any testimony that would reflect any other lesser charge is the law, not the fact that you can infer malice." (Trial Tr. p. 73-74, ln. 24-25, 1-3). Trial Counsel went on to state that it was his understanding that "whether you charge self-defense or not, whether it's accident or not, it cannot be inferred if there is any other evidence, not just self-defense." (Trial Tr. p. 74, ln. 8-12). Trial Counsel also argued that if you "tell the jury that now, the jury in the whole deliberation, if they hear about a gun they're going to be saying, well, we can infer, it's planted now that they can infer from a gun, and that's just not the law." (Trial Tr. p. 74, ln. 20-23). The Court denied Trial Counsel's Motion for a Mistrial but told Trial Counsel "you have the absolute right in your opening argument to tell them that you know, it cannot be inferred if there is any evidence which would reduce, mitigate, excuse or justify the homicide." (Trial Tr. p. 74, ln. 24 – pg. 75, ln. 2).

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After Trial Counsel's Motion for a Mistrial was denied and the trial resumed, the State told the jury that "inferred malice is not a different type of malice, it can be inferred from the circumstances surrounding the crime, such as use of a deadly weapon, or involvement in another crime." (Trial Tr. p. 75, ln. 24 - p. 76, ln. 3). In Trial Counsel's opening statement, he drew attention to the very same information he had challenged just moments earlier. In his opening statement, Trial Counsel stated that "[t]here is no testimony and we believe from the evidence we have seen there is no testimony that you, Julian, had a gun there. You may be able to infer it, but no testimony." (Trial Tr. p. 79, ln. 20-24). Thus, Applicant's own advocate virtually invited his jury to infer a key element of the crime of murder.

Applicant asserts that it would have been best for Trial Counsel not to "parrot" the State's language in his opening. (PCR Hr'g Tr. p. 17, ln. 13-15). Trial Counsel asserted at the PCR hearing that: he was trying to make sure that the jury knew that Applicant did not have a gun since he believed that the gun was the focal point in the case (PCR Hr'g Tr. p. 16, ln. 2-9); he wanted the jury to start with the fact that Applicant did not have a gun (PCR Hr'g Tr. p. 16, ln. 2-9); he was afraid of the weapon being anywhere near Julian (PCR Hr'g Tr. p. 16, ln. 23); and, he was "trying to make sure I start out front with Julian not having anything to do with that weapon." (PCR Hr'g Tr. p. 17, ln. 3-5).

PCR Counsel asked Trial Counsel on direct examination that "[i]f you felt strongly enough about that and the danger of the jury potentially inferring malice --- from the testimony about a weapon, wouldn't it have been best for you not to parrot that language in your own opening?" (PCR Hr'g Tr. p. 17, ln. 9-15). Trial Counsel acknowledged that in hindsight, PCR counsel may be right. (PCR Hr'g Tr. p. 17, ln. 16-17). However, Trial Counsel said that he was, "trying to prepare for anything that might come down the road." (PCR Hr'g Tr. p. 17, ln. 23-24).

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On cross-examination at the PCR hearing, Trial Counsel stated that he did not tell the jury that they could infer malice. (PCR Hr'g Tr. p. 94, ln. 23-25). Trial Counsel further elaborated saying that "the jury got a right to infer what they want, but I wanted them to know – by the time the case is over, they will see that Julian had nothing to do with this. I couldn't stop them from inferring what they want, but if they will listen and let's get through the case. (PCR Hr'g Tr. p. 94, ln. 1-6). On redirect, Trial Counsel indicated that he was telling the jury that they could infer everything but there were no facts to say that Applicant had a gun. (PCR Hr'g Tr. p. 107, ln. 9-11).

This Court believes that it was improper for the State to argue "implied malice" in its opening statement since no evidence had been presented at this point. This Court also believes that it was proper for Trial Counsel to object to such argument and move for a mistrial. However, after the Court denied Trial Counsel's Motion for a Mistrial, this Court believes that it would have been proper to ask the Trial Court for a curative instruction taking away any taint from the Solicitor's argument, to the extent such curative instruction could do so.

In any event, this Court also finds that Trial Counsel erred in his attempt to rebut the State's argument of this permissive inference pursuant to State v. Belcher. It is of necessity to note that the Belcher decision held that a jury cannot be instructed by the Court that they may infer malice when a defendant uses a deadly weapon during a homicide if there is evidence of mitigation, excuse or justification for the homicide. Belcher, 385 S.C. at 611, 685 S.E.2d at 809 (overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), which held that a jury charge on the inference of malice may not be given by the Court but that this ruling does not apply to convictions challenged on post-conviction relief). However, the Belcher decision stated in a footnote that:

The standard implied malice charge remains valid, as does the general permissive inference instruction: "If facts, are proved beyond a reasonable doubt, sufficient to

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raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." In addition, we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging.

Id. at 612, 685 S.E.2d at 810 (emphasis added).

The Belcher decision points out the difference between the prosecution stating to the jury an inference they may make, defense counsel arguing the absence of malice or the presence of reasonable doubt, and the Court charging the jury about an inference it can make at the close of trial. In the same way that Belcher allowed a prosecutor to argue to the jury that they may infer malice from the use of a deadly weapon, defense counsel may argue the absence of malice or the presence of reasonable doubt.

It is apparent from the outset of this trial that Trial Counsel did not know or understand the implications of Belcher. Trial Counsel did not know that the State could argue that malice may be inferred from the use of a deadly weapon nor did he know, understand, or appropriately argue to the jury the absence of malice or presence of reasonable doubt. Trial Counsel failed to argue to the jury that malice could not be inferred if there was any evidence which would reduce, mitigate, excuse, or justify the homicide after being instructed by the Court that he could do so. (Trial Tr. p. 74 & 75, ln. 24-25, 1-2). Trial Counsel did not follow the court's instructions when he failed to argue the absence of malice or the presence of reasonable doubt which would have contradicted the prosecution's opening argument.

The State's argument that malice could be inferred from the use of a deadly weapon before any evidence was presented and Trial Counsel telling the jury they could infer that Applicant had a gun would result in the only logical conclusion for the jury to reach, and that is, that the element

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of malice was satisfied. This argument conveyed to the jury from the outset how they could supply a vital element to the charge of murder by merely inferring it from the use of a deadly weapon. The argument further allowed the jury to listen to the State's case with an eye towards inferring malice from the beginning of the trial until its conclusion. Since the jury could logically reach this conclusion as to malice, the only remaining element the State would have to prove would be the "killing of any person" which was not, nor could it have been, contested.

It is clear that Trial Counsel was deficient in his efforts to protect Applicant from the very danger that he perceived and failed to protect Applicant's rights by choosing to argue to the jury in a manner contrary to that suggested by the trial judge. Rather, Trial Counsel's deficient conduct at this early stage of the trial increased the prejudice to Applicant by reinforcing the State's argument which he had, just moments before, made a motion for a mistrial before any evidence was presented in the case. Trial Counsel's error at this stage of the trial was particularly prejudicial to Applicant since the jury was told they could infer malice and infer that Applicant had a gun from the very beginning.

While Trial Counsel articulated a reason for his argument, it was unreasonable under an objective standard of reasonableness since Trial Counsel's theory from the outset was that no one could connect the gun to Applicant while at the same time telling the jury they could infer that Applicant had a gun. This Court further believes that Trial Counsel's argument was prejudicial to Applicant's case because he planted in the mind of the jury that they could Applicant had a gun after the State told them they could infer malice from the use of a deadly weapon. This argument, in essence, allowed the jury to infer a vital element of the murder charge that Applicant was forgoing.

Therefore, Applicant has established that Trial Counsel was deficient as to this allegation and has established that this deficiency resulted in a "reasonable probability that, but for counsel's

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unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Therefore, this Court grants Applicant's relief as to this allegation.

Trial Counsel was ineffective for failing to adequately counsel Applicant concerning the potential advantages and disadvantages of testifying in his own defense. (Allegation 7)

Some decisions are reserved for the client, rather than for the lawyer, notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991)). Waiver of Fifth Amendment right must be knowing and voluntary. Id. (citing State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

Rule 1.2 of the Rules of Professional Conduct states, in part, the following:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. **In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.⁵**

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.⁶

S.C. Rules of Professional Conduct 1.2 (d) (2016).

Rule of Professional Conduct 1.4(a)(2) & (b) states:

(a) A lawyer shall:

⁵ "Consult" of consultation denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. S.C. Rule of Professional Conduct 1.0(c) (2016).

⁶ "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. S.C. Rule of Professional Conduct 1.0(h) (2016).

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(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.⁷

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Rule of Professional Conduct 1.4(b)(2) & (b) (2016).

Rule of Professional Conduct 3.3 (a)(3) states:

(a) A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes to be false.⁸

During the trial, prior to the State resting its case, and before SLED Agent Richard Johnson testified, Applicant was advised of his Constitutional Rights, including his right to testify. (Trial Tr. p. 330, ln. 3 through p. 332, ln. 3). The Trial Court inquired as to whether Applicant had previously discussed this issue with his attorney and he acknowledged that he had. (Trial Tr. p. 330, ln. 4-6). The Trial Court then inquired as to whether Applicant had discussed this issue with his family or friends and Applicant indicated that he had not. (Trial Tr. p. 330, ln. 13-15). Finally, Applicant indicated to the Trial Court that he wanted an opportunity to discuss this issue with his family. (Trial Tr. p. 330, ln. 16-17). After Agent Johnson testified and before the State rested its case, Applicant was given the opportunity to meet with his attorneys and family to discuss whether

⁷ "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer. S.C. Rule of Professional Conduct Rule 1.0(k) (2016). "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and the circumstances are such that the belief is reasonable. S.C. Rule of Professional Conduct Rule 1.0(l) (2016).

⁸ Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. S.C. Rules of Professional Conduct, Comment 9 (2016).

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or not he would testify. After meeting with his attorneys and family, Applicant indicated to the Trial Court that he did not wish to testify. (Trial Tr. p. 378, ln. 9-21).

Trial Counsel testified at the PCR hearing as to this allegation as follows: Applicant did not want to testify (PCR Hr'g Tr. p. 33, ln. 24); Applicant had the opportunity whether he wanted to take the stand or not (PCR Hr'g Tr. p. 34, ln. 10-11); Applicant was real nervous (PCR Hr'g Tr. p. 34, ln. 12); Applicant's aunt, the minister, was present when we they discussed the issue of him testifying (PCR Hr'g Tr. p. 34, ln. 11-15); Applicant said, "Look, I don't want to take the stand. I'm nervous" (PCR Hr'g Tr. p. 34, ln. 15-16); Applicant's decision not to testify was not from not knowing or from not explaining (PCR Hr'g Tr. p. 34, ln. 24-25); we talked about all the issues and the fact that Applicant could testify but Applicant said he was nervous and that he did not want to take the stand (PCR Hr'g Tr. p. 40, ln. 8-16); there was not a "t" that was not crossed nor an "i" not dotted (PCR Hr'g Tr. p. 77, ln. 17-18); and that if Applicant did not want to take the stand, then he could not put him up to give the evidence (PCR Hr'g Tr. p. 108, ln. 2-3). PCR counsel also asked Trial Counsel whether or not he had any recollection of telling Applicant that if he did not take the stand there would not be a chance of getting a charge on the lesser included offenses. Trial counsel responded saying: "The way you ask that question I gonna – I'm gonna say no, I don't remember that." (PCR Hr'g Tr. p. 215, ln. 2-7). Trial Counsel went on to say, however, that Applicant fully understood what would happen if he didn't take the stand. (PCR Hr'g Tr. p. 215, ln. 8-10).

Co-counsel testified at the PCR hearing as well. He testified to the following: Applicant was afraid to testify (PCR Hr'g Tr. p. 187, ln. 3-8); that they met with Applicant's family (PCR Hr'g Tr. p. 192, ln. 10-12); and that multiple people were involved in the decision. (PCR Hr'g Tr. p. 92, ln. 13-14). PCR Counsel also asked Co-Counsel at the PCR hearing whether Applicant was

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advised that if he did not testify and tell his side of the story there was not going to be enough evidence in the record for the judge "to give voluntary manslaughter, involuntary, certainly not accident or self-defense?" (PCR Hr'g Tr. p. 187, ln. 12-15). Co-counsel, similar to Trial Counsel's response, acknowledged that he could not recall if they discussed this issue in those terms with Applicant. (PCR Hr'g Tr. p. 188, ln. 2-13).

Applicant testified at the PCR hearing that: he was told a little bit about the good and bad of testifying (PCR Hr'g Tr. p. 242-43, ln. 24 through 3); he was scared (PCR Hr'g Tr. p. 259, ln. 24-25); Applicant was told that if he testified, they (the State) would cross-examine him, mix him up, mix up his words, and it would be like 500 degrees (PCR Hr'g Tr. p. 260, ln. 5-10); Trial Counsel did not think he should testify because they would cross-examine him (PCR Hr'g Tr. p. 264, ln. 11-13); he was nervous and scared (PCR Hr'g Tr. p. 264, ln. 13-14); the conversation that took place with his family about him testifying occurred during an approximate thirty minute break during the trial (PCR Hr'g Tr. p. 265, ln. 5-7); and they never had a discussion about whether or not he should testify before trial. (PCR Hr'g Tr. p. 265, ln. 8-10). Applicant was also asked at the PCR hearing whether his attorneys ever explained to him that if he did not testify and tell his side of the story, then there was not going to be a factual basis for "jury instructions on any of those things," to which Applicant responded that he could not really remember. (PCR Hr'g Tr. p. 242, ln. 10-20). When Applicant was further asked "[b]ut did they tell you that if you didn't testify there wasn't gonna be a way to get those charges," Applicant responded, "No. They didn't told (sic) me that." (PCR Hr'g Tr. p. 243, ln. 12-14).

While Trial Counsel and Co-Counsel testified to the above, Trial Counsel also testified at the PCR Hearing that he did not want to put Applicant on the stand because he was trying to "protect the record and not do any fraud on the Court." (PCR Hr'g Tr. p. 34, ln. 17-22).

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Counsel also said that there was reasoning behind why Applicant did not take the stand. (PCR Hr'g Tr. p. 34, ln. 23-24). He also stated that he "couldn't put Julian up." (PCR Hr'g Tr. p. 35, ln. 1). Trial Counsel further stated that he thought, but was not positive, he asked Applicant if he had struggled with Bailey for the gun and that this had a lot to do with not wanting to put him on the stand. (PCR Hr'g Tr. p. 42, ln. 11-21). Co-Counsel reaffirmed Trial Counsel's position when he testified that if Applicant testified, it would have forced them into a position of committing a fraud upon the Court. (PCR Hr'g Tr. p. 190, ln. 12-25).

Applicant testified that: the only in depth discussion that he had with Trial Counsel about the facts of the case was whether or not the gun would be found (PCR Hr'g Tr. p. 238, ln. 23-25 – p. 239, ln. 1); he did tell Trial Counsel what actually happened on the night of the incident⁹ (PCR Hr'g Tr. p. 239, ln. 10-24); Trial Counsel was basically telling him not to testify and he felt as though Trial Counsel forced him not to testify (PCR Hr'g Tr. p. 259, ln. 21-22) & (PCR Hr'g Tr. p. 269, ln. 15-17); and his decision not to testify was based on what he knew at that time and on the advice of Trial Counsel. (PCR Hr'g Tr. p. 281, ln. 20-25). In addition, Applicant testified that: Trial Counsel did not tell him why he did not want him to tell his side of the story (PCR Hr'g Tr. p. 259, ln. 4-6); he would have testified to get the lesser included charges regardless of being scared (PCR Hr'g Tr. p. 261, ln. 1-7); and he would overcome his fear of testifying and insisted on telling his side of the story (PCR Hr'g Tr. p. 261, ln. 8-20).

It is clear, based upon the above, that Applicant waived his right to testify at trial. Trial Counsel, Co-Counsel and Applicant acknowledge that Applicant was scared and nervous. This is

⁹ This is somewhat confirmed by Trial Counsel acknowledging at the PCR hearing that he had asked Applicant if he had struggled with the gentleman in the bar and Trial Counsel stating that that had a lot to do with not wanting to put Applicant on the stand. (PCR Hr'g Tr. p. 42, ln. 11-16).

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not something that should surprise anyone in light of the severity of the charge against Applicant, the fact that he was only seventeen at the time of his trial, and he did not have a prior criminal record. (PCR Hr'g Tr. p. 39, ln. 23-24). However, this Court does not believe that Applicant voluntarily waived this right with the knowledge of its consequences. It is apparent from above that Applicant did not make his decision not to testify after "consultation" with his attorney(s) as required under Rule 1.2, Rules of Professional Conduct, since "consultation" requires that an attorney communicate information to his client that is reasonably sufficient so the client can appreciate the significance of the matter. Trial Counsel and Co-Counsel failed to reasonably consult with Applicant in a manner that reasonably prudent and competent lawyers should do. The significance of the matter in this case was that if Applicant did not testify, then there would be no chance of receiving lesser included charges of involuntary or voluntary manslaughter or the defense of accident or self-defense since there was not sufficient evidence in the record after the State rested its case to warrant such charges.¹⁰

Applicant's waiver of his right to testify both knowingly and voluntarily is further highlighted by the requirement of Rule 1.4 of the Rules of Professional Conduct which require a lawyer to explain matters reasonably necessary to permit the client to make an informed decision regarding such representation. Trial Counsel and Co-Counsel acknowledged that they did not convey to Applicant that if he did not testify, then there would be no chance of receiving lesser included charges of involuntary or voluntary manslaughter or the defense of accident or self-defense. By not explaining this to Applicant, he was not in a position to make an informed decision as to whether or not to testify. Had Trial Counsel and Co-Counsel adequately explained the

¹⁰ The legitimacy and applicability of these will be further discussed below

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advantages and disadvantages of testifying to Applicant, Applicant testified, and this Court believes, that he would have overcome his nervousness and fear and testified.

Having determined that Applicant's waiver of his right to testify at his trial was not knowing and voluntary, it is imperative that this Court address another issue relevant to Allegation 7. Trial Counsel's theory, as discussed above, based solely on Applicant telling him that the gun used in the incident would never be found, led him to not want to put Applicant on the stand during his trial because of his concern that Applicant would perpetrate a fraud upon the Court. This concern of Trial Counsel is completely misplaced. While Rule 3.3 of the Rules of Professional Conduct prohibits an attorney from knowingly offering evidence that the lawyer knows to be false, it does not prohibit an attorney in a criminal trial from putting up evidence that the lawyer reasonably believes is false. Comment 9 to Rule 3.3 even elaborates saying that a lawyer in a criminal trial may not refuse to offer testimony where the lawyer reasonably believes or does not know that the testimony will be false.

It was not reasonable for Trial Counsel to infer that Applicant brought the gun to the incident based solely upon Applicant saying that the gun would not be found. If Trial Counsel believed this, that Applicant brought the gun to the incident, he did not know that Applicant's testimony would be false. In other words, he did not have actual knowledge of this fact. Because Trial Counsel did not know the testimony would be false he would be required to honor the client's decision to testify if the client so desired. Therefore, it was error on Trial Counsel's part not to want to put Applicant on the stand out of fear that Applicant would perpetrate a fraud on the Court when did not know if Applicant brought the gun to the incident.

Because Applicant's waiver of his right to testify was not knowing and voluntary and because Trial Counsel's belief that he could not put Applicant on the stand at his trial because he

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feared Applicant would perpetrate a fraud on the court is misplaced, Applicant has clearly established that Trial Counsel was deficient and that he was prejudiced to the extent that if he had been properly advised of the advantages and disadvantages of testifying, there is a reasonable probability that the outcome would have been different which will be further discussed below in addressing Allegations 8-13.

Failure to Advise Applicant as to Possible Defenses and Lesser-Included Offenses

Applicant has numerous Allegations that fall within the scope of Counsel's alleged failure to advise Applicant thoroughly on the law concerning possible defenses and lesser included offenses and the impact of such failure. Specifically, the Allegations are that:

Counsel neglected to advise Applicant concerning the law as it relates to the defense of self-defense (Allegation number 8);

Counsel neglected to advise Applicant thoroughly concerning the law as it relates to the lesser-included offense of voluntary manslaughter (Allegation number 9);

Counsel neglected to advise Applicant concerning the law as it relates to the defense of accident (Allegation number 10);

Counsel failed to adequately explain to Applicant the fact that jury charges on the law as it relates to self-defense, voluntary manslaughter, and accident would not be given unless there was some evidence before the Court which tended to support those jury instructions (Allegation number 12); and,

Counsel failed to adequately explain that, absent testimony from him, there would be no evidence on the record to support a request for jury charges concerning voluntary manslaughter, self-defense or accident inasmuch as testimony presented during the State's case in chief did not provide evidence supporting these theories (Allegation number 13).

Allegations 8-10

Trial Counsel testified that he recalled reviewing the possible defenses and the lesser included offenses with Applicant. (PCR Hr'g Tr. p. 41, ln. 15-18). Trial Counsel testified that he discussed self-defense with Applicant. (PCR Hr'g Tr. p. 33, ln. 11-12). Applicant confirmed that Trial Counsel discussed self-defense with him but could not recall what he was told about self-

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defense. (PCR Hr'g Tr. p. 240, ln. 16-20). Trial Counsel testified he could not recall discussing the defense of accident with Applicant.¹¹ (PCR Hr'g Tr. p. 41, ln. 13-18). At the PCR hearing, when PCR Counsel asked Applicant whether Trial Counsel went over "different ideas in the law and different concepts like self-defense or accident," Applicant responded saying that Trial Counsel "said something about the – like, I think the accident. Basically, I was just using the term of me understanding was, like, self-defense." (PCR Hr'g Tr. p. 240, ln. 3-10). However, when Applicant was further questioned about this issue, Applicant testified that Trial Counsel did discuss the defense of accident with him. (PCR Hr'g Tr. p. 241, ln. 1-2). Trial Counsel testified that he did discuss voluntary manslaughter with Applicant. (PCR Hr'g Tr. p. 41, ln. 13-18). Applicant testified to the contrary, stating that he was not told anything about voluntary or involuntary manslaughter. (PCR Hr'g Tr. p. 241, ln. 1 - p. 242, ln. 2).

The conclusion from the above is that Trial Counsel and Applicant agree that self-defense was discussed. Trial Counsel asserts that he did not discuss the defense of accident with Applicant while Applicant asserts that it was. However, based upon Applicant's answers to PCR Counsel's questions concerning this defense, Applicant was likely confused as to his understanding of the difference between accident and self-defense. Therefore, the defense of accident probably was not discussed in detail with Applicant. Trial Counsel asserts that voluntary manslaughter was discussed with Applicant. However, it is not clear if involuntary manslaughter was discussed with Applicant because it does not appear in the record that Trial Counsel was specifically asked this question. What is clear from the record though is that Trial Counsel asserts that he submitted a

¹¹ At the PCR hearing, Trial Counsel stated that he did not explain accident because I didn't see how accident applied because my thought from the process he (Applicant) brought the gun, and one of the elements of self-defense is not to be the one who instituted the problem." (PCR Hr'g Tr. p. 215, ln. 11-15).

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brief to the trial court concerning these lesser included charges and in fact the trial court judge states on the record, after an in-chambers conference, that he would not be charging these lesser-included offenses (voluntary and involuntary manslaughter).¹² (PCR Hr'g Tr. p. 91, ln. 11-19) & (See Trial Tr. p. 382, ln. 3-7). Therefore, this Court believes, in all likelihood, that these two lesser-included offenses were discussed with Applicant in some fashion. To what extent though, it is unclear.

Overall, the testimony at the PCR hearing and the trial record indicates that Trial Counsel likely discussed some lesser-included offenses and defenses and failed to discuss others. Whether Trial counsel adequately explained the law concerning these lesser included offenses and defenses is important and could be evidence of deficiency of Trial Counsel. However, this Court believes a failure to adequately explain that these jury charges would not be given absent evidence or testimony from Applicant are more critical in assessing deficiency and prejudice of Trial Counsel's conduct and will therefore be discussed more fully below.

Allegations 12 & 13

The law to be charged to the jury is determined by the evidence presented at trial.¹³ State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. State v. Shuler, 344 S.C. 604,

¹² When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999), finding trial counsel was deficient for failing to place his argument about the jury seeing his client in chains on the record, and thus failing to adequately preserve the issue for appeal).

¹³ Solicitor Sorenson was asked at the PCR hearing whether he objected to the Trial Court Judge refusing to charge the jury on the lesser included offense of manslaughter. Solicitor Sorenson stated that he couldn't imagine that he would have objected to the charge but he could only guess that it was Trial Counsel that had objected. However, he did not have any independent recollection. (PCR Hr'g Tr. p. 163, ln. 7-19).

632, 545 S.E.2d 805, 819 (2001). A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. Lee, 298 S.C. at 364, 380 S.E.2d at 835.

During the PCR hearing, PCR Counsel asked whether Trial Counsel had explained to Applicant that, at the conclusion of the State's case-in-chief, "[n]one of these other people have testified to anything that's gonna give me a basis for asking for voluntary manslaughter, asking for accident, asking for self-defense. So if I'm going to be able to ask for a charge on either one of those defenses with a lesser included, you've gotta tell your side of the story." (PCR Hr'g Tr. p. 50, ln. 10-16). Trial Counsel responded: "As to the accident, again, no. As to the others, yes. (PCR Hr'g Tr. p. 50, ln. 8-23). PCR counsel also asked Trial Counsel whether or not he had any recollection of telling Applicant that if he did not take the stand there would not be a chance of getting a charge on the lesser included offenses. Trial counsel responded saying: "The way you ask that question I gonna – I'm gonna say no, I don't remember that." (PCR Hr'g Tr. p. 215, ln. 2-7). Co-Counsel was also asked about this issue. More specifically, he was asked by PCR Counsel if Applicant was told that if he didn't testify and tell his side of the story, then there was not going to be evidence in the record for the trial judge to give voluntary manslaughter, involuntary, accident or self-defense. Co-Counsel's response was that he could not recall if it was put in those terms. (PCR Hr'g Tr. p. 187, ln. 9-18; p. 88, ln. 2-3).

Applicant initially testified that he could not remember whether he was advised that if he did not testify this would result in the trial Court not giving the jury charges at issue, and then testified that Trial Counsel did not explain this to him. (PCR Hr'g Tr. p. 242, ln. 10 p. 243, ln. 21). Applicant testified that Trial Counsel explained to him that testifying and telling his side of the story could result in the trial court giving beneficial jury charges, but he was not told by Trial

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Counsel that testifying would be the only way that the trial court would give helpful jury instructions. (PCR Hr'g Tr. p. 243, ln. 12-13).

Applicant's Allegations 12 and 13 come down to Applicant's assertion that he would have testified at trial had he been informed by Trial Counsel of the necessity of evidence being in the record to receive these beneficial instructions, especially in light of the fact that at the conclusion of the State's case, there was insufficient evidence supporting a charge on these lesser included offenses and/or defenses. (PCR Hr'g Tr. p. 243, ln. 12-13). This Court has already concluded in its analysis of Allegation 7 above that Trial Counsel and Co-Counsel were deficient in failing to advise Applicant of the advantages and disadvantages of testifying thus preventing him from making an informed decision about whether or not to testify. Whether Applicant would have received these beneficial instructions had he taken the stand is, therefore, analyzed more fully below.

Voluntary manslaughter

Voluntary manslaughter is defined as the intentional and unlawful killing of a human being in sudden heat of passion and upon sufficient legal provocation. State v. Niles, 412 S.C. 515, 522 772 S.E.2d 877, 880 (2015). Sudden heat of passion, upon sufficient legal provocation, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. Id. (citing State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996)). "In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." State v. Pittman, 373 S.C. 527, 575, 647 S.E.2d 44, 45 (1997).

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(2007) (internal citation omitted). For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing. State v. Smith, 391 S.C. 408, 412-413, 706 S.E.2d 12, 14-15 (2011).

Applicant's case is very analogous to the Niles case referenced above. In Niles, the South Carolina Supreme Court held that a jury charge on voluntary manslaughter was not proper in the factual scenario when an arranged drug deal, gone awry, led to the defendant shooting and killing the drug dealer. 412 S.C. 515, 772 S.E.2d 877. In Niles, the defendant (buyer) was leaning into the passenger door window of the victim's (drug dealer) car. Id. at 519, 772 S.E.2d at 879. He was then seen fleeing the victim's vehicle and jumping into the vehicle that the defendant had arrived in, which was parked near the victim's. Id. at 518-519, 772 S.E.2d at 878-879. The witness testifying to this was in the back seat of the victim's car, and this witness testified that the defendant had robbed the victim before fleeing back to the car that the defendant arrived in. Id. at 519, 772 S.E.2d at 878. After the defendant jumped back into the car opposite of the victim's, the victim began firing shots at the defendant. Id. at 520, 772 S.E.2d at 879. The defendant fired shots in response, which killed the victim. Id. at 519-520, 772 S.E.2d at 879. The defendant testified at trial that he "grabbed [his pistol] and that's when I shot two times...I went pow pow...I was just trying to get [the victim] to stop shooting." Id. at 520, 772 S.E.2d at 879. The Niles Court held that the defendant, by his own testimony, lacked the intent to harm the victim, and thus a voluntary manslaughter charge was not appropriate. Id. at 523, 772 S.E.2d at 881.

Gipson testified at trial that he was the only one that knew Bailey. (Trial Tr. p. 140, ln. 4-6). So, there was no previous relation between Applicant and Bailey. Furthermore, there was no testimony from any of the witnesses, at trial or at the PCR hearing, that Applicant was ever enraged or that Applicant was acting "under an uncontrollable impulse to do violence" when Bailey was

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shot. In fact, Applicant testified at the PCR hearing that he lacked the intent to kill the Bailey. He testified that he "was just trying to get the gun," that he was just trying to take the gun away from the Bailey, and that he was not even aware that he had shot the Bailey at the time when the shooting occurred. (PCR Hr'g Tr. p. 254, ln. 10-13; p. 255, ln. 10-14; p. 255 ln. 1-2 & p. 256, ln. 5-6).

Based on the Niles holding and the facts above, as referenced herein, this Court finds that a jury charge on voluntary manslaughter would not have been likely as a matter of law had Applicant given the same testimony at trial that he gave at his PCR hearing. Therefore, this Court does not believe that Trial Counsel was deficient nor was Applicant prejudiced, even if he failed to discuss the lesser included offense of voluntary manslaughter and its application to the facts of Applicant's case. Thus, Applicant's request for relief as to all allegations of ineffectiveness pertaining to voluntary manslaughter are denied.

Self-Defense

The elements of self-defense are as follows:

(1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3)(a) if the defense is based on the belief of imminent danger, then a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or (3)(b) if the defendant was actually in imminent danger, the circumstances were such that would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and, (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

The South Carolina Court of Appeals noted in State v. Owens, 25 S.C. 325, 831 S.E.2d 126 (2019), that our Supreme Court held that a defendant who brought a concealed pistol to court

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deal brought on the difficulty and is therefore not entitled to a self-defense charge. Owens, 427 at 332-33, 831 S.E.2d at 129 (citing to State v. Williams, Op. No. 27895, 427 S.C. 246, 830 S.E.2d 904, 2019 WL 2518797 (S.C. Sup. Ct. filed June 19, 2019)). If there is any evidence in the record from which it could reasonably be inferred that Defendant acted in self-defense, it should be charged. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002) (internal citation omitted). The State must disprove self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998). The defense of self-defense is not established if any one of the elements is disproven. See State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

Gipson testified at trial, on cross examination by Trial Counsel, that in neither one of his statements did he say that Applicant had a gun. (Trial Tr. p. 155, ln. 11-13). Pinkney testified that he didn't see Applicant get out of the car or get back in the car after the incident with a gun. (Trial Tr. p. 186, ln. 6-11). Alston testified that he did not see Applicant with a gun. (Trial Tr. p. 225, ln. 1-20). Thompson testified that he never saw Applicant with a gun. (Trial Tr. p. 262, ln. 17-20). Finally, Applicant testified at the PCR hearing that it was Bailey that pulled a gun from beside his console. (PCR Hr'g Tr. p. 253, ln. 10-19). Based upon the testimony of each of these individuals, there is no evidence that Applicant brought the gun to the incident or was at fault in bringing on the difficulty.

As to element 2 and 3, Gipson testified at trial that Applicant was leaning in Bailey's car and that Applicant and Bailey were tussling over something that Gipson could not see. (Trial Tr. p. 143, ln. 19-24). Gipson also testified that Bailey backed up and at that point he heard a "pop." (Trial Tr. p. 144, ln. 17-21). Gipson further stated that when he heard the "pop", he believed Applicant was still hanging in the car tussling with Bailey. (Trial Tr. p. 144-45, ln. 25 & 1-10)

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Alston testified that when Bailey began to back his car up, Applicant was inside Bailey's car, "getting dragged by it, somewhat getting dragged by it" and that is when he heard a "pow." (Trial Tr. p. 212, ln. 6-11). Thompson testified that after Alston decided not to purchase the marijuana from Bailey and after Alston had returned to the car that they came in, he felt the car jerk and Applicant was hanging out the passenger side of the car and then he heard a loud bang. (Trial Tr. p. 251, ln. 21-24). Applicant testified that he was leaning in Bailey's car talking to him when he reached by his console, that Bailey put the car in reverse, that the car was hitting him with the door and that it was knocking him out of the way. Applicant also testified that Bailey hit their car and that he was "jammed in it." (PCR Hr'g Tr. p. 252, ln. 11-25). Finally, Applicant testified that while he was trying to take the gun away from Bailey, he heard a "pop." (PCR Hr'g Tr. p. 254, ln. 19-22).

This Court believes that this would have been sufficient evidence to create a question for the jury as to whether Applicant actually believed or actually was in imminent danger of losing his life or sustaining serious bodily injury. This Court further believes that this testimony would have created a question for the jury as to whether or not a "reasonably prudent man of ordinary firmness and courage would have entertained the same belief" of being in imminent danger or whether "the circumstances were such that would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life."

As to the final element of self-defense, and referring to the facts previously referenced, Gipson testified that Applicant was hanging out of the car and tussling with Bailey when he heard the "pop." Alston testified Applicant was getting dragged by the car when he heard the "pow." Thompson testified Applicant was hanging out the passenger side of the car when he heard a loud bang. Finally, Applicant testified that Bailey hit their car and that he was "jammed in it." (PCR

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Hr'g Tr. p. 252, ln. 11-25). These facts would have certainly been evidence for the jury to decide as to whether Applicant had "no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance."

This Court finds that the testimony of Gipson, Alston, and Thompson coupled with that of Applicant would have established evidence in the record creating a reasonable inference that Applicant acted in self-defense. Furthermore, these facts would have further placed the burden upon the State to disprove self-defense beyond a reasonable doubt. Therefore, Applicant has established that: Trial Counsel was deficient for not adequately explaining to Applicant that a jury charge of self-defense would not be given unless there was some evidence before the Court from the State, or more importantly from Applicant, to support such a charge; and, Applicant was prejudiced in the sense that he has established, as discussed above, that the Trial Court would have been required to charge self-defense based upon the above-referenced facts creating a reasonable probability that the result of the trial would have been different.

Accident

A homicide will be excusable on the ground of accident when: (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). The defense of accident protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. See State v. Commander, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011). If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). The defense of accident fails if the State proves beyond a reasonable doubt that Defendant's unlawful activity

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proximately caused the harm. State v. Goodson, 312 S.C. 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1 (1994). Where there is evidence that the Bailey was the aggressor along with evidence that the gun discharged accidentally then a jury charge on accident would be applicable. See Tisdale v. State, 378 S.C. 122, 126, 662 S.E.2d 410, 413 (2008).

As discussed above, Applicant engaged Bailey after Alston refused to purchase marijuana from Bailey and after Alston had walked away from Bailey's car. (PCR Hr'g Tr. p. 250, ln. 15-16). Applicant further testified that : it was Bailey who reached by his console and grabbed a weapon before they started tussling (PCR Hr'g Tr. p. 253, ln. 1-3 & 16-19); while Applicant and Bailey were tussling over the gun, the gun went off (PCR Hr'g Tr. p. 254, ln. 8-13); Applicant did not know that Bailey had been shot (PCR Hr'g Tr. p. 255, ln. 1-2); and Applicant was trying to get control of the gun so that Bailey would not shoot him. (PCR Hr'g Tr. p. 255, ln. 11-14). Had Applicant testified to these facts at trial, this Court believes that he would have been entitled to charge on the defense of accident.

The above is evidence that Bailey was the aggressor and that he was killed unintentionally. What may questionable is whether Applicant was acting lawfully. The purchase or attempt to purchase marijuana is an unlawful act. The State would have had to prove beyond a reasonable doubt that the unlawful activity proximately caused Bailey's death. However, this Court believes that death cannot be said to be the natural or necessary result of buying or attempting to purchase marijuana, especially when there is no evidence that Applicant possessed a gun prior to the incident that resulted in Bailey's death or that there was any preexisting plan to rob Bailey. It is also questionable as to whether Applicant exercised due care in the handling of the weapon. Regardless of what is questionable here, this Court finds that Applicant testifying at trial to the same effect

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that he testified at the PCR hearing would have resulted in a jury charge on the defense of accident. It would have clearly created a question for the jury.¹⁴

Therefore, Applicant has established that Trial Counsel was deficient for not adequately explaining to Applicant that a jury charge of accident would not be given unless there was some evidence before the Court from the State, or more importantly from Applicant, to support such a charge. Furthermore, Applicant has established that he was prejudiced by this error, as discussed above, in that the Trial Court would have been required to charge accident based upon the above-referenced facts creating a reasonable probability that the result of the trial would have been different.

Involuntary manslaughter

Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011). Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). Evidence of a struggle between the defendant and the Bailey over a weapon supports submission of an involuntary manslaughter charge. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). The South Carolina Supreme Court also recognized in State v. Brayboy that evidence of a struggle between a defendant and Bailey supports submission of an involuntary manslaughter

¹⁴ While this Court is aware that the defense of self-defense and accident are often mutually exclusive, there are instances where both charges are warranted. This Court believes that both would have been warranted in Applicant's case had he testified. See State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990); see also State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).

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charge. State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (2010) (citing to State v. Light, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008), holding a jury charge on involuntary manslaughter was proper when petitioner testified that he took a loaded gun from the Bailey who was threatening him with the gun, that the gun fired almost immediately after he took possession of it, and that there was a struggle between he and the Bailey over the gun).

During the trial, Gipson testified that he saw Applicant and Bailey tussling in the car. (Trial Tr. p. 142, ln. 13-14). Alston also testified that he saw Applicant and Bailey "tugging" over something but did not know what it was about. (Trial Tr. p. 224, ln. 14-18). Applicant added to this testimony at the PCR hearing when he testified that Bailey was reaching by his console when Bailey grabbed a gun. After Bailey grabbed the gun, Applicant and Bailey began "tussling" over the pistol. (PCR Hr'g Tr. p. 253, ln. 13-19). Applicant further testified that while they were tussling for the gun that both his and Bailey's hands were on the gun when he heard a "pop." (PCR Hr'g Tr. p. 254, ln. 17-22). Trial Counsel even acknowledged at the PCR hearing that he asked Applicant if he had struggled with Bailey over the gun and said this had a lot to do with not wanting to put Applicant on the stand. (PCR Hr'g Tr. p. 42, ln. 11-16).

Gipson also testified at trial that he brought Bailey in on the deal because the guy wanted more than the amount of marijuana he had available. Gipson said he thought it was going to be "something small like a Ten or a Twenty." (Trial Tr. p. 131, ln. 22 - p. 132, ln. 2). Alston testified that he was the one who wanted to buy marijuana that night and said he planned to buy, "probably like an ounce or something." (Trial Tr. p. 203, ln. 8). Therefore, the testimony seems to indicate that the drug deal that was planned involved an ounce of marijuana which would constitute a misdemeanor pursuant to S.C. Code Ann. § 44-53-370 (c) (4) (1976 Supp. 2011).

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This Court believes that if Applicant testified at trial, consistent with his testimony at the PCR hearing, coupled with the testimony of Gipson and Alston, then he would have received a jury charge on involuntary manslaughter since there would have sufficient evidence establishing a jury question as to whether the killing was unintentional without malice while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily injury. Furthermore, this Court believes that Applicant would have been entitled to an involuntary manslaughter charge even in light of Dr. Kelly Rose testifying at trial that the bullet that struck Bailey "traveled from right to left, slightly down, and slightly forward," (Trial Tr. p. 269, ln. 17-19). In other words, a charge on involuntary manslaughter would have been warranted even if they State argued that Bailey's wound was inconsistent with Applicant's testimony because this Court does not believe that there is overwhelming evidence that Applicant intentionally killed Bailey.¹⁵ See Tisdale v. State, 378 S.C. 122, 126, 662 S.E.2d 410, 412 (2008).

Therefore, Applicant has established that: Trial Counsel was deficient for not adequately explaining to Applicant that a jury charge of involuntary manslaughter would not be given unless there was some evidence before the Court from the State, or more importantly from Applicant, to support such a charge; and, Applicant was prejudiced in the sense that he has established, as discussed above, that the Trial Court would have been required to charge voluntary manslaughter based upon the above-referenced facts creating a reasonable probability that the result of the trial would have been different.

¹⁵ A self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges. State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008). This Court believes that if Applicant had testified at trial consistent with his testimony at the PCR hearing, he would have been entitled to a jury charge on both self-defense and involuntary manslaughter.

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Conclusion as to the lesser included charges and defenses

Based upon the above discussion of the lesser included offenses and defenses, this Court believes that Applicant would have been entitled to a jury charge on self-defense, accident, and involuntary manslaughter had his testimony at trial been consistent with his testimony at the PCR hearing. Because Trial Counsel and Co-Counsel were deficient in failing to adequately explain the necessity of his testimony to receive such charges, Applicant has demonstrated prejudice by showing that he would have received these charges had he testified and established that there is a reasonable probability the result of the proceeding would have been different.

Trial Counsel neglecting to discuss with Applicant the decision of the Supreme Court of South Carolina in *State v. Belcher* and the potential impact of that decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon in the homicide for which Applicant was charged. (Allegation 11)

The Belcher decision, as noted during the discussion of Allegation 1, held that a jury cannot be told that they may infer malice when a defendant uses a deadly weapon during a homicide if there is evidence of mitigation, excuse or justification for the homicide. Belcher, 385 S.C. at 611, 685 S.E.2d at 809. Applicant asserts that Trial Counsel failed to discuss or explain the implications of Belcher and what was necessary to prevent the trial court from telling they jury that they could infer malice from the use of a deadly weapon in his case.

Trial Counsel was asked at the PCR hearing if he explained to Applicant that if he did not testify and provide some basis for the assertion of a lesser included or some affirmative defense, then there was not going to be a basis to object to the Court charging that malice could be inferred from the use of deadly weapon. (PCR Hr'g Tr. p. 49, ln. 18-23). Trial Counsel indicated that he thought he had explained it and that he thought he did a brief on it as well. (PCR Hr'g Tr. p. 49-50, ln. 24-25 & 1-2). PCR counsel further inquired of Trial Counsel asking him whether after the

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State rested and their witnesses had not testified to anything that would give the Court "a basis for asking for "voluntary manslaughter, asking for accident, asking for self-defense," if he told Applicant he had to tell his side of the story so that he could ask for these charges and receive the benefit of Belcher. Trial Counsel responded stating, as to accident, no, but as to the others, yes. (PCR Hr'g Tr. p. 50, ln. 23). Upon further questioning of Trial Counsel, PCR Counsel asked Trial Counsel why he persisted that the rule in Belcher applied to this case when he knew the Trial Court was not going to charge voluntary, involuntary, accident or self-defense. (PCR Hr'g Tr. p. 214, ln. 11-14). Trial Counsel responded saying that he was trying to protect the record. (PCR Hr'g Tr. p. 214, ln. 15-23).

Co-Counsel was also asked about this issue and he testified he understood Belcher to mean that if there was no evidence of a lesser included offense(s) and or defense(s), then Applicant would not receive the benefit of Belcher. (PCR Hr'g Tr. p. 182, ln. 7-22). Co-Counsel acknowledged that when the Trial Court Judge told them that he was not going to give "voluntary manslaughter or involuntary manslaughter" because there was no evidence of mitigation, then that was based upon the record in front of him (the Trial Court Judge) and what "y'all did do, not what you didn't do." (PCR Hr'g Tr. p. 182-183, ln. 23-25 & 1-5). Co-Counsel was further asked, but could not recall, if they told Applicant that if he did not testify there was not going to be enough evidence for the trial judge to give voluntary manslaughter, involuntary, accident or self-defense. (PCR Hr'g Tr. p. 187, ln. 12-16). PCR Counsel went on to state that she would assume that Co-Counsel "did not discuss with him that if you (Applicant) didn't get jury charges on something in that group, you were not gonna be able to stop the judge from giving the inference of malice from the use of a deadly weapon charge. (PCR Hr'g Tr. p. 188, ln. 5-9). Co-Counsel stated that he could not recall "saying it in those terms." (PCR Hr'g Tr. p. 188, ln. 10-13). PCR Counsel pointed

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out that even though there was no evidence that would warrant a lesser included charge(s) and/or defense(s), Trial Counsel still objected to the Court charging the jury that they could infer malice from the use of a deadly weapon. (PCR Hr'g Tr. p. 189, ln. 8-18). After pointing this out, PCR Counsel asked Co-Counsel if they understood that the rule in Belcher only came into play if those lesser charges or defenses were before the Court and Co-Counsel indicated that he could not remember but thought that he knew that they had to get some evidence of mitigation on the record to receive the benefit of Belcher. (PCR Hr'g Tr. p. 189, ln. 18-24).

This issue was briefly discussed by PCR Counsel and Applicant at the PCR hearing. Applicant was asked if he was told that if he did not testify, there was not going to be a legal reason for the judge not to charge the inference of malice from the use of a deadly weapon. Applicant initially responded that they had but when asked again, responded that they had not. (PCR Hr'g Tr. p. 243, ln. 15-21).

It appears there was some discussion with Applicant concerning the possible implications of Belcher and avoiding a jury charge that they could infer malice from the use of a deadly weapon. This Court, however, finds insufficient evidence that Applicant was adequately advised of the need to testify to establish evidence in mitigation of the charge of murder and receive the benefits of Belcher. As noted previously in discussing Allegations 7-13, Counsel and Co-Counsel were asked at the PCR hearing whether they discussed the issue that without the defense putting forth evidence that would mitigate, excuse or justify the homicide, the inference of malice jury charge would be proper. Trial Counsel testified he did not recall specifically informing Applicant about the implications of the Belcher decision in those terms. (See PCR Hr'g Tr. p. 215, ln. 2-7). Co-Counsel confirmed such as well. (See PCR Hr'g Tr. p. 188, ln. 4-9, ln. 4-13).

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This Court believes that it was incumbent upon Trial Counsel and Co-Counsel to thoroughly advise Applicant of what was needed to receive the benefits of Belcher so that he could make an informed decision of whether or not to testify. Had Trial Counsel done so, Applicant testified at the PCR hearing that he would have insisted on testifying at trial and Trial Counsel would have been required to honor Applicant's decision pursuant to the Rules of Professional Conduct which have previously been referenced above and discussed.

Given how crucial Applicant's testimony would have been with regard to obtaining application of the rule announced in Belcher, this Court cannot find that Trial Counsel's failure to adequately advise Applicant on the necessity for his testimony was harmless error. Because of this deficient and inadequate advice, Applicant was unable to make a knowing and voluntary waiver of the benefits that he would have received under Belcher had he testified. Applicant has therefore proven that Trial Counsel was deficient and that but for Trial Counsel's error, there exists a reasonable probability that the outcome of the trial would have been different had Applicant testified at trial consistent with his PCR testimony. For this reason, this Court finds that Applicant is entitled to relief as to this Allegation.

Trial Counsel was ineffective for neglecting to object to testimony from SLED agent Richard Johnson in which he testified that in the course of their investigation "everyone said he didn't carry a weapon" in response to question concerning whether there was any evidence that the deceased carried a weapon for defense (Allegation 45).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(d), SCRE. The improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (2010). The improper admission of hearsay testimony is deemed harmless when it could not have reasonably affected the result of the trial. State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) (citing State v. Blackburn, 271

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S.C. 324, 247 S.E.2d 334 (1978). Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. Jennings, 394 S.C. at 478, 716 S.E.2d at 93-94.

During Applicant's trial, Agent Johnson was asked by Trial Counsel on cross-examination whether Agent Johnson had determined through his investigation that Bailey carried a gun to protect himself. (Trial Tr. p. 353, ln. 23-25). Agent Johnson responded, "From all account, no, sir. Everyone said he didn't carry a weapon." (Trial Tr. p. 354, ln. 1-2). Trial Counsel's follow-up question to this answer was whether Agent Johnson determined that (Bailey) carried a gun to protect himself, to which Agent Johnson responded that he did not recall that Bailey carried a gun to protect himself. (Trial Tr. p. 354, ln. 3-6). Trial Counsel then asked Agent Johnson if he ever found out that Bailey had multiple guns to which Agent Johnson said that he had not. (Trial Tr. p. 354, ln. 9-14). The State then objected to Trial Counsel's question asserting that the question had already been asked, and answered. The Trial Court stated, "he's already answered that he didn't have any guns, so" (Trial Tr. p. 354, ln. 15-19).

Trial Counsel testified at the PCR hearing that: the questions were intended to plant a seed of doubt into the jury that Bailey could have been the one who possessed the gun in question (PCR Hr'g Tr. p. 95-96, ln. 10-25 & 1-20); he was trying "to make sure if there was anything out there, it was my time to try to get it on the record" (id.); the focal point was the gun and proving that nobody had any evidence that Applicant had a gun (PCR Hr'g Tr. p. 98-99, ln. 22-25 & 1); there was nothing in the discovery that led him to believe there was any evidence that Bailey had prior charges for carrying a gun or having a weapon at any juncture (PCR Hr'g Tr. p. 99-100, ln. 12); and, there were "rumors" about Bailey having a gun(s) and stating "don't you think it's important for the - if - if there's the possibility - the opportunity for the law-enforcement to say that this guy

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(Bailey) carries a gun, too, you don't think that that would've been important if that got in?" (PCR Hr'g Tr. p. 99, ln. 17-25).

Trial Counsel was then asked why he did his "digging" in front of the jury. Trial Counsel simply responded saying that that was the way he does it. (PCR Hr'g Tr. p. 100, ln. 1-2). Upon being pressed further by PCR Counsel concerning this issue, Trial Counsel stated again that his theory of the case was to show that the gun came from Bailey and that his question did not work out but there were "rumors" that Bailey not only had one gun, but multiple guns. (PCR Hr'g Tr. p. 101, ln. 7-12). Trial Counsel then stated "if they didn't give it to me in writing and it's sitting out there and I've heard it, it's just a chance you take with your strategy. I took a chance." (PCR Hr'g Tr. p. 101, ln. 15-20). PCR Counsel asked Trial Counsel why he did not ask Agent Johnson, outside the presence of the jury, whether their investigation had yielded any evidence that Bailey carried a weapon or was known to be armed. Trial Counsel responded saying, "I made a decision in the courtroom at that time to ask the question. I thought it fit within my strategy. Had I had to do it, I'd probably do the same thing again in this case. There's nothing else I can say. I made a decision and I did it." (PCR Hr'g Tr. p. 102, ln. 1-9). Trial Counsel then acknowledged that if he had asked Agent Johnson this question outside of the presence of the jury and learned that no one said Bailey ever carried a gun, then he does not know what he would have done. (PCR Hr'g Tr. p. 103, ln. 5-18). Finally, Trial Counsel acknowledged that he could have asked Agent Johnson this question outside the presence of the jury in an interview outside of the courtroom. (PCR Hr'g Tr. p. 106, ln. 8-14).

This Court believes that there was no more critical issue in this trial than the question of who brought the gun to the scene of this drug deal. Trial Counsel's theory throughout the trial was to show that the gun came from Bailey. (PCR Hr'g Tr. p. 101, ln. 7-8) Agent Johnson's response

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to Trial Counsel's question was classic hearsay. It was clearly a statement offered for the truth of the matter asserted, that everyone said Bailey did not carry a gun. Rule 801, SCRE. Furthermore, this hearsay statement did not fit within any recognized exceptions to the Hearsay Rules found in Rule 803, SCRE. There is no clearer principal of evidence law than the absolute prohibition against the admission of out-of-court statements to prove the truth of the matter asserted, unless an exception to the rules apply. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994); Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991).

The prejudice to Applicant from Agent Johnson's hearsay response is clearly apparent. When Agent Johnson testified, Gipson, Alston, Pinckney and Thompson had already testified. Gipson had testified that it was "either his, the friend that was with him or he (Applicant) had the gun." (Trial Tr. p. 156, ln. 6-8). Pinckney testified that Applicant did not get out of the car with a gun or get back in the car with a gun. (Trial Tr. p. 186, ln. 6-11). Alston testified he did not see Applicant with a gun. (Trial Tr. p. 225, ln. 1-20). Thompson testified that he did not see a gun, coming or going. (Trial Tr. p. 262, ln. 17-20). Gipson further testified that Alston was about two feet, diagonal from him and that he was not at Bailey's car when the shot occurred. (Trial Tr. p. 144, ln. 11-16). Alston testified he was back in the car that he came in when the shooting occurred. (Trial Tr. p. 212, ln. 15-17). Likewise, Thompson testified that Alston was back in the car when the shooting occurred. (Trial Tr. p. 251, ln. 21-24). All of this testimony established that no one saw Applicant with a gun and that Alston was back in the car when the shooting occurred.

Thus, Agent Johnson's testimony essentially bolstered the testimony of Gipson with substituted anonymous claims from absent accusers by alluding to the fact that the gun had to have come from Applicant. With this damaging testimony coming in through cross-examination, Trial Counsel also managed to establish that law enforcement had not searched Bailey's apartment after

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the shooting. (Trial Tr. p. 353, ln. 10-18). Rather than object to Agent Johnson's testimony and ask that it be stricken from the record, or make a Motion for a Mistrial, Trial Counsel exacerbated the prejudice to Applicant by asking the question again. While Trial Counsel apparently tried to muddy the water, so-to-speak, by getting Agent Johnson to say he did not recall ever determining that Bailey carried a gun for protection, he never objected to this prejudicial, inadmissible hearsay.

Furthermore, it cannot be said that Agent Johnson's testimony was cumulative to other evidence offered in the trial. As pointed out above, none of the State's witnesses had placed a gun in Applicant's hands through their testimony. More importantly, no other witness had testified that Bailey did not carry a gun(s) for protection. Since Agent Johnson's testimony was not cumulative, his hearsay response to Trial Counsel's question cannot be viewed as harmless because Agent Johnson's hearsay response completely undermined Trial Counsel's theory of the case: that the gun came from Bailey.

This Court is aware that the argument can be made that Trial Counsel opened the door to the damaging hearsay testimony by asking the questions he asked in cross-examination. However, this Court finds that Agent Johnson could have simply answered the question with a simple "no," instead of interjecting hearsay into his testimony. When Agent Johnson did not answer with a simple "no," Trial Counsel had an obligation to object to this damaging hearsay testimony. To the extent Trial Counsel should have known he was questioning this witness in such a manner that he risked soliciting a hearsay response, this Court finds he was deficient and ineffective for doing so. The real prejudice to Applicant, comes from Trial Counsel's failure to object to the testimony. Had his objection been sustained, Trial Counsel could have then decided between a request to strike the testimony in question or make a Motion for a Mistrial. Had such an objection been overruled, then this important issue would have been preserved for appellate review.

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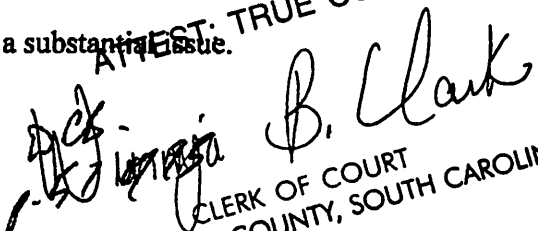
An additional issue needs to be addressed which this Court believes goes hand-in-hand with Allegation 45. At the beginning of the PCR hearing, Trial Counsel testified that he had read every witness statement. (PCR Hr'g Tr. p. 29, ln. 4). During the State's cross-examination of Trial Counsel during the PCR hearing, Trial Counsel was asked, "Do you feel like you thoroughly investigated this case;" and Trial Counsel responded, "painstakingly." (PCR Hr'g Tr. p. 98, ln. 6-8). PCR Counsel did not object to this question by the State or the answer provided by Trial Counsel. On redirect examination of Trial Counsel by PCR Counsel, Trial Counsel was asked why he did not ask Agent Johnson the question about whether his investigation revealed that Bailey carried a gun(s) for protection beforehand, outside the presence of the jury. Trial Counsel acknowledged that: he had spoken to Agent Johnson several times outside the presence of the jury (PCR Hr'g Tr. p. 101, ln. 21-24); and, that "I made a decision in the courtroom at that time to ask the question. I thought it fit within my strategy. Had I had to do it, I'd probably do the same thing again in this case. There's nothing else I can say. I made a decision and I did it." (PCR Hr'g Tr. p. 102, ln. 1-9).

This Court recognizes that no formal allegation by Applicant raised the issue of ineffectiveness of Trial Counsel for failure to investigate. However, the South Carolina Code of Laws states that an Applicant's application for Post-Conviction Relief "shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence." S.C. Code Ann. § 17-27-50 (1976). The South Carolina Code of Laws also states that "[a]t any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over for filing further pleadings or motions, or for extending the time of filing of any pleading." *Id.*

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Rule 71.1(a), SCRCP, states that "[t]he South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act. Rule 15(b), SCRCP, asserts that when issues that are not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. However, implied consent will not be found if all the parties did not recognize it as an issue at trial, even if evidence in the record exists to support the amendment. Armstrong v. Collins, 366 S.C. 204, 227-228, 621 S.E.2d 368, 380 (2005). On the other hand, in Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017), the South Carolina Supreme Court stated that "the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure." Mangal, 421 S.C. at 99, 805 S.E.2d at 575. The Mangal Court went on to say that it encourages trial courts in PCR cases to use their discretion on procedural matters to find reasonable ways – within the flexibility of the Rules – to reach the merits of substantial issues. Id. at 99-100, 805 S.E.2d at 575-576. Mangal further states that "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application." Id. at 100, 805 S.E.2d at 576 (quoting Robertson v. State, 418, S.C. 505, 513, 795 S.E.2d 29, 33 (2016)); quoting Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)).

Since the State raised this issue without objection and PCR Counsel further questioned Trial Counsel about the issue of not talking to Agent Johnson prior to taking the stand as it relates to whether or not they determined that Bailey carried a gun(s) for protection, this Court is therefore treating such as an amendment to the PCR application. Failure to do so, would be contrary to the interest of justice since this Court believes that this is a substantial issue.

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A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). A criminal defense attorney has a duty to perform a reasonable investigation, including "at a minimum...the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Id. at 331-332, 642 S.E.2d at 597 (internal citation omitted). On a claim of ineffective assistance of counsel, the validity of counsel's strategy is reviewed under an objective standard of reasonableness. Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008).

The case of Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002), is very similar to the case before this Court. In Ingle, counsel failed to interview a witness to ascertain whether she would support defendant's theory of the defense prior to putting her on the stand. Ingle, 348 S.C. at 471, 560 S.E.2d at 403. When she testified, she failed to corroborate defendant's theory of the case. Id. At the PCR hearing, trial counsel stated that he did not interview the witness because his client said she would be honest and when the state did not call her as a witness, he thought she would be favorable. Id. The Ingle Court, in citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995), set forth the law that counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Id. (citing Roseboro, supra). The Ingle Court concluded that it was unreasonable for counsel to rely on defendant's assertion that the witness would be honest, and his assumption that she would be favorable since the State had not called her, amounted to an unreasonable strategy. Id. at 472, 560 S.E.2d at 403. The Ingle Court went on to say that it was objectively unreasonable for counsel to ask such a crucial question of the witness without first ascertaining her response. Id.

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Similar to the Ingle case, Trial Counsel in Applicant's case asked a crucial question of Agent Johnson prior to him taking the stand. Trial Counsel asked Agent Johnson this question because it fit within his theory of the case, which was that the gun came from Bailey. However, Trial Counsel's question was based upon "rumors" that Bailey carried a gun, when Trial Counsel had no evidence of such, making it objectively unreasonable. Trial Counsel had every opportunity to interview Agent Johnson beforehand and it was incumbent upon him to know the answer to this question prior to asking it. Asking this question and receiving Agent Johnson's answer, without knowing the answer or objecting to the answer, totally undermined Trial Counsel's theory of the case and was tremendously prejudicial to Applicant. Because of such, Trial Counsel's representation was deficient, falling below an objective standard of reasonableness. This Court further finds that Trial Counsel's actions as to this issue, coupled with Applicant's allegations previously discussed, make it clear that there is a reasonable probability that the outcome of the proceedings would have been different. Therefore, Applicant is entitled to relief as to this issue.

Counsel was Ineffective for Continuing to Question Ricky Gipson about whether he saw Applicant with a Gun. (Allegations 23 & 24)

Applicant alleges that Trial Counsel was ineffective for continuing to cross-examine State witness, Ricky Gipson, whether he had seen Applicant with a weapon during the incident in question after this witness had clearly testified that he had not seen Applicant with a weapon on that date. (Allegation 23). Applicant also alleges that Trial Counsel was ineffective for continuing to cross-examine Ricky Gipson whether or not he had ever informed law enforcement that he saw Applicant with a weapon on the day in question because there was a previous statement Gipson made to law enforcement, which was part of discovery but not part of evidence at trial via testimony, where Gipson claimed that either Applicant or his friend with him had a gun. Applicant

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alleges that this questioning resulted in publication of testimony and evidence that was prejudicial to Applicant (Allegation 24).

During Applicant's trial, while Trial Counsel was cross-examining Ricky Gipson, the following line of questioning occurred:

Q. You signed a statement on your first visit. And I want to be sure, in all of those statements not one time did you say that Julian had a gun, is that correct?

A. I don't know who had the gun, because I don't know any names.

Q. I didn't ask you that, sir, please answer my question and then you can explain. In any one of those statements did you say Julian had a gun?

A. No, sir.

Q. Okay.

A. It was one of the two though, so technically, yes.

Q. Okay. If that's what you want to say. The only thing I'm asking, and I want to get that clear, did you say in any statement that Julian had a gun?

Objection by the Solicitor

Q. Did in either statement you say that Julian had a gun?

A. No, but as, in the statement I said either his, the friend that was with him or he had the gun.

Trial Tr. p. 155, ln. 5-18, p. 156, ln. 6-8.

After Trial Counsel asked these questions and received those respective responses from Gipson, Trial Counsel handed Gipson a copy of his statement and asked him to point out where he had said this. Gipson at this point claimed that the handwriting was "a little sketchy" and that he could not read it. (PCR Hr'g Tr. p. 157, ln. 7-8). Solicitor Sorenson, then on redirect, asked Gipson the following:

Q. Okay. Tell the jury, would you read for the jury what you wrote on that, that same day?

A. "This is one of the guys there, either it was him or the man with him that had the gun, that shot the gun, shot Jon."

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Q. Okay. So, you did, in fact, tell the police back on May the Sixth of Two thousand eleven, and write it down on State's Exhibit Number 19 that it had to be one or the other that shot Jon, is that correct?

A. Yes, sir.

Trial Tr. p. 166, ln. 17-25.

The following references to Trial Counsel's testimony are contained in the line of questioning by Applicant's PCR Counsel directed to Trial Counsel regarding the above-captioned Allegations. (PCR Hr'g Tr. p. 24, ln. 23 - p. 31, ln. 6). Trial Counsel testified that he interpreted the witness's statement to mean that the witness was saying that either Applicant or the Bailey had to have had the gun. (PCR Hr'g Tr. p. 211, ln. 10-12). Trial Counsel also testified that: he got witness Gipson to admit multiple times on cross-examination that he never saw Applicant with a gun that day; and, if Applicant did not have a gun it would have been reasonable to infer that the Bailey is the one who brought the gun that day. Additionally, Trial Counsel testified that his focus was on the fact that he got the witness to repeatedly say that he never saw Applicant with a gun on the day of the incident. The critical point within this testimony by Trial Counsel is that the Defense's "theory of the case was that Julian wasn't [sic]-- didn't have a gun, [that] no one saw him with the gun," (PCR Hr'g Tr. p. 26, ln. 24 - p. 27, ln. 1); and Trial Counsel "wanted that on the record" (PCR Hr'g Tr. p. 27, ln. 1-2) and "wanted the jury to hear Julian didn't have a gun" (PCR Hr'g Tr. p. 27, ln. 12-14).

It was unreasonable for Trial Counsel to interpret Gipson's testimony to mean that either Applicant or Bailey had the gun. Gipson had previously testified that he was the only one that knew Bailey so the Bailey could not have been the "friend" of Applicant that Gipson referred to (PCR Hr'g Tr. p. 140, ln. 4-5). In addition, Gipson testified that the "darker-skinned heavier set guy" (Alston) was kind of next to him, about two feet diagonal to him when the shooting occurred.

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(PCR Hr'g Tr. p. 144, ln. 11-16). This testimony further illustrated that Alston was not in close proximity to Bailey when the shooting occurred.

Applicant has established that Trial Counsel was deficient for continuing to ask Gipson if he saw Applicant with a gun after beneficial testimony was already in the record concerning such. Trial Counsel knew, or should have known, from an adequate review of the discovery, that pursuing this line of questioning further would have a prejudicial impact upon Applicant. Furthermore, Trial Counsel's conduct was prejudicial to Applicant in that Trial Counsel opened the door for the State to further clarify to the jury that the only people at Bailey's car when the shooting occurred was Bailey and Applicant. Applicant was further prejudiced in that Gipson's response to Trial Counsel's continuous line of questioning once again undermined Trial Counsel's theory of the case that the gun came from Bailey. Because Applicant has proven that Trial Counsel was deficient as to this allegation and that Applicant was prejudiced, Applicant is entitled to relief as to this Allegation.

Failure to Properly Cross-Examine or Impeach Witnesses

Applicant alleges various instances of ineffective assistance counsel relating to Trial Counsel's failure to impeach State's witnesses or failure to properly cross-examine State's witnesses. The following Allegations fall within the category of failure to properly cross-examine or impeach witnesses and investigate plea negotiations between the State and witnesses appearing for the prosecution: 2; 3; 5; 6; 15; 16-22; 26-28; 34-36; and, 43. Within these Allegations, Applicant alleges Trial Counsel was deficient for failing to impeach State's witnesses by not questioning the witnesses regarding the following: potential deals and consideration they may have received for cooperation and in exchange for testifying at trial; the amount of marijuana involved

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in the deal; potential sentencing exposure for various offenses; potential for future prosecution of various charges; and, whether or not charges were brought against them as a result of this incident.

I. Specific Allegations related to failure to properly cross-examine witnesses

I. Ricky Gipson

Trial Counsel was ineffective for neglecting to adequately cross-examine witness, Ricky Gipson, concerning what deals he had reached with law enforcement in the Solicitor's Office in exchange for his testimony. (Allegation 2)

On cross-examination at trial, Trial Counsel asked witness Ricky Gipson: how many days he served in jail, to which Gipson responded "none" (Trial Tr. p. 158, ln. 8-9); whether he was ever under arrest, to which Gipson responds that he was not (Trial Tr. p. 158, ln. 11-12); and, whether he set up the drug deal in question, to which Gipson responds that he did set up the drug deal. (Trial Tr. p. 158, ln. 13-14). Trial Counsel also asked Gipson on cross-examination: "Didn't they cut you a deal because you wasn't [sic] charged?" Gipson responded "No, sir" (Trial Tr. p. 163, ln. 18-19); "everybody else went to jail," and Gipson responded "I wasn't with them;" and, "you didn't ride over there with them in the car," and Gipson responded "inadvertently, yes." (Trial Tr. p. 163, ln. 20-24).

The record clearly indicates that Trial Counsel did cross-examine Ricky Gipson regarding whether he had reached a potential deal with law enforcement and in the Solicitor's Office. Trial Counsel's question regarding the fact that Gipson did not serve any jail time also emphasized that he had not been charged in connection with this homicide despite playing a significant role in the chain of events leading to the homicide.

Trial Counsel was ineffective for neglecting to question witness, Ricky Gipson, concerning the penalties for dealing in the quantity of drugs admittedly involved in the transaction he set up between Alston and the Bailey. (Allegation 3)

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During the direct examination of Gipson, Solicitor Sorenson asked Gipson "And tell the jury what that was that you were doing back in the spring of Two Thousand eleven [sic]," to which Gipson responds "selling marijuana." (Trial Tr. p. 129, ln. 11-13). During Trial Counsel's cross-examination of Gipson, Trial Counsel stated, "When this happened you were a drug dealer, correct?" to which Gipson responds "Yes, sir, that's correct." (Trial Tr. p. 152, ln. 6-8).

While Trial Counsel did not specifically question Gipson regarding the penalty for dealing marijuana in the quantity involved in the transaction in question, Trial Counsel's questions clearly placed before the jury the fact that Gipson was a drug dealer at the time of this incident. More importantly, Trial Counsel enumerated a valid and legitimate trial strategy for not further cross-examining the witnesses beyond that which he did at trial, to be discussed below. In that discussion, the Court will further address this Allegation.

Trial Counsel was ineffective for neglecting to cross-examine Ricky Gipson concerning his potential sentencing exposure for murder in connection with the death of the Bailey had the State elected to pursue the charge of murder against him under the concept of accomplice liability. (Allegation 5)

Trial Counsel asked Gipson, on cross-examination: "And you admitted to facts that you could get charged for felony murder" with Gipson answering affirmatively; and, "you're going home," to which Gipson answered yes. (Trial Tr. p. 165, ln. 2-6). Trial Counsel also asked Gipson: "Did you not cause this murder with helping sell these drugs," to which Gipson responded "[i]nadevertantly, yes." (Trial Tr. p. 160, ln. 4-6).

The record indicates that, while Trial Counsel did not question witness Ricky Gipson regarding the specific sentence exposure for murder or under what theory of criminal liability he could have been charged, he did elicit testimony from Gipson acknowledging that he could have been charged with murder.

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Trial Counsel was ineffective for neglecting to cross-examine witness Ricky Gipson concerning the amount of marijuana involved in the drug deal he allegedly set up between the Bailey and Applicant and his friends. (Allegation 6)

The trial testimony shows, which this Court referenced in its discussion of Allegation 3 above, there was testimony from Gipson on cross-examination that he was a drug dealer. The trial record clearly indicates that Gipson, as he testified to on cross-examination, set up the drug transaction in question (Trial Tr. p. 162, ln. 3-6). More importantly, however, the exact amount of marijuana to be purchased was evidence placed into the record by testimony, albeit not from Gipson on cross-examination. During direct examination of Ray Anthony Alston, Solicitor Sorenson asked "And do you remember how much you were looking to buy," to which Alston replied "Probably like an ounce or something." (Trial Tr. p. 203, ln. 7-8). During cross-examination of Alston, Trial Counsel asked, "And you said the amount you wanted to buy was an ounce, is that correct," to which Alston answers affirmatively. (Trial Tr. p. 222, ln. 25 - p. 223, ln. 2). Therefore, while the amount of marijuana involved in the transaction did not come in through the testimony of Gipson, it was clearly placed in the record before the jury by the testimony of Alston.

Trial Counsel was ineffective for neglecting to cross-examine witness, Ricky Gipson, concerning the fact that he could have been charged with attempted armed robbery and was not. (Allegation 15)

Trial Counsel cross-examining Gipson regarding the possibility of him being charged with attempted armed robbery would be speculative since there was a lack of facts in the record that would support Gipson being charged with attempted armed robbery. As Trial Counsel indicated during the PCR hearing, none of the witnesses in the car testified that Applicant intended to rob or did rob Bailey. (PCR Hr'g Tr. p. 23, ln. 4-13). The only testimony was that Gipson observed Applicant and Bailey "tussling" over something for which Gipson did not know what was a question

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come and testify to which Alston said "no." (Tr. Tr. p. 220, ln 24-25, p. 221, ln. 1). The fact that Alston had been charged with murder in connection with this incident and that he was still in jail for this murder charge was before the jury.

As to Allegation 26, it is unclear what Applicant means when stating that there were "potential charges [Alston] could have faced" and what the "potential sentencing exposure [Alston] would have been facing had he been prosecuted on each of these charges." To the extent it refers to Alston being charged with murder, which was the only offense for which Alston was charged, the jury was aware of Alston's pending murder charge throughout his testimony during direct examination. Thus, Trial Counsel not cross-examining Alston regarding the specific sentencing exposure for murder is not ineffective assistance of counsel. If Applicant is referring to the potential charge of attempted armed robbery in Allegation 26, then cross-examining Alston regarding sentencing for attempted armed robbery would be both speculative and contrary to the evidence and Trial Counsel's line of questioning on cross-examination of Alston (Trial Tr. p. 228, ln. 7: "So there was no preplan for robbery?").

Allegation 27 would tend to signify that Trial Counsel was required to have asked speculative questions to witness Alston. Putting this aside, the Court will further discuss Allegation 27 and 28 below.

4. Maurice Thompson

Trial Counsel was ineffective for failing to cross examine Maurice Thompson concerning the potential charges he could have faced on the facts of this case and the potential sentencing exposure he would have been facing had he been prosecuted for on each of those charges. (Allegation 34)

Trial Counsel was ineffective for neglecting to adequately cross-examine Maurice Thompson concerning the fact that the State could still exercise its discretion to prosecute him for additional charges arising out of the incident at some future date. (Allegation 35)

Trial Counsel was ineffective for neglecting to adequately cross-examine Maurice Thompson concerning what considerations he had been given by the State in exchange for his testimony and what future considerations he hoped to receive as a cooperation in exchange for his testimony. (Allegation 36)

The Court reiterates that these Allegations all tend to state that Counsel was ineffective for failing to cross-examine witness Maurice Thompson in a manner that would essentially be asking speculative questions, which would clearly not amount to ineffective assistance of counsel. Additionally, it would have been contrary to Trial Counsel's line of questioning on cross (Trial Tr. p. 259, ln. 17-19: "And one of the things you said was, there was never a plan of robbery with the four or the five of y'all, is that true?"). These Allegations will be further discussed below.

General allegation that Trial Counsel was ineffective for failing to adequately investigate any plea negotiations between the State and witnesses appearing for the prosecution at Applicant's trial. (Allegation 43)

In Allegations 2, 28, and 36, there are allegations of ineffectiveness of Trial Counsel for failure to cross-examine witness Ricky Gipson, Ray Anthony Alston and Maurice Thompson concerning any deals or consideration they received in exchange for their testimony. There was no such allegation relating to witness Hilliard Pinckney. Therefore, this Court is only addressing allegation 43 as it relates to Pinckney since the other witnesses were addressed under the above-referenced allegations.

During Applicant's trial, Solicitor Bell questioned Pinckney. Solicitor Bell specifically asked Pinckney: if he was charged with accessory after the fact; whether he had been offered anything to testify; and, if was expecting to cooperate to help himself. (Tr. Tr. p. 182, ln. 23-25, p. 183, ln. 1-5). Pinckney answered Solicitor Bell confirming the charge, denying he had been offered anything to testify, and that was testifying with the expectation of helping himself. *Id.*

At the PCR hearing, Solicitor Sorenson indicated that Pinckney was charged with accessory after the fact pursuant to this incident. (PCR Hr'g Tr. p. 130, ln. 15-16). Therefore,

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Pinckney, Thompson, and Alston testified at Applicant's trial with pending charges against them, of which they were aware. (PCR Hr'g Tr. p. 136, ln. 8-11). However, Pinckney's charge was ultimately dismissed in October 2013, over a year after Applicant's trial. (PCR Hr'g Tr. p. 130, ln. 15-17). The charge was dismissed against Pinckney because he was not driving the car on the night of the incident. (PCR Hr'g Tr. p. 136, ln. 22-25). Since Pinckney was questioned about his pending charges and his expectations or benefits for testifying, it was not deficient performance by Trial Counsel for not questioning Pinckney concerning such.

II. General analysis of the Allegations regarding Counsel's alleged ineffective questioning of witnesses on cross-examination. (Allegations 2, 3, 5, 6, 15, 21, 22, 16-20, 26-28, 34-36, & 43)

The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. State v. Stokes, 381 S.C. 390, 401-02, 673 S.E.2d 434, 439 (2009). If a defendant has the opportunity to cross-examine a witness, there is no violation of the Confrontation Clause. State v. Nance, 393 S.C. 289, 712 S.E.2d 446 (2011); see U.S. Const. amend. VI.

In addressing the Allegations not fully addressed in the prior sections, and in addressing the above-referenced Allegations generally, this Court observes that Trial Counsel did cross-examine each of the State's witnesses. Trial Counsel testified at the PCR hearing that his strategy in not stringently cross-examining State's witnesses was due to the fact that their testimony was helpful to Applicant and that he did not think it was beneficial to antagonize witnesses that were being cooperative and testifying in Applicant's favor which was consistent with his theory of the case:

PCR Counsel: Every single one of the witnesses, Alston, Thompson, Pinckney, they -- Gipson, they that all got the potential for the State to have developed a different theory, which was that they all came there with the intention all along to rob the drug dealer, right?

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PCR Counsel: And so under sound principles of accomplice liability, Gipson could have been charged with murder and attempted armed robbery, Alston -- all of them could have.

Trial Counsel: ...I didn't need to antagonize them. They said nothing to hurt -- matter of fact, everything they said helped our case. I was banking on that because each one of them said he wouldn't -- he left the car with no gun, he didn't come back with a gun.

Trial Counsel: None of those guys -- none of the ones that were in the car with Julian said he was trying to rob the -- rob him. Even Gipson said he didn't know whether he was robbing him or not, that the -- the State wanted that theory, but none of them testified to that theory.

PCR Hr'g Tr. p. 21, ln. 4-8; p. 21, ln. 22-24; p. 22, ln. 21-25; p. 23, ln. 9-13.

A review of the trial record confirms that none of the witnesses in question testified that they intended to rob Bailey. As Trial Counsel correctly noted at the PCR hearing, the State's theory at trial was that this incident resulted from a planned attempt to rob Bailey. Contrarily, the Defense's theory of the case was that no witness saw the murder weapon at any point and thus there was insufficient evidence to convict Applicant for murder. Furthermore, a review of the record reveals that part of Trial Counsel's strategy was specifically to get testimony into the record that this was not a planned or intended robbery. Trial Counsel questioning witnesses regarding whether they could have been charged with attempted armed robbery would have been favorable to the State's theory of the case and would have undermined Trial Counsel's theory of the case.

As to the Allegations that it was ineffective to not cross-examine witnesses regarding the possibility of being charged with drug offenses in relation to this incident, this Court also finds that attacking the credibility of the witnesses regarding this issue would undermine Trial Counsel's strategy of not jeopardizing the credibility of their general testimony that they did not meet Bailey with the intent to rob or shoot him and that they never saw Applicant with a gun. As to the possibility of being charged with murder with regard to witnesses Gipson and Alston, witness Gipson was questioned whether he realized he could have been charged with murder and witness

Alston was in fact charged with murder. Solicitor Sorenson testified at Applicant's PCR hearing

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that the rationale in only charging Alston, in addition to Applicant, with murder was because Alston had gotten out of the vehicle and they had a "hand print or something of his on the vehicle" driven by the Bailey. (PCR Hr'g Tr. p. 131, ln. 4-7). He also said that "proving that everybody in the vehicle knew that what he (Applicant) was going to do ahead of time, I'm not – I'm not sure that was quite as clear cut." (PCR Hr'g Tr. pg. 132, ln. 4-16). This was because it was their story that they went there just to buy marijuana. (PCR Hr'g Tr. pg. 133, ln. 2-4). This was also confirmed by Solicitor Sorenson when he said that there wasn't evidence that would have convicted Alston of murder or any of them as an accessory before the fact of murder. (PCR Hr'g Tr. pg. 134, ln. 16-24).

Questioning witnesses Pinckney and Thompson on whether they understood they could have been charged with murder, or any other charges under the theory of accomplice liability, calls for speculation because law enforcement and the Solicitor's Office did not charge them with murder. In other words, it is speculation that they could have been charged with murder when they, in fact, were not charged with murder. The conclusion that this would have been speculation is further supported by the fact there was no testimony from these witnesses showing that this was a planned and prepared robbery that had gone wrong, and hence no evidence to support questioning regarding the witnesses being accomplices before the fact to murder under a theory of accomplice liability or the hand of one, hand of all.

At the PCR Hearing, PCR Counsel also questioned Solicitor Sorenson about the hand of one, hand of all (accomplice liability). PCR Counsel, asked Solicitor Sorenson "that in terms of – of potential evidence of hand of one being the hand of all, you didn't have much more on Alston that (sic) you did on Maurice Thompson and Pinckney." (PCR Hr'g Tr. pg. 134, ln. 9-12). Solicitor Sorenson agreed with PCR Counsel's assessment. (PCR Hr'g Tr. pg. 134, ln. 17-18).

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This Court believes the facts of this case leading up to the shooting illustrate that these witnesses were "merely present," rather than accomplices, when this shooting occurred. There was no evidence, as previously discussed, that there was a plan to rob Bailey. Furthermore, each of these witnesses testified while they had pending charges against them from this incident and none of them had been promised anything in exchange for their testimony.

Under South Carolina law, the mere presence of individuals at the scene of the crime is not sufficient to prove that individuals are guilty of a crime and the presence of individuals at the scene where a crime is being committed, or mere association with a person who commits the crime, does not amount to those present being accomplices or aiders and abettors of the crime. State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973). Witnesses Gipson, Alston, Pinckney and Thompson appear to have been "merely present" based upon the evidence presented at trial as opposed to accomplices before the fact. It is important to note again, that Gipson was not charged with any crime, Alston and Thompson subsequently pled to Misprision of a Felony because of their actions after the incident, and the charges against Pinckney were dismissed because he wasn't driving the car. (PCR Hr'g Tr. p. 136, ln. 22-25)

This Court certainly recognizes the argument by PCR Counsel that these witnesses received a benefit for their testimony. However, this Court also recognizes that the charges that were not charged, dismissed or pled down were the result of the evidence that was presented at Applicant's trial, not from any "deals" or promises. Most importantly, none of the charges against any of these witnesses were dismissed, reduced, or pled down until after Applicant's trial. PCR Hr'g Tr. p. 137, ln. 4-6).

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For these reasons, this Court finds that Applicant has failed to prove that Trial Counsel was deficient in his cross-examination of these witnesses or that he was prejudiced. Therefore, Applicant's request for relief as to these allegations is denied.

Counsel Citing "Felony Murder" in Cross-Examination of Ricky Gipson
(Allegation 4).

Applicant alleges that Trial Counsel was ineffective for cross-examining Ricky Gipson concerning "felony murder" where said "cross-examination was inconsistent with South Carolina law and could readily mislead the jury into believing that Applicant's involvement in a felony drug deal made him responsible for murder in connection with any death occurring in the course of said felony."

In looking at the trial transcript, Trial Counsel asked Gipson if he had ever "heard of a felony murder." (Trial Tr. p. 159, ln. 21-23). Trial Counsel then followed that question asking Gipson, what is "felony murder," wherein Gipson answered that it is murder. (Trial Tr. p. 159, ln. 24-25). Gipson was then asked by Trial Counsel if that means "you call it a murder and you're committing a felony," to which Gipson responded "yes." (Trial Tr. p. 160, ln. 1-3).

Trial Counsel testified that he knew that South Carolina does not recognize felony murder, but he meant that murder was itself a felony. Trial Counsel testified that his intent with that line of questioning was to get witness Gipson back in line, as he felt Gipson was not taking the situation seriously:

I started cross-examining him and he started getting smart, and I was trying to get him back in line. I said 'look, you understand this . . . was a felony. We don't have a felony murder, but it was a felony to murder somebody. You understand that.' And his attitude changed immediately. I got his attention.

PCR Hr'g Tr. p. 206, ln. 8-14.

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Trial Counsel testified that he wanted to make Gipson realize how high the stakes were and that he felt that Gipson began to testify more truthfully after that line of questioning. (PCR Hr'g Tr. p. 206, ln. 21 - p. 207, ln. 2). This Court finds Trial Counsel articulated a valid reason at the PCR hearing for questioning Gipson about "felony murder." Applicant has failed to show that Trial Counsel was deficient or that he was prejudiced by this line of questioning. Therefore, Applicant's claim for relief as to this allegation is denied.

Counsel Failing to Cross-Examine Ricky Gipson Concerning Discussion Heard
(Allegation 14)

Applicant alleges that Trial Counsel was ineffective for neglecting to cross-examine witness Ricky Gipson concerning what, if any, discussions he heard between Applicant and the Bailey. Trial Counsel testified that he did not ask Gipson about any conversations he may have overheard because his understanding was that Gipson was not near the car when the incident occurred. (See generally PCR Hr'g Tr. p. 59-60). During direct examination, Gipson stated "... after I heard the pop I was really trying to get away from the scene," and also answered affirmatively when asked whether he took off running at this point. (Trial Tr. p. 145, ln. 3-7). On re-cross, Trial Counsel asked Gipson "And you testified that you didn't know what happened in the car, right, so you're assuming that one of them had the gun, right because you wasn't [sic] there, right, because you dashed," to which Gipson responded, "Well, you could say that." (Trial Tr. p. 188, ln. 5-8). Gipson testified that he heard the "pop" of the gunfire right after the car, which Applicant and Bailey were in the front seat of, began to "spur out" and go into reverse. (See Trial Tr. p. 141, ln. 19 - p. 142, ln. 21). When asked where he was "when the car started backing up," Gipson replies, "I was at the rear of the car close to, I wasn't all the way at the end, by the bumper in between the bumper and tire you could say, the bumper and the back tire." (Trial Tr. p. 144, ln. 6-10).

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At the PCR hearing, Trial Counsel testified that Gipson "got out of the car and walked away, the Alston boy been in the other car and it was just he and Julian –it was Julian and the deceased at the car – I don't think anybody heard any discussion . . . [;]" Trial Counsel also testified that Gipson left the car and ran when he heard the "pops." (PCR Hr'g Tr. p. 59, ln. 1 - p. 60, ln. 6). Trial Counsel said that he did not believe that there was any reason to ask the witness about what he may have heard, because there was no evidence he was near the car when the incident occurred. (See PCR Hr'g Tr. p. 59, ln. 17-20).

This Court finds that there was no evidence in the record, or testimony during trial, that witness Gipson heard any conversation between Applicant and the Bailey. Thus, it is merely speculation that there was a conversation between Applicant and Bailey and that Gipson could have potentially heard the conversation. In addition to the trial record lacking any such evidence, there was no evidence at the PCR hearing that there was any conversation between Applicant and Bailey that could have been overheard. Applicant has failed to meet his burden in establishing that Trial Counsel was deficient or that he was prejudiced by Trial Counsel not cross-examining Gipson concerning any discussion he may have heard between Bailey and Applicant. Therefore, Applicant's claim for relief as to this allegation is denied.

Counsel was Ineffective for Failing to Object to Portions of the State's Closing Argument. (Allegations 29-32 & 37)

Applicant alleges that Trial Counsel was ineffective for failing to object to portions of the State's closing argument where the State argued matters not in evidence and improperly commented on the strategies of the Defense. Specifically, Applicant asserts Trial Counsel erred in failing to object to the following portions of the State's closing argument:

The State's improper comment on the strategies employed by Defense Counsel in violation of the 6th Amendment. (Allegation number 29)

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The State “essentially” arguing that there was no legal basis for the position of defense that Witness Ricky Gipson could have been charged with murder and other offenses. (Allegation number 30);

The State’s argument of matters not in evidence through its argument that there was evidence that Applicant pulled the trigger and was trying to steal from the Bailey. (Allegation number 31);

The State’s argument that Ricky Gipson would not have taken “them” to buy marijuana if he had known that Applicant had a gun. (Allegation number 32);

The State’s argument that witness Gipson ran from the scene because he didn’t have a gun on him where said argument addressed matters not in evidence and as such was highly improper. (Allegation number 37); and,

The State’s argument that “we know it’s not a contact” in arguing that any suggestion that the Bailey shot himself with his own gun “makes no sense” where said argument was erroneous and not consistent with the testimony of the State’s own expert witness, the pathologist. (Allegation number 38).

It is well settled that “the solicitor must confine his arguments to the evidence in the record and its reasonable inferences.” State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). “If a Solicitor’s closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs.” State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). “Undoubtedly, a Solicitor may argue the State’s version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.” Id. (internal citations omitted). The solicitor can attack the credibility of a defense. State v. Liberte and Sims, 336 S.C. 678, 521 S.E.2d 744 (Ct. App. 1999). “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (internal citation omitted).

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“The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. (internal citation omitted)

Allegation 29, wherein Applicant asserts that the State’s closing argument violated his Sixth Amendment right to be fully heard in his defense through the solicitor improperly commenting on the strategies employed by Trial Counsel, is without merit. As previously stated, a Solicitor may attack the credibility of a defense, as allowed under Liberte and Sims, and this is exactly what the State did. (Trial Tr. p. 395, ln. 11 - p. 401, ln. 5). Furthermore, Applicant was allowed to confront and cross examine each of the State’s witnesses as required by the 6th Amendment.

Applicant next asserts that Trial Counsel was ineffective for failing to object to the State “essentially” arguing that there was no legal basis for the position of defense that witness Gipson could have been charged with murder and other offenses (Allegation 30). Applicant references pages 406 and 407 of the trial transcript in support of this allegation. Gipson testified during trial, however, that he contacted Bailey to set up the drug deal. (Trial Tr. p. 131, ln. 1-25). Because of this, along with no evidence of a preplanned robbery, there was not sufficient evidence to charge Gipson with murder or with accessory before the fact. (PCR Tr. p. 134, ln. 9-24). However, upon review of the Solicitor Sorenson's argument, he does state in his closing argument that Gipson could have been charged “with selling marijuana or something.” Solicitor Sorenson never asserts that there was no legal basis for the position of Counsel that Gipson could have been charged with murder and other offenses. Therefore, this Allegation is without merit.

As to Allegation number 31, Applicant asserts that Trial Counsel was ineffective for failing to object to a portion of the State’s closing argument in which the prosecution argued matters not in evidence, in arguing that there was evidence that Applicant pulled the trigger and was trying to

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steal from Bailey. The record reflects that there was no direct evidence from any witness that Applicant pulled the trigger that shot Bailey nor was there any direct evidence that Applicant was attempting to steal from Bailey. However, there was testimony that Applicant was leaning into the passenger side of Bailey's car, that Bailey and Applicant were tussling over something, and that a "pop" was heard. (Trial Tr. p. 144-145). There was also testimony from Dr. Kelly Rose, the State's Forensic Pathologist, who testified that the wound to Bailey "traveled from right to left, slightly down, and slightly forward." (Trial Tr. p. 269, ln. 17-19). Other witness' testimony placing Applicant to the right side of Bailey when the shot occurred, coupled with that of Dr. Rose's testimony as to the path of the bullet, is clearly circumstantial evidence which could lead to a reasonable inference that Applicant did shoot Bailey. In addition, there was testimony at trial that when law enforcement arrived and searched Bailey's car, there was money and what appeared to be marijuana in the passenger floorboard. Moreover, there was testimony from witness Kendra Williams, the responding officer to the crime scene, that upon asking Bailey whether he had been robbed, "Bailey shook his head, yes." (Trial Tr. p. 89, ln. 7-8).

Circumstantial evidence in the trial record and the testimony of what Bailey told law enforcement creates a reasonable inference that a robbery was attempted by Applicant. As stated previously, the state's closing arguments are allowed to entail what is in evidence and the reasonable inferences from that which is in evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Therefore, the State's argument was not improper nor objectionable. Therefore, Applicant's assertion that Trial Counsel was ineffective for failure to object to such argument is without merit and is hereby denied.

Applicant asserts in Allegation 32 that Trial Counsel was ineffective for failing to object to a portion of the State's closing argument wherein Solicitor Sorenson stated that Gipsen would

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is evidence that he did not have a gun, or at the very least, facts that create a reasonable inference of such. This testimony is direct or circumstantial evidence that Gipson did not have a gun on him when he ran from the scene which would allow the Solicitor to make such an argument during closing. Therefore, Applicant's assertion that Trial Counsel was ineffective for failing to object to this argument is without merit and Applicant's request for relief as to this Allegation is denied.

Allegation 38, asserts that Trial Counsel was ineffective for failing to object to a portion of the State's closing argument wherein Solicitor Sorenson argued that "we know it's not a contact" in arguing that any suggestion that Bailey shot himself with his own gun "makes no sense" where said argument was erroneous and not consistent with the testimony of the State's pathologist. Dr. Kelly Rose was the State's pathologist that performed the autopsy on the Bailey. She testified that Bailey had an open wound in his stomach and an exit wound coming out of his left side. (Trial Tr. p. 266, ln. 23-24). Dr. Rose also testified that the bullet would have traveled from right to left, slightly down, and slightly forward. (Trial Tr. p. 269, ln. 17-19). In addition, Dr. Rose defined different types of wounds, but most importantly she defined a "contact wound." She stated that if a wound is a contact wound, you would see a muzzle imprint. Dr. Rose then testified that there was no evidence of a muzzle imprint and no soot on Bailey. (Trial Tr. p. 276, ln. 14-15; Trial Tr. p. 277, ln. 14-15).

Based upon this testimony, direct evidence was presented for the State to argue that Bailey did not have a "contact wound." This testimony, as well as the entry location and exit location of the wound, created a reasonable inference supporting the State's argument that it would make "no sense" that Bailey shot himself. Therefore, the State's argument in closing as to this assertion was not objectionable, nor was it error for Trial Counsel not to object. Therefore, Applicant's assertion

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that Trial Counsel was ineffective for failing to object to this argument is without merit and Applicant's request for relief as to this Allegation is denied.

In addition to the above, Trial Counsel testified at the PCR hearing that: he did not object to comments by Solicitor Sorenson in the State's closing argument as part of his trial strategy (see generally PCR Hr'g Tr. p. 64, ln. 23 - p. 70, ln. 7); there are differing thoughts on how to handle objections during closing arguments (id.); he believes that it was best to not object throughout closing arguments because the defense had last argument and he could explain the defense's theory of the case (id.); and he did not see where the comments by Solicitor Sorenson were inappropriate in that they were simply the State's theory of the case. (PCR Hr'g Tr. p. 66, ln. 13-24).

As previously stated, a solicitor is allowed to comment on the facts in evidence and reasonable inferences therefrom. The State was allowed to attack the credibility of a Trial Counsel's theory of the case. This Court, as previously stated, finds that the comments made by Solicitor Sorenson in the State's closing argument were neither inappropriate nor objectionable. Additionally, Trial Counsel enumerated a valid strategy for not objecting to the State's closing argument. Therefore, Trial Counsel was not deficient when he chose not to object to Solicitor Sorenson's statements at issue.

In addition, the Court finds that even if the comments were objectionable, Applicant suffered no prejudice. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003), holding appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record). "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Tucker, 324 S.C. at 169, 478 S.E.2d at 267-68 (internal citations omitted). "The burden of proof is on [Applicant] to show prejudice." Id. (internal citation omitted). In evaluating

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prejudice, a number of factors should be considered: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." United States v. Mason, 344 Fed.Appx. 851, 854 (4th Cir. 2009). "When making this determination, [courts] must 'review the alleged impropriety of argument in the context of the entire record.'" State v. Liberte, 336 S.C. 648, 655-656, 521 S.E.2d 744, 748 (Ct. App. 1999) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

Putting aside the issue of whether or not Solicitor Sorenson's statements were improper, this Court finds that they were clearly not of a nature that would infect the trial with such unfairness as to mark Applicant's conviction as a denial of due process. Therefore, this Court finds that Applicant has failed to meet his burden in regards to these Allegations and his request for relief as to these Allegations is denied.

Failure to Adequately Argue to Suppress Statements of Dying Bailey. (Allegations 41, 42, & 42(A))

This Court finds that it need not address the allegations relating to the suppression of statements of the deceased Bailey, Allegation numbers 41, 42 and 42(A), since these issues were raised and argued on direct appeal. (See State v. Julian Young, Appellate Case No. 2012-213006, Unpublished Opinion No. 2014-UP-234 (filed June 18, 2014)). Issues that have been raised and ruled upon in a direct appeal may not be raised again in a post-conviction relief proceeding. See S.C. Code Ann. § 17-27-90 (1976); see Robertson v. State, 418 S.C. 505, 513-514, 795 S.E.2d 29, 33 (2016). This Court dismisses these Allegations as being improperly raised and outside the scope of the proceeding.

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Trial Counsel was ineffective for failing to adequately argue that the statements made by the deceased did not have the degree of reliability typically afforded a dying declaration where the evidence before the Court verified that the description of the circumstances under which he was shot as a robbery was in fact suggested to him by the law enforcement officer questioning him. (Allegation 41)

Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his identity from law enforcement by lying about his name provided direct evidence that he was not operating under the belief that his demise was imminent. (Allegation 42)

Additionally, this Court finds that Allegations 41 & 42 lack merit on their face. In PCR Counsel's direct line of questioning to Trial Counsel at the PCR hearing, she acknowledges that Trial Counsel argued for suppression of the statements Bailey made to law enforcement on the basis that Bailey's unwillingness to identify himself to law enforcement showed the Bailey was forward-thinking, and thus his statements to law enforcement lacked the reliability required to be admissible under the dying declaration hearsay exception. Trial Counsel also submitted a brief in support of suppression of the statements. (PCR Hr'g Tr. p. 70, ln. 22- p. 71, ln. 4). More importantly, the trial record indicates that the Trial Court did not find this statement to be a dying declaration. Rather, the Trial Court admitted the statement under the excited utterance exception to hearsay. Thus, an Allegation that Trial Counsel did not adequately argue that the statement was not a dying declaration is clearly without merit when Trial Counsel argued that the statement did not qualify as a dying declaration and the statement was not admitted as a dying declaration.

Trial Counsel was ineffective for failing to adequately argue for the suppression of the statements attributed to the deceased on the ground that his attempt to conceal his identity from law enforcement, by refusing to provide his name, constituted direct evidence that he had the capacity for reflective thought at the time of the utterance. (Allegation 42(A))

The Allegation claims that Trial Counsel was ineffective for not adequately arguing for the suppression of the Bailey's statement, on the basis of it not being part an excited utterance, based

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on its lack of reliability. At the PCR hearing, PCR Counsel acknowledged that "[Trial Counsel] had argued previously that the fact that [Bailey] declined to provide his name was evidence of the fact that he didn't think he was about to die" and that "[Bailey] was thinking about possible prosecution..." (PCR Hr'g Tr. p. 72, ln. 19 – p. 73, ln. 2). At trial, Trial Counsel argued this as a basis for the lack of reliability of Bailey's statement and that it was inadmissible hearsay and not within the dying declaration exception. PCR Counsel claims it was ineffective to repeat this argument once the trial court overruled Trial Counsel's suppression motion finding it to be admissible as an excited utterance.

Upon review of the trial record, this Court finds this Allegation lacks merit for several reasons. For one, as noted above, Trial Counsel did in fact argue Bailey's statements were unreliable as they evidenced that Bailey did not want to give his name to law enforcement. While Trial Counsel may have not used the exact terminology of excited utterance at trial, the law is clear that "the excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (internal citations omitted). Trial Counsel argued to the Trial Court that Bailey's unwillingness to identify himself showed reflective thought through Bailey's apparent fear of law enforcement knowing his identity, and hence the statement lacked reliability. Since Trial Counsel argued the correct legal basis for when a statement cannot, as a matter of law, be an excited utterance at trial, this Court does not find Counsel to be ineffective for merely failing to give the technical label to the argument he was making.

Secondly, the testimony exchanged between PCR Counsel and Trial Counsel at the PCR hearing regarding this issue makes apparent why this Court finds this Allegation to be without merit. PCR Counsel asked Trial Counsel at the PCR hearing whether Trial Counsel considered

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arguing separately that the statement was not an excited utterance, after the trial court had ruled that it was such. (PCR Hr' Tr. p. 73, ln. 6-19). In response, Trial Counsel stated that the trial court ruled it was an excited utterance and Trial Counsel objected to this ruling. The Trial Court noted Trial Counsel's objection and his motion to suppress the statements, and therefore Trial Counsel did not believe there was any action left to take. (PCR Hr'g Tr. p. 73). This Court tends to agree with Trial Counsel.

Lastly, Trial Counsel did in fact argue, albeit through his brief in support of his motion to suppress the statement rather than on the record, that Bailey's statement was not an excited utterance. (PCR Hr'g Tr. p. 74, ln. 4-5). Thus, the argument was before the Trial Court and was before the trial judge in the Trial Court's consideration and final ruling on the statement's admissibility.

For these reasons, these Allegation are without merit and Applicant's claim for relief as to these Allegations is denied.

Failure to Object to State's Characterization of Witness's Criminal History.
(Allegation 25)

Applicant alleges in this Allegation that Trial Counsel was ineffective for failing to object to the State's characterization of witness Ray Anthony Alston's criminal record where such characterization was intended to minimize the impact of the witness's criminal record. While not apparent on the face of this Allegation, PCR Counsel said during the PCR hearing that this characterization was also "an effort by the prosecution to, by analogy...minimize the misconduct of the deceased..." (PCR Hr'g Tr. p. 63, ln. 21-23). Specifically, during the State's examination of Alston, Solicitor Sorenson characterized Alston's criminal record as being "just a little bit of trouble in the past" and "a couple of marijuana convictions" (Trial Tr. p. 194, ln. 25 - p. 195, ln. 2).

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When Trial Counsel was asked about this issue at the PCR Hearing, he admitted that he did not object to such characterization. (PCR Hr'g Tr. p. 63, ln. 15-18). Trial Counsel further asserted that he did not believe this characterization minimized his prior record because Alston admitted selling drugs all the time and Trial Counsel called Alston a drug dealer on cross-examination. (PCR Hr'g Tr. p. 64, ln. 7-12).

This Court finds that Trial Counsel was not deficient for failing to object to this portion of Solicitor Sorenson's question and that this characterization of Alston's criminal record did not prejudice Applicant. The allegation that the State's characterization of Alston's prior marijuana convictions as a "little bit of trouble" drew an analogy to the Bailey's drug-dealing and painted the Bailey in a favorable light, which prejudiced Applicant, requires several different layers of speculation.

It appears that the progression of this Allegation is that: the jury heard the State characterize Alston's prior marijuana convictions as being a little bit of trouble; prior marijuana convictions are only a little bit of trouble; people in general dealing marijuana, including Bailey on the date in question, is only a little bit of trouble; Applicant allegedly murdered a Bailey who was taking part in an offense that could only lead to a little bit of trouble; and, Applicant was more culpable and Bailey more innocent. The problem with these assumptions is that, by its own logic, this characterization would also minimize the activity of Applicant on the date in question, which was purchasing marijuana. In other words, however much it can be conceived that this characterization led to prejudice against the Applicant, it minimizes the negative connotations around being involved with marijuana transactions. Even assuming this failure to object was an error, it is nonetheless not enough "to show that the error had some conceivable effect on the outcome of the

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proceeding” or that Applicant was prejudiced by such. Therefore, Applicant's claims for relief as to this Allegation is denied. Strickland, 466 U.S. at 693.

Trial Counsel was ineffective for neglecting to object to the manner in which a law enforcement officer was questioned concerning the chronology between when other State's witnesses were arrested, cooperated with an interview, and then gave statements where the method in which the officer was questioned concerning each of the State's witnesses, followed by the same testimony concerning Applicant, which did not reference cooperation and the giving of a statement, amounted to an improper comment on the Applicant's exercise of his right to remain silent. (Allegation 33).

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being “compelled in any criminal case to be a witness against himself[.]”); S.C. Const. art. I, § 12 (“[N]or shall any person be compelled in any criminal case to be a witness against himself.”). Pursuant to that right, both comments by the prosecution on a defendant’s silence and instructions by the trial judge indicating a defendant’s silence constitutes evidence of guilt are prohibited. Griffin v. California, 380 U.S. 609, 615 (1965); see Doyle v. Ohio, 426 U.S. 610, 618 (1976) (“[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.”). “In particular, the State may neither comment upon nor present evidence at trial of a defendant’s decision to exercise his right to remain silent[.]” Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.”); State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004) (“As a corollary of this

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right, a prosecutorial comment, whether direct or indirect, upon a defendant's failure to testify at trial is constitutionally impermissible."). "The obvious purpose [of that prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Edmond, 341 S.C. at 346, 534 S.E.2d at 685; see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) ("The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony").

However, the mere mention of a defendant's decision to exercise his right to remain silent during trial does not automatically constitute reversible error. See State v. Truesdale, 285 S.C. 13, 17, 328 S.E.2d 53, 56 (1984) ("When such a violation occurs, the question remains, however, whether it is cause for reversal or is harmless error beyond a reasonable doubt."), rev'd on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989). Instead, such testimony only requires reversal where its admission results in prejudice to the defendant. Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001); see State v. Johnson, 306 S.C. 119, 129, 410 S.E.2d 547, 553 (1991) (declining to reverse Johnson's conviction as a result of the introduction of testimony establishing Johnson invoked his right to counsel after determining the admission of that testimony was not prejudicial to Johnson's case). Significantly, the burden rests upon the defendant to establish the admission of the testimony deprived him of a fair trial. Gill, 346 S.C. at 221, 552 S.E.2d at 33; see also Weaver, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one").

In determining whether the defendant was prejudiced by the admission of testimony concerning his post-arrest silence, any error resulting from the admission of that testimony will

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not result in reversal if a review of the entire record establishes the error was harmless beyond a reasonable doubt. State v. Arther, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986); see United States v. Hastings, 461 U.S. 499, 509 (1983) (“[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]”). In reviewing the record to determine whether an error was harmless, the following factors should be considered: (1) whether the reference to defendant’s right to remain silent was a single reference; (2) whether the reference was repeated or alluded to at another point during trial; (3) whether the prosecutor tied the defendant’s exercise of his right directly to his exculpatory story; (4) whether the exculpatory story was totally implausible; and (5) whether the evidence of guilt was overwhelming. Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687; see Truesdale, 285 S.C. at 18-19, 328 S.E.2d at 56 (identifying the factors relied upon in the opinion of the Fifth Circuit Court of Appeals in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), as relevant factors to be considered in determining if a Doyle violation is harmless). None of those factors is alone dispositive, and the specific circumstances of each case should be considered individually on a case-by-case basis to determine whether the error was harmless beyond a reasonable doubt. Truesdale, 285 S.C. at 19, 328 S.E.2d at 56; see Alderman v. Austin, 695 F.2d 124, 126, n. 7 (5th Cir. 1983) (instructing that the factors for determining whether a Doyle violation is harmless identified in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), are not to be treated as rigid rules or applied strictly to all cases); see also United States v. Shaw, 701 F.2d 367, 382 (5th Cir. 1983) (“Subsequent cases have illustrated, however, that factual situations are not always amenable to description with the rigid Chapman types. Consequently, we have held Chapman inapplicable and the error to be harmless even though the defendant’s story is ‘not totally

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implausible,' but the evidence of guilt is 'substantial.'" (internal citations omitted)); see, e.g., State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding [of harmlessness]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.").

Agent Johnson of SLED is alleged to have given testimony (PCR Hr'g Tr. p. 66, ln. 25 - p. 67, ln. 17) that referenced State witnesses giving statements and cooperating and then gave testimony that did not reference Applicant cooperating or giving a statement:

Q: Okay. And that was when you took a statement from [Ricky Gipson] at the Sumter County Sherriff's Office?

A: That's correct

Trial Tr. p. 340, ln. 6-8.

Q: And did Mr. Pinckney cooperate and give y'all a statement when you interviewed Mr. Pinckney?

A: No, sir, no interview was conducted with Pinckney.

Q: Okay. He asked for a lawyer when you attempted to interview Mr. Pinckney?

A: Yes.

Q: And then lastly, co-defendant, Maurice Thompson, was arrested, I think he testified, on May the Nineteenth, does that sound right?

A: Yes, sir.

Q: Okay. And did he, in fact, cooperate and give a statement?

A: Yes, sir.

Trial Tr. p. 346, ln. 8-20.

Applicant alleges this was an improper comment on his right to remain silent. Trial Counsel testified at the PCR hearing that he did not object to this line of questioning as being an impermissible comment on Applicant's right to remain silent. (PCR Hr'g Tr. p. 67, ln. 18). Trial Counsel also testified that he did not believe it to be an attempt to obtain "back door" testimony

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relating to Applicant's invocation of his rights in violation of Doyle. (PCR Hr'g Tr. p. 67, ln. 10-21).

This Court has reviewed the relevant case law cited above and the record. First, a review of the record shows that Agent Johnson testified that Hilliard Pinckney did not cooperate, meaning that it is not clear that this line of questioning tended to point out that Applicant did not cooperate. Second, this Court finds that the testimony presented was not an improper comment on Applicant's right to remain silent nor was Trial Counsel ineffective for failing to object to the testimony. Furthermore, this Court, after reviewing the factors espoused in Edmond, finds that even if the testimony was an improper comment on Applicant's invocation of the right to remain silent, it was not of the nature that would warrant reversal. Even assuming this testimony could have provided for an inference on Applicant's invocation of his right to remain silent, it was not a reference to Applicant's invocation of such rights. The testimony was not alluded to throughout the trial, and the State did not tie the invocation of such rights directly to an exculpatory story by Applicant. Therefore, this Court finds that Trial Counsel was not ineffective for failing to object to this testimony or prejudiced by such. Therefore, Applicant has failed to meet his burden as to this Allegation and his claim for relief as to this Allegation is denied.

Failure to Discuss Potential Plea Negotiations with Applicant. (Allegation 44)

A defendant has no constitutional right to plea bargain. State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994). "Prosecutors have broad powers in the plea bargain process." State v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (1999). "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." Becka, 333 S.C. at 684, 511 S.E.2d at 400-401.

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Trial Counsel testified that he discussed the possibility of pursuing a plea offer with Applicant and that Applicant was not interested in pursuing a deal that would involve jail time. (PCR Hr'g Tr. p. 76, ln. 5-9). Trial Counsel testified that they would have pursued plea negotiations had Applicant requested they do so. (PCR Hr'g Tr. p. 75, ln. 3 - 15). Trial Counsel also testified that he discussed the possibility of Applicant entering a plea, but Applicant "was not interested in pleading guilty to anything." (PCR Hr'g Tr. P. 139, ln. 19-23). Co-Counsel confirmed that Applicant was not interested in a plea deal stating that Applicant was not interested in anything that gave him time. (PCR Hr'g Tr. p. 192, ln. 18-23). Co-Counsel also testified that if Applicant had wanted them to pursue a plea deal they would have done so. (PCR Hr'g Tr. p. 192, ln. 24 - p. 193, ln 1). Applicant failed to contradict Trial Counsel or Co-Counsel or provide any testimony concerning this issue at the PCR hearing.

Solicitor Sorenson testified at the PCR hearing that there was no record of an offer being made in this case and he did not have any independent recollection of an offer being made. Solicitor Sorenson also stated that the "general gist from Mr. Johnson was that his client was not interested in pleading guilty to anything. (PCR Hr'g Tr. p. 139, ln. 12-22). He also testified that he had notes about potential plea negotiations, but that they were of the sort that he would have used in discussions with Bailey's family about potential outcomes and were not indicative of actual plea negotiations. (PCR Hr'g Tr. p. 139-140, ln. 24-25, & 1-6).

This Court finds the testimony of Trial Counsel and Solicitor Sorenson to be credible and not contradicted by Applicant. This Court finds that Trial Counsel discussed the possibility of pursuing a plea offer with the State on behalf of Applicant but Applicant chose not to pursue that course of action. Furthermore, even if Trial Counsel had not discussed the possibility of pursuing a plea offer, this Court notes that even when defense counsel seeks a plea for a defendant, the State

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is not required to extend any plea offers to a defendant, nor does a defendant have a constitutional right to a plea offer. See Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007). Therefore, Trial Counsel was not ineffective in his actions and Applicant has failed to show any prejudice resulting therefrom. Therefore, Applicants request for relief as to this Allegation is denied.

CONCLUSION

Based upon the findings of fact and conclusions of law set forth herein, this Court concludes that Applicant has met his burden of proof with regard to Sixth Amendment allegations addressed herein. This Court finds that Trial Counsel failed to provide Applicant reasonable professional assistance of counsel in the Trial Court and that the errors and omissions of counsel were not harmless error inasmuch as they damaged Applicant's right to a fair trial. It is the finding of this Court that, but for counsel's errors and omissions addressed herein, there is a reasonable probability that the outcome of Applicant's trial would have been different.

It is the observation of this Court that applications for post-conviction relief generally fall into two categories. Some cases involve situations where an attorney, who generally provided reasonable professional assistance of counsel, made isolated errors which were so serious and prejudicial as to warrant a reversal notwithstanding the fact that counsel otherwise represented his client within the prevailing norms for attorneys representing defendants in criminal matters. In other cases, evidence presented by the Applicant demonstrates an overall failure to provide reasonable professional assistance of counsel. In this case the representation of counsel, when viewed in its totality, fails to live up to the required standards for reasonable professional assistance of counsel. While this Court believes that multiple errors made by trial counsel in this case warrant reversal standing alone, this Court additionally finds that the overall representation of trial counsel

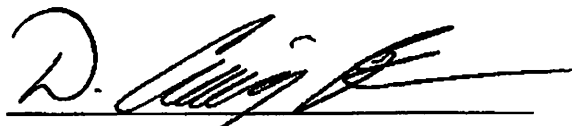
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fell below an objective standard of reasonableness and warrants vacation of Applicant's conviction and sentence based upon a finding of cumulative prejudice.

This Court recognizes that the issue of whether the accumulation of several errors would warrant relief is an unsettled question in South Carolina. Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002). As discussed above, this Court has found multiple errors by Trial Counsel warrant reversal on their individual merit. However, this Court believes that in the event an appellate court were inclined to find no one issue in this case warranted reversal, the collective prejudice arising from the multiple errors and omissions presented in this case certainly does and this case could be the one that would give our appellate courts an opportunity to settle this question.

IT IS, THEREFORE, ORDERED:

This 11 day of May, 2020.



D. CRAIG BROWN
Presiding Judge

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