THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2018-CP-18-1709

Tashon E. Hurell, #320499 ..... Appellant,

v.

State of South Carolina .....Respondent.

NOTICE OF APPEAL

Tashon E. Hurell appeals the Order of the Honorable Diane S. Goodstein filed April 23, 2020 dismissing his Application for Post Conviction Relief and her subsequent denial of Appellant's Motion to Reconsider pursuant to Rule 59(e), filed July 8, 2020. Appellant's counsel received notice of entry of this Judgment on July 22, 2020.

August 21, 2020

Leslie T. Sarji
Sarji Law Firm, LLC
PO Box 20248
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Other Counsel of Record:
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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP1801709

Tashon Earl Hurell		**South Carolina State Of**	

PLAINTIFF(S) **DEFENDANT(S)**

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

CERTIFIED COPY

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court: **Pursuant to this Court's authority under Rule 59(f) SCRC, the Plaintiff's Motion to Reconsider is dismissed without oral argument and determined upon the pleadings on file. I find that all arguments properly raised to the Court have already been ruled upon and this Court will not consider further arguments on the matter.**

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein, Circuit Court Judge	**2112** **Judge Code**	6/30/2020 **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

For Clerk of Court Office Use Only

This judgment was entered on 7/8/2020, and a copy mailed first class or placed in the appropriate attorney's box on 7/8/2020, to attorneys of record or to parties (when appearing pro se) as follows:

Tashon Earl Hurell Lcl Cb08 #320499 P.O Box 205
Ridgeville, SC 29472
Leslie Therese Sarji 230 Congress Street Charleston, SC 29403

Sarah Gunton and
Benjamin Hunter Limbaugh 1000 Assembly Street
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

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

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

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

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP1801709

Tashon Earl Hurell		**South Carolina State Of**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

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

Original - Filed
2020 APR 23 AM 8:1
DORCHESTER COUNTY
CLERK OF COURT

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Diane S. Goodstein — 4/23/2020

Circuit Court Judge | **Judge Code** | **Date**

For Clerk of Court Office Use Only

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

Tashon Earl Hurell#320499, Lieber Correct.Inst. P.O Box 205, EA-0019-A, Ridgeville, SC 29472
Leslie Therese Sarji 230 Congress Street Charleston, SC 29403

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

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

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO.: 2018-CP-18-1709
Tashon Hurell,	)	
	)	ORDER OF DISMISSAL
Applicant,	)	
V.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter came before me in Dorchester County on September 11, 2019 upon Applicant's request for post-conviction relief ("PCR"). The Applicant, Tashon Hurell, made several arguments in support of his claim of ineffective assistance of trial counsel. Those arguments and the Court's findings on each are discussed below.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. Applicant was indicted in case number 2015-GS-18-0085 for one count of Attempted Murder; in case number 2015-GS-18-0086 for one count of Kidnapping; and in case number 2015-GS-18-0087 for one count of armed robbery. Applicant entered a not guilty plea and was tried by a jury on February 8 – 10, 2016 before the Honorable Edgar W. Dickson. Applicant was represented at trial by John Loy, Esquire. He was found guilty on all three charges and was sentenced to thirty years on each charge, with sentences on all charges to run concurrent.

Applicant filed a timely Notice of Appeal and appealed his conviction. His appeal was denied by the Court of Appeals on August 1, 2018, and Applicant's conviction and sentence were affirmed. The Remittitur was issued on August 27, 2018.

CURRENT APPLICATION

On September 25, 2018, Applicant filed an initial application for post-conviction relief, as well as an amended application for post-conviction relief, dated September 3, 2019. Applicant's amended application for post-conviction relief alleges that he is being held in custody unlawfully as he received ineffective assistance of counsel for the following reasons that were pursued during the hearing of this matter:

a. Trial counsel provided ineffective assistance of counsel in advising Applicant to waive his right to a mistrial;

b. Trial counsel failed to subject the prosecution's case to "meaningful adversarial testing";

c. Trial counsel failed to fully investigate the case prior to trial; and

d. Trial counsel failed to present alibi witness testimony.

STATEMENT OF FACTS ADDUCED AT TRIAL

On April 23, 2014, Mary Pecorora (Victim) was working at the Kangaroo gas station in the early morning hours when someone entered the store wearing a mask and carrying a bat. (R. 9, line 10–R. 10, line 17). He threatened to cut her throat and then he hit her in the head with the bat before grabbing her by the neck and dragging her to the cash register. (R. 10, line 20–R. 11, line 5). She opened the register upon his command, and he grabbed the money, hopped over the counter, and took off out the door. (R. 11, lines 9–15). Victim described the assailant as Afro-American, slender, five feet, ten inches to five feet, eleven inches tall, and wearing a ski mask, bandana, hooded jacket, gloves, and red shoes. (R. 11, line 16–R. 12, line 2). Following the attack, she called 911 and EMS and the police came to the scene. (R. 12, lines 3–25). She did not have much of an opportunity to speak to the police because EMS was attending to her

medical needs and she was subsequently transported to MUSC for several days of treatment, including surgery. (R. 13, lines 1–16).

Officer Bernard Nelson of the Summerville Police Department responded to the crime scene, gathered information from Victim, and relayed a description of the suspect to all units. (R. 20, line 17–R. 22, line 10). He took photos at the scene and viewed the surveillance video to gather a better description of the suspect. (R. 22, lines 11–12; R. 24, lines 13–21). The description he provided to the other units was: "black male subject wearing a light hoodie with the multi-colored graphic designs on the front. Bright lime green hoodie, black pants, red shoes, black gloves, dark colored bandana over his face. He was a medium build and had a husky voice carrying a baseball bat." (R. 25, line 22–R. 26, line 1). The solicitor showed Officer Nelson State's Exhibit #18, a screenshot from the video of the suspect jumping over the counter, and Nelson verified that he described the shoes as red. (R. 25, lines 3–4; R. 26, lines 2–4).

Officer Hobie Williams, also of the Summerville Police Department, responded with his K-9 to the scene of the crime and his K-9 was able to track from the Kangaroo to the Somerset Apartments. (R. 48, line 19–R. 51, line 23). Officers were unable to continue the track at that point because they did not have available officers to set up a perimeter. (R. 52, lines 2–7). Instead, he and another officer searched for evidence on the path between the Kangaroo and the Somerset Apartments. (R. 52, lines 8–15). At Building G, they saw a white male smoking on the upper level and decided to talk to him. (R. 52, lines 15–19). He reported to the officers that he had seen a black male with a bat running to the apartment below his, G-4. (R. 53, line 18–R. 54, line 1). Officer Williams saw a dollar bill lying on the ground inside the breezeway of the balcony. (R. 54, lines 5–6; R. 55, lines 1–8). He noted the bill was dry even though the area all around was wet, and the bill also had blood on it. (R. 55, lines 9–14). He collected the dollar

bill with gloves and secured it in an evidence bag. (R. 59, lines 6–22). Officer Williams then talked to Tashima Jones, ~~Appellant~~ Applicant's sister and the occupant of the apartment, who allowed him to come in and search. (R. 56, lines 4–21). Traquan Hurell, one of ~~Appellant~~ Applicant's brothers, was also in the apartment. (R. 56, lines 22–25).

Lucas Hartman, the man who lived above apartment G-4, testified he was sitting on his balcony on April 23, 2014, around 1:30 to 2:00 a.m. when he saw a man wearing black clothes and carrying a baseball bat and a backpack jump over the balcony below and heard the door open. (R. 69, line 3–R. 70, line 20). He then witnessed the man come back out, jump over the balcony, and drive off in a white vehicle, possibly a Mustang, and then come back and do the same thing again. (R. 70, line 19–R. 71, line 1).

Detective Michael Weaver of the Summerville Police Department got involved in the case on April 23, 2014, and obtained the officers' reports. (R. 94, line 22–R. 95, line 22). He used DMV records to find out who lived at apartment G-4 and found that in addition to Jones, Traquan Hurell and ~~Appellant~~ Applicant were listed in the records. (R. 96, lines 2–17). He then obtained photo lineups from SLED of Traquan and ~~Appellant~~ Applicant. (R. 97, lines 6–11). Based on Hartman's statement that he heard someone going in and out of the apartment below, Det. Weaver obtained a search warrant for apartment G-4, obtained a key from the apartment manager, and searched the apartment while no one was home, finding nothing of evidentiary value. (R. 98, lines 1–23). His findings included two pairs of red shoes, but when he discovered they did not match the ones in the surveillance video, he returned them. (R. 98, line 23–R. 99, line 8). After returning the key to the apartment manager, he noticed a car was parked in front of G-4, so he knocked on the door and found Jana Hurell, ~~Appellant~~ Applicant's mother, there. ~~Appellant~~ Applicant was also at the apartment at the time. (R. 101, lines 3–7). When the solicitor asked Det. Weaver whether he showed either

Ms. Hurell or Appellant any photographs, and he said that he did, defense counsel told the trial court he had a matter of law to take up. (R. 101, lines 8–13). The solicitor proffered what he was going to ask, which was what photograph he showed Appellant, and Det. Weaver described the photograph as one taken from behind the cash register during the incident, which shows the bright green sweatshirt the suspect was wearing. (R. 102, lines 2–15). He showed it to Appellant to see if he recognized the shirt and testified that Appellant laughed and said who would wear something like that during this?" (R. 102, lines 20–22). Defense counsel objected that the above comment "simply attempts to show that if, in fact, he laughed in the face of this bloody picture[] and stuff, attempts to paints him as cold-hearted or villainous." (R. 104, lines 3–5). Specifically, his objection was based on relevance and prejudice. (R. 104, line 19–R. 106, line 2). The trial judge stated that he thought Appellant's comment was humorous and seemed to show he was not worried about it, not that he was being callously indifferent. (R. 106, lines 18–20; R. 110, lines 2–5). He ruled that he would allow the State to ask the question. (R. 110, lines 6–8).

Det. Weaver testified he showed Victim each of the three lineups that contained photos of the three Hurell brothers. She identified Tramaine as someone who had been at the gas station that night and said he was a regular customer. (R. 115, line 4–R. 116, line 7). Det. Weaver testified that he spoke to Tramaine during the investigation and that he was tall and skinny and had a high-pitched voice that did not sound like the suspect in the video. (R. 122, lines 2–12). He testified part of his investigation involved looking on Facebook, where he discovered a photo of Appellant wearing shoes that looked similar to the ones pictured in the video of the crime. (R. 117, line 19–R. 118, line 25).

Next, the State proposed calling Shelby Bradt to the stand, to which defense counsel objected. (R. 154, line 3–R. 155, line 3). Specifically, he objected to her giving her opinion after watching the video that it was not Tramaine, the Hurell brother she dated, in the video. (R. 156, line 3–R. 157, line 25). He argued it would confuse the jury, was not relevant, and was more prejudicial than probative. (R. 158, line 1–13). The trial judge noted that because the apartment was a place where any of the three brothers could have been living, and because it was a circumstantial evidence case, the State could show evidence to try to prove who in the apartment would not be the suspect. (R. 159, lines 1–5). For those reasons, and because testimony had already been provided that Tramaine was taller and had a higher voice than the suspect, the trial judge allowed Bradt to testify. (R. 159, lines 5–11).

Bradt then testified that she dated Tramaine for three or four months, including during April 2014, and had met Appellant four or five times. (R. 161, lines 5–19). She identified a family photo taken at Traquan's graduation that included all three brothers. (R. 162, lines 1–10). The solicitor showed her a video clip and asked if she recognized the individual in the video; she did not and said it did not look or sound like Tramaine. (R. 163, lines 6–14).

Next, Tashima Jones, Appellant's sister who lived in apartment G-4, testified. (R. 164, lines 10–17). She recalled being awoken by a bang on the door by police, who reported to her that a robbery had just taken place at the nearby Kangaroo and asked if they could come in. (R. 164, line 20–R. 165, line 3). They asked her who else was home and she answered that her son and brother (Traquan) were home, and she allowed the officers to come in and search. (R. 165, lines 6–15). When asked where Appellant was living at the time, she reported that he stayed at both his girlfriend's and his mother's house and often came to Jones's house but did not stay there. (R. 166, line 13–R. 167, line 1). When the State asked whether she was aware Appellant

listed her address as his with the DMV, she answered, "Prior to him getting out from serving some time, yes, I am." (R. 169, lines 17–22). Defense counsel told the trial judge he had a matter of law to discuss and the judge excused the jury. (R 169, line 25–R. 170, line 7). Defense counsel moved for a mistrial due to Jones's response being a comment on a prior conviction that was clearly prejudicial to Appellant. (R. 170, lines 9–20). The solicitor was quick to point out he simply asked if she was aware he was using her address and in no way intended to elicit that response. (R. 170, line 22–R. 170, line 2). Before defense counsel argued his motion, he asked for time to confer with Appellant, and after a discussion that lasted over thirty minutes, defense counsel reported to the court that he would be withdrawing the motion for mistrial while reserving his right to renew later if it became necessary. (R. 171, line 20–R. 173, line 17). Defense counsel then went over everything he and Appellant talked about, clarifying with Appellant along the way, and concluded by saying, "Once we put it back and the jury starts going, it gets waived, it's over. We don't get to renew it down the road." (R. 173, line 17–R. 175, line 15).

Traquan then testified that police visited him at his workplace in April 2014 to ask him questions about a picture of a man in a hoodie. (R. 183, line 22–R. 184, line 8). He claims he told them he did not recognize the person but did recognize the hoodie as having a picture of the Tasmanian Devil on the front and being made by Warner Brothers. (R. 184, lines 11–19). He testified he told police he did not own a hoodie like that. (R. 184, lines 19–20). He specifically denied telling police that was his hoodie and that he got it in the eighth grade and that it was in his closet recently. (R. 185, lines 1–6). At that point, the State recalled Det. Weaver, who testified that Traquan told him the sweatshirt was given to him by a friend when he was in the eighth grade. (R. 186, lines 2–24). He also pointed out that one could not tell from the side

angle of the photo that the Tasmanian Devil was on the front of the sweatshirt. (R. 186, line 24–R. 187, line 2).

Sergeant Nick Santana then testified that he was with Det. Weaver when they spoke to Traquan and that he saw Weaver show him a side photograph of the suspect and ask if he recognized the clothing. (R. 189, line 14–R. 190, line 5). He testified that Traquan told them he did recognize the sweatshirt as one that was given to him in the eighth grade by a friend and reported that it should be in his closet. (R. 190, lines 6–10). Derek Cheek, an investigator with the solicitor's office, then identified a photograph from Appellant's Facebook page showing Appellant wearing red and black shoes with a white mark, possibly a Nike swoosh. (R. 192, line 13–R. 193, line 23). He testified the suspect in the surveillance photo was wearing red and black shoes and identified those shoes in a still shot from the video. (R. 193, line 23–R. 194, line 8). He then identified a photograph of a shoe print left behind at the incident location in the victim's blood. (R. 194, lines 9–12). He then began searching on the internet for those shoes and found some that were red and black with a white Nike swoosh and that had a similar tread pattern to the print. (R. 194, lines 13–23). When the State tried to move the photos from the internet into evidence, defense counsel objected claiming no foundation had been laid and that it was not relevant because no shoes had been recovered. (R. 196, lines 2–13). The trial court overruled the objection because the witness indicated the photos were a fair and accurate representation. (R. 196, lines 14–16).

Samuel Stewart, a forensic scientist for SLED, was then qualified as an expert in DNA analysis. (R. 198, line 17–R. 210, line 8). He testified he received a swab from the dollar bill officers found at the apartment and a buccal swab from the victim, both in sealed bags. (R. 211, lines 19–25). He analyzed and compared the two samples, and the results of the comparison

showed that Item 1, the swab from the dollar bill, matched Item 2, the DNA profile of Victim. (R. 213, line 7–R. 214, line 5).

The State rested, and defense counsel moved for a directed verdict, relying on *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011). (R. 218–26). He argued all the evidence had shown was that Appellant's family used Tracfones and someone at or near his sister's apartment was arguably involved in the crime. (R. 226, lines 14–18). He claimed there was no DNA and no circumstantial evidence to support a verdict of guilt. (R. 226, lines 19–25). The State relied on the more recent *State v. Bennett*[1] case, in which the Supreme Court clarified the proper standard of review for a directed verdict circumstantial evidence case: whether substantial evidence exists from which a jury could reasonably infer guilt. (R. 227, lines 5–14). The solicitor listed the evidence that existed: a physical description of the suspect given by the victim; the testimony that Appellant has access to the apartment, which would give him access to the sweatshirt based on Traquan's statement to police that it was in his closet; he had access to a white car similar to the one described by Hartman; his cellphone was pinging off towers in that area, which matches the eyewitness's account that a man with a bat went in and out of apartment G-4; he had red shoes similar to the ones in the surveillance footage and with a similar tread pattern to the bloody print. (R. 227, line 15–R. 228, line 21). Defense counsel then argued that the evidence the State listed merely raised a suspicion and that a directed verdict should have been granted. (R. 229, lines 18–21). The trial judge noted that the line in *Bennett* that gave him the most concern was that the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. (R. 230, lines 6–10). The trial judge then went through the evidence again and determined "there is the

[1] 415 S.C. 232, 781 S.E.2d 352 (2016).

existence of evidence that a reasonable juror could believe if they believe every[y] step in the chain of circumstantial evidence that the State has presented" and denied the motion. (R. 230, line 6–231, line 12).

After the defense rested, each side made closing arguments, and the trial judge charged the jury on the presumption of innocence, reasonable doubt, the types of evidence, believability of witnesses, experts, and the element of the crimes. (R. 240–280). After the jury began deliberations, it sent a note to the trial judge saying it would like to review the sister's testimony, specifically asking, "Did she say when he got out he sometimes stayed with her?" (R. 281, line 9–R. 282, line 1). Defense counsel attempted to renew his motion for a mistrial due to the note indicating to him that the jury was deliberating about this topic. (R. 282, lines 1–18). Another note came out after that one that said to please disregard the last request. (R. 282, line 22–R. 283, line 2). The State argued it was improper to try to guess what the jury is deliberating, especially because the second note came immediately following the first. (R. 283, lines 1–14). The trial judge took a recess to consider the issue. (R. 284, lines 2–7). The trial judge came back and reminded defense counsel he had spoken to Appellant and Appellant knowingly and intelligently waived his mistrial motion after hearing the sister's testimony. (R. 284, lines 10–17). He then stated that he was initially concerned when the jury sent the first note wanting more information about the sister's testimony and would have reconsidered a motion for mistrial if that had been a question the court had to resolve. (R. 284, lines 18–23). However, because the jury immediately asked the court to disregard the question, he was taking the position that the jury was also disregarding the question and denied the motion. (R. 284, line 23–R. 285, line 11).

Ultimately the jury found Appellant guilty of all charges, and the trial judge sentenced him to thirty years' imprisonment for each charge, to be served concurrently. (R. 312).

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 the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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 the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that

counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether 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. (citing 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. 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. 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. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. 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." Id. at 687; Harrington, 562 U.S. 86.

"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. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. 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. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). 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.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result

would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Each allegation is addressed fully below:

Allegation: Advising Applicant to Waive Right to Mistrial

Applicant alleges trial counsel was ineffective for advising him to waive the motion for mistrial. Counsel initially moved for a mistrial following testimony from Applicant's sister that Applicant used her address "prior to him getting out from serving some time." Applicant testified that he remembered counsel initially moving for a mistrial. Applicant testified that he recalled discussing with counsel whether or not he wanted to go forward with the mistrial motion or proceed with the trial. Applicant testified that counsel told him that it was ultimately his decision as to whether or not to move forward with the mistrial motion and that he chose to proceed with trial. Counsel testified that he discussed the mistrial motion with Applicant and that he told Applicant that it was his decision as to how he wanted to proceed. Counsel testified that it was ultimately Applicant's decision to withdraw the motion and proceed with the trial. Even if counsel did not withdraw the motion, there is no indication that the grounds for the motion were sufficient for the court to grant a mistrial.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion

amounting to an error of law." *State v. Wilson*, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and internal quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." *Id.* at 585-86, 698 S.E.2d at 865. "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." *Id.* at 586, 698 S.E.2d at 865 (citation and internal quotation marks omitted).

Applicant has failed to show how counsel, after conferring with Applicant, was deficient for withdrawing the motion for mistrial. Applicant has failed to show that if the motion had not been withdrawn there would have been grounds sufficient for the trial court to grant the motion. Further, Applicant has failed to show any prejudice resulting from the decision to withdraw the motion. This Court finds that Applicant has failed to meet his burden of proof in showing deficiency on the part of counsel as it relates to this allegation. Therefore, this Court dismisses this allegation with prejudice.

Allegation: Failure to Subject Prosecution's Case to Meaningful Adversarial Testing

Applicant alleges counsel was ineffective for failing to put the State's case through meaningful adversarial testing. This Court finds this allegation to be exceedingly broad and is encompassed by Applicant's other allegations. However, this Court will note that counsel did subject the State's case to meaningful adversarial testing. Counsel thoroughly cross-examined State's witnesses, moved for a directed verdict, provided an in-depth closing argument to the jury, and moved for a mistrial during jury deliberations. This Court finds that counsel did subject the State's case to meaningful adversarial testing and Applicant has failed to show otherwise. Therefore, this Court finds that Applicant has failed to meet his burden in showing counsel's deficiency and the allegation is dismissed with prejudice.

Allegation: Failure to Adequately Investigate the Case and Offer Alibi Witness Testimony

Applicant alleges counsel was deficient for failing to adequately investigate the case and for failing to present alibi witnesses at trial. Applicant testified that he felt counsel was ineffective for failing to investigate and call alibi witnesses at trial including: Janah Hurell, Tremayne Hurell, and Julia Piper-Simons. All three of these potential alibi witnesses were present and testified during the evidentiary hearing.

Applicant testified that he wanted counsel to investigate the aforementioned alibi witnesses and call them at trial to testify that Applicant was sleeping at his mother's home when the crime occurred. Applicant testified that he told counsel about the existence of Julia Simons and that counsel did not investigate her as a potential witness. Applicant testified that he told counsel to investigate his mother and his brother as potential alibi witnesses and that he wanted them to be called on his behalf at trial. Applicant testified that he was aware that counsel did in fact investigate his mother and his brother as potential witnesses. Applicant testified that counsel discussed calling them at trial, but that counsel felt that a jury would not believe them because they were his close family. Applicant testified that he did not understand why a jury would not believe them and that he still wanted them to be called at trial.

Applicant's mother, Janah Hurell, testified at the evidentiary hearing. She testified that counsel met with her to discuss her potential testimony and ultimately told her that the jury would not believe her because she was Applicant's mother. She testified at the evidentiary hearing that she was home the night of the incident. On direct examination, she testified that Tremayne went to sleep around 9 or 9:30 that night, but changed her testimony on cros-examination to being either 10 or 11pm. She testified that Applicant would typically wait for his brother to go to sleep before he would go get in bed. She testified that her daughter called around

12:30 or 1 and told her that a robbery had occurred at the gas station near her apartment. She testified that Applicant and his brother were both asleep when her daughter called.

Applicant's brother, Tremayne Hurell, testified at the evidentiary hearing. Tremayne testified both that he did not speak with counsel until after the trial and that he had spoken with him before the trial. Tremayne testified that he spoke with counsel about what happened with Applicant and that Applicant was in bed with him when the incident occurred. Tremayne testified that he told counsel prior to trial that he wanted to testify, but counsel told him that it was the State's burden and that he did not think the jury would believe him because he was Applicant's brother. Tremayne testified that he and Applicant were sleeping in the same bed because Applicant was visiting from Atlanta. Tremayne testified that he went to sleep around 10pm the night of the incident. Tremayne testified that he was a light sleeper and that he believes he would have woken up had Applicant gotten out of bed. Tremayne testified that his mother woke he and Applicant up when his sister called. Tremayne testified that he and Applicant both went back to sleep after their mother woke them up. Tremayne testified on cross-examination that at trial he would have testified that he was asleep when Applicant got in the bed with him, but that he would have noticed if another full grown man got out of the bed.

Applicant's sister, Tashima Hurell, testified at the evidentiary hearing. Tashima testified that she was home the night of the incident and woke up to a police K-9 unit at her door. Tashima testified that the officers told her the K-9 led them from the incident location at the gas station to her apartment. Tashima testified that the police also told her that a witness had reported seeing the suspect jump onto her balcony and go into her apartment through the balcony door. Tashima testified that the balcony door was always locked, that the door locked from the inside, and that Applicant did not have a key to that door. Tashima testified that she has a Yorkie, breed

of dog, that barks constantly and loudly. Tashima testified that the dog barks at people it knows, she did not hear the dog bark that night, and that the dog would have barked if someone entered the apartment that night. Tashima testified that counsel did not interview her about the case, but that she was called at trial as a witness by the State. Tashima testified that counsel did not ask her any of the questions asked by PCR counsel during the evidentiary hearing. (ALL OF THIS TESTIMONY WAS ELICITED ON DIRECT AT TRIAL)

Applicant's girlfriend at the time, Julia Piper-Simons, testified at the evidentiary hearing. Julia testified on direct examination that she was with Applicant that day and dropped him off at his mother's house around 9 or 10pm that night. Julia testified that she dropped Applicant off at his mother's house a number of times, he often stayed there when he was in town visiting. Julia testified that counsel did not interview her prior to trial to discuss the case.

Trial counsel testified at the evidentiary hearing that he recalled discussing the possibility of calling his brother and mother as potential alibi witnesses, but did not recall Applicant mentioning that he wanted his sister or Julia Simons to testify as alibi witnesses. Counsel testified that he interviewed Applicant's mother and brother, but that he did not believe that their story or testimony would be compelling to a jury. Counsel testified that he does not remember Applicant being adamant about calling the potential alibi witnesses at trial or it being a big issue that the decision had been made not to call them. Counsel also testified that he wanted to have the final argument to the jury in this case and felt that it was important. Counsel testified that he did not speak with Applicant's sister or Julia Simmons prior to trial.

Encompassed in counsel's duty to investigate is the duty to investigate alibi witnesses identified by a defendant. Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (citing Grooms v. Solem, 923 F.3d 88, 90 (8th Cir. 1991)). "Failure to make some effort to contact them

to ascertain whether their testimony would aid the defense is unreasonable." Id. However, when the testimony presented at the evidentiary hearing from purported alibi witnesses do not establish an alibi defense, no prejudice can result from the alleged deficiency. See Glover v. State , 318 S.C. 496, 458 S.E.2d 538 (1995) (holding trial counsel's failure to contact alleged alibi witnesses did not result in prejudice when the testimony these alibi witnesses presented did not establish an alibi defense). Moreover, questions concerning the weight and believability of alibi witnesses is Walker, 407 S.C. at 407, 756 solely within the province of the post-conviction relief court. S.E.2d at 147.

Through an alibi, an accused attempts "'to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime.'" State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am. Jur. 2d Criminal Law § 136)). To do so, the accused must show "'he was at a place so distant that his participation in the crime was impossible.'" Id. Furthermore, the alibi must account for the entire time during which these crimes were committed. Id. "Since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Glover, 318 S.C. at 498, 458 S.E.2d 540 (citing Robbins, 275 S.C. 373, 271 S.E.2d 319).

Here, Applicant has failed to show deficiency by counsel for failing to call two potential alibi witnesses at trial and for failing to investigate two other potential alibi witnesses. Applicant has also failed to show any resulting prejudice from the alleged deficiency of counsel. Applicant alleges trial counsel should have called his mother and his brother at trial to testify to the fact that he was home asleep at the time of the incident. Counsel testified that he interviewed both

potential witnesses and decided that the jury would likely not believe their testimony or find it compelling. Both counsel and Applicant testified that they discussed this decision and counsel testified that he recalled Applicant agreeing with the decision at the time. This Court agrees that the testimony of Applicant's mother and brother at the evidentiary would not have made for a compelling alibi defense for Applicant. Although their testimony was consistent, this Court agrees that it is perfectly reasonable for counsel to weigh how the jury will respond to an alibi presented by Applicant's close family with the potential benefits of having the closing argument to the jury. The testimony of Applicant's brother Tremayne was also not an alibi at all. Tremayne's testimony at the evidentiary hearing was that he was asleep when his brother returned home and was only made aware of his presence in the bed when their mother woke them up to tell them about the incident. Tremayne testified that he believes he would have woken up if Applicant got out of the bed that night, however, he did not testify with certainty. Tremayne's testimony in no way accounts definitively for Applicant's whereabouts until the point where his mother comes in to wake them up. Applicant's mother's testimony could potential provide an alibi, however, counsel made a reasonable strategic not to call her as a witness for the reasons enumerated previously.

In regards to the first potential alibi witness counsel failed to investigate, Julia Piper-Simmons, this Court must examine the reasonableness of counsel failing to investigate this witnesses, whether her testimony provides an alibi at all, and whether or not Applicant has demonstrated prejudice from any alleged deficiency. There is discrepancy in the testimony as to whether or not Applicant asked counsel to investigate Julia Simmons as a potential alibi witness. Applicant testified that he asked counsel to investigate, counsel testified that he only recalled Applicant requesting that he interview his mother and his brother. Regardless, this Court will

examine her testimony accordingly. Julia's testimony at the evidentiary hearing was that she dropped Applicant off at his mother's house between 9 and 10pm the night of the incident and did not see him the rest of the evening. This testimony suffers from the same issue as Applicant's brother, it in no way accounts for Applicant's whereabouts during the time the incident occurred. All this testimony would have presented to the jury was that Applicant was dropped off at his mother's house around that time. This Court must consider this testimony as what the witness would have presented at trial and the testimony elicited would not have amounted to a possible alibi for Applicant. In evaluating this testimony, this Court finds that Applicant has failed to prove he was prejudiced by counsel not investigating and calling this witness at trial. This Court dismisses this allegation under the prejudice prong of Strickland.

In evaluating the failure to investigate the second potential alibi witness, Tashima Hurell, this Court will use the same standards as set forth above. There is no discrepancy in the testimony as it relates to this witness, both counsel and Applicant testified that counsel was not asked to investigate Tashima as a potential alibi witness. This Court notes that counsel was in fact deficient for failing to interview Applicant's sister who was interviewed by law enforcement and would have been known to counsel in preparation for trial. However, this Court must evaluate whether her testimony provides an alibi for Applicant and whether or not Applicant was prejudiced by counsel not calling her as an alibi witness at trial. Tashima's testimony at the evidentiary hearing was that Applicant was not at her apartment that night, if someone had been in her apartment her dog would've barked, her balcony door locked from the inside, and Applicant did not have a key to the apartment. Tashima's testimony in no way accounts for Applicant's whereabouts during the incident. The testimony does not affirmatively place Applicant anywhere during the time of the incident, but simply works as a counter to the State's theory of what happened after the incident occurred. Tashima's testimony does not provide an alibi defense for Applicant when it does not at all account for his whereabouts during the time of the incident and leaves open the possibility that Applicant could have been at the incident location at the time of the incident. Further,

Applicant could not possibly be prejudiced by counsel's failure to call Tashima at trial to elicit this testimony because the same testimony was elicited by the State on direct examination at trial. During the State's direct examination at trial Tashima testified to the following: 1. Nobody had come in the apartment that night and she did not open the door for anyone. 2. Applicant was staying at their mother's house while he was there visiting. 3. Applicant did not have a key to her apartment. App. 213-216. The testimony elicited during the evidentiary hearing would have been duplicative to the testimony the jury heard during the State's case, eliminating the need for counsel to lose last argument by calling her as a witness and removing any potential prejudice alleged by Applicant. Applicant cannot show he was prejudiced by counsel failing to call Tashima as an alibi witness where the jury heard all of her relevant testimony during the State's case. Ultimately, Applicant got the benefit of the jury hearing the testimony he wanted counsel to elicit, but without the consequence of losing last argument to the jury. Considering the relevant testimony at the evidentiary hearing was the same as that at trial, this Court cannot find it to be reasonable that the result of the trial would have been different had Tashima testified on behalf of Applicant. Therefore, this Court dismisses this allegation with prejudice.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review,

PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 21 day of April, 2020.

Diane S. Goodstein

DIANE GOODSTEIN
Presiding Judge
[redacted] Judicial Circuit
1st FIRST