

NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A
POST CONVICTION RELIEF

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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OCT 25 2021

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Courtney Clyburn Pope., Circuit Court Judge

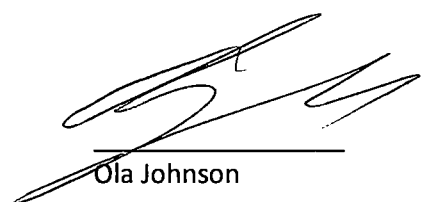
Case No. 2018-CP-32-04205

The State,.....Respondent,

Raphael Pontoo,.....Appellant,

Notice of Appeal

Raphael Pontoo appeals the order of the Honorable Courtney Clyburn Pope, dated September 22nd, 2021, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on September 30, 2021.



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Lillian L. Meadows, Assistant Attorney General

The State,.....Respondent,

Raphael Pontoo,.....Appellant,

I certify that I have served the Notice of Appeal on Lillian L. Meadows, Assistant Attorney General by United States mail on October 22, 2021, at Post office Box 11549, Columbia, SC 29211

I certify that I have served the Notice of Appeal on the Office of Appellate Defense by United States mail on October 22, 2021, at Suite 401, 1330 Lady Street Columbia, South Carolina 29201.

I certify that I have served the Notice of Appeal on the Clerk of Court of Common Pleas by United States mail on October 22, 2021, at 205 East Main Street, Suite 128, Lexington, SC 29072.



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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

2021 OCT 11 AM 9:30

Raphael L. Pontoo, SCDC #362840,

LISA M. COMER
CLERK OF COURSE
LEXINGTON SC

No. 2018-CP-32-4205

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

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OCT 25 2021

S.C. SUPREME COURT

I. INTRODUCTION

This matter comes before the Court by way of post-conviction relief (PCR) action commenced by Raphael L. Pontoo (Applicant) on December 11, 2018. The State requested an evidentiary hearing through its return on March 22, 2019. Applicant filed an amended application on June 7, 2021, and a second amended application on June 16, 2021.

A hearing into the matter convened before the undersigned July 2, 2021, via Cisco WebEx Meetings in accordance with the Chief Justice’s administrative memorandum, *Court Operations*, dated September 14, 2020.¹ Applicant was present at the hearing and represented by Ola A. Johnson, Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Applicant testified on his own behalf at the hearing. The State presented testimony from Applicant’s trial counsel, David M. Mauldin, Esquire, and appellate counsel, Donald L. McCune, Jr., Esquire.

¹ See S.C. Sup. Ct. Memorandum dated September 14, 2020 (“Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. Consent of the parties or counsel is not required. Please use WebEx, the conferencing platform supported by the Judicial Branch.”).

In addition to the pleadings in this action, this Court had before it a copy of the Lexington County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; and the records of the current PCR action.

After hearing the testimony at the PCR hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of trials and appellate counsel are without merit. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

II. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections² pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on January 30, 2014, following an investigation into an armed robbery and subsequent high-speed vehicle chase that ended in a fatal crash. During its June 2014 term, the Lexington County Grand Jury indicted Applicant for failure to stop for a blue light resulting in death (FTSFBL) (2014-GS-32-1408) and armed robbery (2014-GS-32-1409).

On January 26, 2015, Applicant proceeded to a jury trial before the Honorable Thomas A. Russo. Assistant Appellate Defender David M. Mauldin Esquire (Trial Counsel) represented Applicant. Deputy Solicitor D. Shawn Graham and Assistant Solicitor Robert E. McNair, III, prosecuted the case.

A. Summary of Evidence Adduced at Trial

In the early morning hours of January 24, 2014, Jonathan Ruple was hanging out with a

² Applicant is in SCDC custody although he is currently housed at CoreCivic, a private prison located in Mississippi.

friend at the Mile High Club, a bar located in West Columbia, South Carolina, when he decided to show his friend his new Hi-Point nine-millimeter pistol. (Trial Tr. 71, 73, 253–54; R. 36, 38, 218–19). The two then headed out to the bar’s parking lot, and Ruple retrieved the pistol from a book bag stowed in the trunk of his car. (Trial Tr. 73, 254–55; R. 38, 219–220). At that point, two men, including one who had dreadlocks and was wearing a black t-shirt, light-colored jeans, and a green puffy jacket, approached Ruple and his friend, and the man with dreadlocks introduced himself as “Los” before striking up a conversation with the pair. (Trial Tr. 72, 75–76, 255–56, 259; R. 37, 40–41, 220–21, 224). During the conversation, Ruple and the others discussed a wide variety of topics, and Ruple showed the men his gun. (Trial Tr. 74, 256; R. 39, 221). In return, “Los” showed Ruple a .22-caliber revolver he indicated he had obtained earlier that day, and his companion showed Ruple a chrome-plated .25-caliber pistol. (Trial Tr. 74, 256–57, 263; R. 39, 221–22, 228). The men then continued to converse with one another for roughly ten to fifteen minutes before Ruple put his pistol back into his book bag, secured the bag on the front passenger’s seat of his vehicle, and re-entered the bar with his friend. (Trial Tr. 75, 257–58, 260–61; R. 40, 222–23, 225–26).

Over the course of the next hour or two, Ruple socialized and drank with his friend inside the bar while “Los” and four of his companions hung out by themselves nearby. (Trial Tr. 78, 260–61, 273; R. 43, 225–26, 238). As the night wound down, Ruple decided to head home, and, as he walked towards the exit, “Los” stopped him and asked him where he was going. (Trial Tr. 80, 262; R. 45, 227). In response, Ruple told “Los” he was going home and then exited the bar, chatted outside with his friend for a few minutes, and got into his car to leave. (Trial Tr. 80, 262; R. 45, 227). At that moment, “Los” approached Ruple’s car from the passenger’s side, knocked on the window, and chatted with Ruple for a few moments about a set of vehicle rims. (Trial Tr. 81, 262–

63; R. 46, 227–28). Then, “Los” suddenly stuck his hand into Ruple’s vehicle, grabbed the book bag that contained Ruple’s gun, and took off running. (Trial Tr. 81, 263; 228).

In response, Ruple speedily chased after “Los” and caught him as he tried to get into a vehicle parked nearby. (Trial Tr. 81–82, 263; R. 46–47, 228). The two then fought over the book bag for a few moments before “Los” pulled out his revolver and pointed it at Ruple’s face. (Trial Tr. 82, 263; R. 48, 228). At that point, Ruple immediately threw up his hands in surrender, and “Los” got into the nearby vehicle and sped away from the area with Ruple’s bag. (Trial Tr. 83, 264–65; R. 48, 229–30). However, as “Los” fled, Ruple took down the license tag number of the getaway vehicle, and he quickly reported the robbery to the authorities along with a description of the getaway vehicle. (Trial Tr. 83, 125–26, 142, 163, 264; R. 48, 90–91, 107, 128, 229).

Shortly thereafter, Trooper Brandon Lee of the South Carolina Highway Patrol spotted a vehicle matching the description and license tag number of the vehicle involved in the armed robbery, and he pulled the vehicle over to the side of the road after it abruptly slowed down upon encountering him. (Trial Tr. 125–28; 130–31; R. 90–93, 95–96). He then drew his weapon, requested back-up from his fellow officers, and began ordering the occupants out of the vehicle one at a time starting with the driver. (Trial Tr. 128, 132; R. 93, 97). While he while doing so, an individual seated in the rear of the vehicle on the driver’s side repeatedly opened his door and had to be commanded to remain in the vehicle. (Trial Tr. 133–34; R. 98–99). That individual then remained in the vehicle while the driver, Carlisle Jones (“Carlisle”), and two of the other passengers, Iquawn Jones (“Iquawn”) and Patrick Johnson, exited the vehicle and were secured.³ (Trial Tr. 132–34, 282–83, 289, 313, 316–18, 347–48, 371; R. 97–99, 247–48, 254, 276, 279–81,

³ Neither Carlisle, Iquawn, nor Johnson had dreadlocks at that time. (Trial Tr. 283, 304, 374–77; R/ 248. 267. 337–40).

310-11, 334). At that point, one of the individuals remaining in the vehicle suddenly jumped into the driver's seat and sped off in the vehicle, and several officers at the scene quickly pursued. (Trial Tr. 134-35, 142-43, 283; R. 99-100, 107-08, 248).

Over the course of the next few minutes, the driver of the vehicle led officers on a high-speed chase that reached speeds in excess of one-hundred miles per hour. (Trial Tr. 143-44, 160; R. 108-09, 125). The chase continued until the driver, who had dreadlocks that were visible to the pursuing officers, lost control of the vehicle as he approached the intersection of two separate highways, and the vehicle went off the road before crashing into a nearby wooded area. (Trial Tr. 136, 145-46, 152-53, 163-64; R. 101, 110-11, 117-18, 128-29). The pursuing officers then quickly exited their vehicles and ran to the crashed vehicle. (Tr. 137, 166; R. 102, 131). When they reached it, they found Applicant Raphael Lamarr Pontoo pinned into the driver's seat by a tree branch that went through the vehicle's windshield along with another individual, Alexander Clemmons, unconscious and severely injured in a rear seat.⁴ (Trial Tr. 137-39, 147-49, 171, 176-77; R. 102-04, 112-14, 136, 141-42). Additionally, the officers observed a black Hi-Point nine-millimeter pistol resting on the front passenger's seat in close proximity to Applicant's outstretched hand, and that weapon was quickly secured.⁵ (Trial Tr. 149, 167, 169; R. 114, 132, 134).

In the ensuing minutes, emergency medical personnel responded to the scene of the crash, and they rapidly transported Clemmons, who was unconscious and unresponsive, to a landing zone so he could be taken to a hospital by helicopter. (Trial Tr. 175-78, 190-92, 194-95; R. 140-43, 155-57 159-60). As they waited for the helicopter, Clemmons's condition began to deteriorate,

⁴ At that time, Applicant had dreadlocks and Clemmons had short, frizzy hair. (Trial Tr. 139, 145, 166, 191, 194-95, 200-01, 233; R. 104, 110, 131, 156, 159-60, 165-66, 198).

⁵ Later on, a book bag, a phone, and several winter coats were located at the scene of the crash, and each of the items was collected as evidence. (Trial Tr. 204-05, 215, 220; R. 169-70, 180, 185).

and paramedic Amanda Sucher from Lexington County Emergency Medical Services removed his clothing, which included an orange jacket and dark jeans, to aid in the provision of medical treatment. (Trial Tr. 173, 179–181; R. 138, 144–46). Upon doing so, she discovered a handgun hidden behind Clemmons's left knee. (Trial Tr. 181–82, 192; R. 146–47, 157). Clemmons was then transported to the hospital by helicopter. (Trial Tr. 232; R. 197).

Meanwhile, firefighters cut into the crashed vehicle to enable Applicant's removal, and Applicant was rapidly transported to the hospital once he was extricated from it. (Trial Tr. 193, 197; R. 158, 162). While Applicant received treatment at the hospital, a .22-caliber pistol fell out of his clothing. (Trial Tr. 222–23, 229; R. 187–88, 194). That gun was then secured and subsequently turned over to the Lexington County Sheriff's Office. (Trial Tr. 223; R. 188). Likewise, officers also obtained Applicant's clothing from the hospital, which included a black t-shirt and light-colored jeans. (Trial Tr. 239–40; R. 204–05).

Thereafter, on January 27, 2014, Clemmons succumbed to the traumatic head injuries he sustained in the crash and died. (Trial Tr. 232, 234–35; R. 197, 199–200). A few days later, Applicant was released from the hospital, and he was placed under arrest as he left the hospital for his involvement in the armed robbery and Clemmons's death. (Trial Tr. 249; R. 214). Subsequently, Applicant was indicted for armed robbery and failure to stop for a blue light resulting in a death, and he elected to proceed forward to trial. (Trial Tr. 11; Indictments; R. 2, 436–37, 439–40).

At the outset of trial, the trial judge conducted an *in camera* hearing at defense counsel's request in regard to the admissibility of statements attributed to Applicant subsequent to the fatal crash. (Trial Tr. 46; R. 11). During the hearing, Detective Garrick testified he and another officer met with Applicant at the hospital on the date of the incident, informed Applicant of his rights, and spoke with Applicant about what had occurred. (Trial Tr. 51–53, 56–57; R. 16–18, 21–22). As they

spoke, the detective stated Applicant became “very argumentative” and repeatedly insisted he did not know anything and did not remember anything before terminating the conversation with the officers. (Trial Tr. 53, 57–59; R. 18, 22–24). Detective Garrick further indicated Applicant was not under arrest and was free to leave at that time, but he acknowledged he asked hospital staff to notify him before Applicant was released from the hospital. (Trial Tr. 51–53, 56; R. 16–18, 21). Additionally, Detective Garrick stated he later drove Applicant to the detention center when he was discharged from the hospital, he believed he informed Applicant of his rights at that time but was not certain, he did not ask Applicant any questions, and Applicant stated no one would believe him if the officers hit him. (Trial Tr. 54–55; R. 19–20). Following the presentation of that testimony, Applicant took the witness stand, denied saying anything to Detective Garrick other than stating he did not want to talk to him, and insisted the detective did not inform him of his rights, did not tell him he had a right to remain silent, and did not tell him anything he said could be used against him. (Trial Tr. 60–63; R. 25–28). Applicant further stated he was informed he could not leave, but he admitted hospital personnel told him that as opposed to the officers based on his medical condition. (Trial Tr. 65; R. 30).

At the conclusion of the hearing, defense counsel challenged the admission of Applicant’s alleged statements at the hospital on the grounds Applicant was in custody at the time of the questioning but was not informed of his rights. (Trial Tr. 66; R. 31). Similarly, defense counsel argued Applicant’s alleged statements on the way to the detention center were irrelevant, overly prejudicial, were made while Applicant was in custody, and were made without him being informed of his rights. (Trial Tr. 65–66; R. 30–31). In rebuttal, the solicitor asserted Applicant’s statements from the hospital were admissible because Applicant was not in custody at that time and was informed of his rights prior to any questioning. (Trial Tr. 67–68; R. 32–33). The solicitor

further asserted the admissibility of Applicant's statements on the way to the detention center was dependent on the defense presented during trial. (Trial Tr. 67; R. 32). After considering the arguments of counsel, the trial judge found Applicant was not in custody at the time he made the statements in the hospital and, based on that ruling, made no ruling in regard to whether Applicant had been informed of his rights at that time. (Trial Tr. 69; R. 34). Likewise, the trial judge ruled Applicant's statements on the way to the detention center were potentially admissible as they were not made in response to any interrogation, but he declined to fully rule on those statements at that time due to the potential issues related to relevancy. (Trial Tr. 69; 34).

Thereafter, the trial judge conducted another *in camera* hearing at defense counsel's request in regard to the admissibility of identification evidence related to the armed robbery. (Trial Tr. 45, 70; R. 10, 35). During the hearing, Ruple testified about the armed robbery, indicated he had a good opportunity to view the robber's face prior to the robbery, and noted he was only two feet away from the robber when they conversed for ten to fifteen minutes before the crime occurred. (Trial Tr. 74-75, 81; R. 39-40, 46). Ruple further noted the area where he spoke with the robbery was lit by a street light located only a few feet away. (Trial Tr. 75; R. 40). Regarding the appearance of the robber, Ruple indicated "Los" had dreadlocks, was roughly 5'9" to 5'10" tall, weighed approximately 180 pounds, and was wearing a green puffy jacket, a black t-shirt, and "silver grayish" jeans. (Trial Tr. 75-77; R. 40-42). Ruple further indicated he got a good look at the robber inside the bar over the next few hours and saw him again when "Los" pointed a gun at him during the course of the armed robbery. (Trial Tr. 78-79, 82; R. 10, 35). After that, Ruple indicated he was shown two identical black-and-white photographic lineups subsequent to the robbery by Detective Garrick, was provided with no hints or suggestions, and was able to narrow down the

robber to the second and fourth individuals depicted in the lineups with complete certainty.⁶ (Trial Tr. 83–85; R. 48–50). However, Ruple indicated he was not able to choose between the two with certainty because of the absence of color photographs and ultimately selected the second individual while writing he was only fifty percent certain on the lineup sheets. (Trial Tr. 84–86; R. 49–51). Furthermore, Ruple indicated he was completely certain Applicant was the armed robber, was experiencing recurring nightmares of Applicant's face, and would select the fourth individual depicted in the photographic lineups if he could repeat the process again. (Trial Tr. 86–87; R. 51–52).

In addition to Ruple's testimony, Detective Garrick testified during the hearing and recounted the circumstances of the photographic lineup procedure. (Trial Tr. 90; R. 55). Specifically, the officer indicated he met with Ruple three days after the armed robbery and obtained a description of the suspect from Ruple, which was consistent with Applicant's physical appearance and the clothing Applicant was wearing on the date of the incident. (Trial Tr. 90–92; R. 55–57). Detective Garrick testified he then showed two identical black-and-white photographic lineups to Ruple that contained Applicant's photograph as the fourth individual depicted.⁷ (Trial Tr. 93–95, 97; R. 58–60, 62). After that, he stated Ruple narrowed the robber down to the second and fourth individuals depicted in the lineup while ultimately selecting the second individual with only fifty percent certainty. (Trial Tr. 94–95; R. 59–60). The detective further indicated he never showed Ruple any pictures other than the ones contained in the photographic lineups and did not advise Ruple he selected the wrong individual. (Trial Tr. 95; R. 60).

⁶ Applicant was the fourth individual depicted in the photographic lineups. (Trial Tr. 95, 246; R. 60, 211).

⁷ Regarding the two identical photographic lineups, Detective Garrick indicated he prepared a second lineup so he would have one to retain in his file. (Trial Tr. 94, 97–98; R. 59, 62–63).

At the conclusion of the hearing, defense counsel generally argued the presentation of two separate photographic lineups was somehow unduly suggestive while also contending the “lineup showing demonstration” was suggestive.⁸ (Trial Tr. 99; R. 64). For those reasons, defense counsel contended both the out-of-court and in-court identifications of Applicant should be excluded. (Trial Tr. 99; R. 64). In response, the solicitor argued the identification procedure used was not suggestive and asserted it did not become so simply because two identical copies of the same photographic lineup were shown to Ruple. (Trial Tr. 99–100; R. 64–65). After considering the arguments of counsel, the trial judge ruled the identification evidence was admissible after finding no evidence was presented suggesting the lineups were prepared in a suggestive manner or shown to Ruple in a suggestive fashion. (Trial Tr. 100–01; 65–66).

Subsequently, during trial, the law enforcement officers who responded to the report of the armed robbery testified about the details of the stop of the vehicle involved in that crime, the subsequent high-speed chase that followed the stop, and their discovery of Applicant in the driver’s seat of the robber’s vehicle after it crashed into a heavily wooded area. (Trial Tr. 125–139, 142–53, 163–69, 281–85, 288–90; R. 90–104, 107–18, 128–34, 246–50, 253–55). Similarly, the medical personnel and other emergency responders involved in the case testified about their responses to the crash and the fatal injuries sustained by Clemmons through that incident. (Trial Tr. 173–83, 187–201, 231–35; R. 138–48, 152–66, 196–200). Furthermore, testimony was

⁸ Specifically, Trial Counsel argued: “It’s our position that the showing of the two separate lineups and both as far as the face lineup and the gun lineup that that is a suggestive process and we believe that they should be excluded under [Applicant]’s due process rights and the Fifth and Fourth Amendments and Article 1, Section 3 of the South Carolina Constitution, his right to a fair trial under the Sixth Amendment of the U.S. and Article 1, Section 14 of the South Carolina Constitution. Your Honor, we believe the lineup showing demonstration was suggestive and it does not meet the standard and therefore they should be excluded any in court identification of [Applicant] and/or the gun should be excluded. Thank you.” (Trial Tr. 99; R. 64).

presented establishing a book bag and a Hi-Point nine-millimeter pistol were recovered from the scene of the crash while a .22-caliber revolver was recovered from the hospital after it fell out of Applicant's clothing there.⁹ (Trial Tr. 149, 167, 169, 204–05, 222–23, 229; R. 114, 132, 134, 169–170, 187–88, 194).

In addition to the presentation of that testimony, Detective Garrick testified about his investigation into the crash and subsequent arrest of Applicant for his role in the crimes. (Trial Tr. 236, 249; R. 201, 214). During his testimony, the officer further testified over objection about the photographic lineups he showed to Ruple after the incident, and he noted Ruple selected the second photograph contained in the lineups with an expressed certainty level of fifty percent despite the fact Applicant's photograph was the fourth one depicted in those lineups. (Trial Tr. 243–48; R. 208–13). Likewise, Ruple testified about the details of the armed robbery that preceded the fatal crash before also discussing the photographic lineups presented to him after the robbery. (Trial Tr. 253–68; R. 218–33). In discussing the lineups, Ruple acknowledged he incorrectly identified the second person depicted, explained he was unable to properly distinguish between the pictures due to their lack of color, and stated he believed at the time of trial the fourth person depicted in the lineups was the robber. (Trial Tr. 266–68; R. 231–33). Moreover, without objection, he identified Applicant in the courtroom as the robber and expressed absolute certainty in his in-court identification. (Trial Tr. 269; R. 234).

Furthermore, Carlisle and Johnson, two of the Applicant's associates who were present on the night of the armed robbery and fatal crash, recounted their experiences on the night of the incident. (Trial Tr. 299, 331; R. 262, 294). Specifically, regarding that night, they both stated they

⁹ Later during trial, Ruple identified the gun recovered from the scene of the crash as the one stolen from him on the night of the incident and confirmed the serial numbers of the recovered gun matched the serial numbers of his gun. (Trial Tr. 271; R. 236).

went to a bar with Applicant, Iquawn, and Clemmons, and each of the men confirmed Applicant was the only one in their group with dreadlocks. (Trial Tr. 303–06, 333–35; R. 266–69, 296–98). Furthermore, Carlisle stated he observed Applicant snatch a bag out of another person's car when they were all getting ready to leave the bar for the evening, Applicant began "tussling" with a man, Applicant pulled out a gun, and the other man threw up his hands in response. (Trial Tr. 310–12; R. 273–75). After that, Carlisle testified Applicant jumped into their car, he chastised Applicant for what he had done while receiving no response, they were subsequently stopped by a trooper after they went to get something to eat, and someone took off in his car during the course of the stop after he, Iquawn, and Johnson exited the vehicle. (Trial Tr. 313–19; R. 276–82). Similarly, Johnson recounted he was in the car waiting to head home from the bar when he observed Applicant, who he had seen with a black revolver earlier that evening, "tussling" with another man until that man put up his hands. (Trial Tr. 331–32, 342–43; R. 294–95, 305–06). Then, Johnson stated Applicant got into the car with a bag and appeared to put something into his pants. (Trial Tr. 342, 344; R. 305, 307). After that, Johnson indicated they went to get something to eat, they were subsequently stopped by a trooper, he was ordered out of the car along with Iquawn and Carlisle, and the car then sped off with Applicant and Clemmons still inside. (Trial Tr. 345–49; R. 308–12).

Thereafter, the State rested its case, and Applicant elected to testify in his own defense. (Trial Tr. 363–64; R. 326–27). During his testimony, Applicant acknowledged he went to the bar with Clemmons and the others on the night of the incident and claimed he observed a man attempt to trade his gun to Clemmons for Johnson's .25-caliber pistol, which he asserted was in Clemmons's possession. (Trial Tr. 364–68; R. 327–31). Subsequent to that, Applicant asserted he got into Carlisle's car to go home and began watching a movie in the car. (Trial Tr. 368–69; 331–32). A few minutes later, Applicant claimed Iquawn, Clemmons, and Johnson returned to the car

with Johnson in possession of the nine-millimeter pistol that belonged to the man he encountered earlier at the bar. (Trial Tr. 369–70; R. 332–33). After that, Applicant asserted they all went to get food together, he remained in the car while the others did so, they all left the restaurant, they were subsequently stopped by a trooper, and everyone but him and Clemmons was ordered from the vehicle. (Trial Tr. 371; R. 334). At that point, Applicant claimed Clemmons stated he was not going to jail, grabbed the stolen nine-millimeter pistol, cocked it, pointed it at him, and forced him to drive away from the stop at gunpoint. (Trial Tr. 372; R. 335). Applicant insisted he then continued to drive until Clemmons grabbed the wheel, and he asserted he could not remember anything after that. (Trial Tr. 372–73; R. 335–36).

Subsequently, during cross-examination, the solicitor questioned Applicant about the firearm he was alleged to have possessed on the night of the incident, and Applicant admitted he was in possession of a .22-caliber revolver that night, asserted he carried the gun into the bar for “the protection of society,” claimed he gave it to Clemmons while inside the bar, and insisted he never got his revolver back. (Trial Tr. 384–87, 396; R. 347–50, 359). As the cross-examination continued, the solicitor asked Applicant if he remembered speaking with Detective Garrick at the hospital following the incident, and Applicant – consistent with his earlier *in camera* testimony – claimed the officer came into the hospital room and he told him he did not want to talk to him. (Trial Tr. 60–63, 411; R. 25–28; 374). The solicitor then asked Applicant whether he told the detective at the hospital he did not know anything and did not remember anything about the incident, and Applicant denied that he did while claiming he simply told the officer he did not want to speak with him. (Trial Tr. 411; R. 374). After that, the solicitor asked Applicant if he admitted to having had an opportunity to tell the detective the story he testified to during trial, and defense counsel objected while simply stating “Fifth Amendment.” (Trial Tr. 412; R. 375). The trial judge

then asked for the question to be repeated and, upon hearing the question, ruled Applicant could answer it. (Trial Tr. 412; R. 375). At that point, Applicant responded he could have told the officer his story that day but did not want to talk to him. (Trial Tr. 412, R. 375).

Thereafter, the defense rested, and Detective Garrick was called to the witness stand in reply to testify about his meeting with Applicant at the hospital. (Trial Tr. 420, 423; R. 383, 386). During his reply testimony, the detective indicated he informed Applicant of his rights when he met with him at the hospital on the date of the incident. (Trial Tr. 423; R. 386). At that point, defense counsel renewed his objection from the *in camera* hearing, and the trial judge overruled the objection. (Trial Tr. 424; R. 387). Detective Garrick then recounted he asked Applicant to tell him what happened and Applicant responded by repeatedly stating he did not know what happened and did not remember what happened. (Trial Tr. 425; R. 388).

Following the presentation of that testimony, the State again rested its case, and the trial judge conducted a charge conference to discuss his intended jury instructions with the parties. (Trial Tr. 425–26; R. 388–89). During the charge conference, the solicitor noted duress was an affirmative defense that the defendant was required to prove by a preponderance of the evidence, and the trial judge confirmed his proposed instruction included such language. (Trial Tr. 427–28; R. 390–91). The trial judge then asked defense counsel if he had any issues with the proposed instruction while noting a duress instruction suggested by defense counsel during an off-the-record discussion was covered by his proposed instruction. (Trial Tr. 428; R. 391). In response, defense counsel conceded he believed the trial judge’s proposed instruction to be a correct statement of South Carolina law while asserting he objected to that statement as burden shifting based on his belief a defendant should not “have to prove anything.” (Trial Tr. 428; R. 391). The trial judge then noted defense counsel’s objection for the record. (Trial Tr. 429; R. 392).

As the trial proceeded forward, the parties presented their closing arguments to the jury. (Trial Tr. 431–46; R. 394–409). During his closing argument, defense counsel focused the jury’s attention on the fact the State allegedly failed to present any evidence about what occurred in the car prior to the crash and called the jurors’ attention to perceived weaknesses and inconsistencies in the evidence presented. (Trial Tr. 431–35; R. 394–98). Thereafter, the solicitor used his closing argument to point out the lack of credibility in Applicant’s testimony and discuss the strength of the evidence of Applicant’s guilt. (Trial Tr. 436–46; R. 399–409). However, the solicitor made no reference whatsoever to Applicant’s failure to provide his allegedly exculpatory story to Detective Garrick prior to trial. (Trial Tr. 436–46; R. 399–409).

At the conclusion of the closing arguments, the trial judge instructed the jury on the relevant and applicable law. (Trial Tr. 447–57; R. 410–20). During his jury instructions, the trial judge explained to the jury the burden of proof was on the State, the defendant was presumed to be innocent, and the defendant was not required to prove his innocence to the jury. (Trial Tr. 448–49; R. 411–12). Additionally, the trial judge instructed the jury in regard to the elements of the indicted offenses. (Trial Tr. 452–55; R. 415–18). Specifically, in instructing the jury on the offense of failure to stop for a blue light resulting in a death, the trial judge stated:

Now, he’s charged in this case with failure to stop for a blue light resulting in death. In order to prove this crime the State must prove beyond a reasonable doubt that the defendant was driving the motor vehicle on a road, street or highway of this state; that the defendant was signaled to stop by a law enforcement vehicle by means of a sire and/or flashing light, and that the defendant did not stop. An official signal requiring a motorist to stop may be a siren or flashing lights, but both are not required. An attempt to increase speed of a vehicle or in some other manner to avoid the pursuing law enforcement vehicle when signaled by a siren and/or flashing light may be considered as evidence of failure to stop for a blue light. However, it is merely an evidentiary fact to be taken into consideration by you along with the other evidence in this case and is to be given whatever weight that you think it should receive. If

you find that the State has proved beyond a reasonable doubt that the defendant failed to stop for a blue light and his actions resulted in the death of another, that would satisfy the elements of the offense of failing to stop for a blue light resulting in death.

(Trial Tr. 452–53; R. 415–16). Furthermore, the trial judge explained to the jury duress or coercion had been raised as a defense in Applicant’s case and indicated such a defense had to be proven by a preponderance of the evidence. (Trial Tr. 455; R. 418).

Following the presentation of those instructions, the trial judge inquired of the parties if they had any objections to his jury instructions aside from defense counsel’s earlier objection to the duress instruction. (Trial Tr. 457–58; R. 420–21). In response, both defense counsel and the solicitor stated they did not have any additional objections. (Trial Tr. 457–58; R. 420–21). The jurors then began their deliberations. (Trial Tr. 458; R. 421, 425).

B. Verdict & Subsequent Proceedings

On January 28, 2015, the jury convicted Applicant as indicted. Judge Russo sentenced Applicant to consecutive terms of twenty years’ imprisonment for failure to stop for a blue light resulting in death and ten years for armed robbery.

Applicant filed a timely notice of appeal. Donald L. McCune, Jr., Esquire,¹⁰ perfected Applicant’s appeal by filing a brief with the Court of Appeals on the following issues:

- I. The Trial Judge’s Jury Instructions Improperly Placed the Burden of Proof for the Duress Defense on the [Applicant]
- II. The Trial Judge Erroneously Allowed the State to Impeach the [Applicant] with Post Miranda Silence
- III. The In-Court Identification of Pontoo was Unduly Suggestive

¹⁰ The South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on appeal. Pursuant to the terms of the 2015 Appellate Practice Project, Chief Appellate Defender Robert M. Dudek moved to appoint Mr. McCune as co-counsel for the purpose of preparing the briefs and record and arguing the case before the Court of Appeals. The Court granted the motion on October 23, 2015.

Following briefing and oral argument, the Court affirmed Applicant's convictions and sentences in an unpublished per curiam opinion. *State v. Pontoo*, 2017-UP-467 (S.C. Ct. App. filed Dec. 28, 2017). The case was remitted back to the circuit court on January 16, 2018.

III. ISSUES BEFORE THIS COURT

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

1. Ineffective assistance of trial counsel
 - a. "Trial Counsel was ineffective and failed to raise all issues"
 - b. Trial counsel "[f]ailed to properly raise and present a Miranda Rights violation"
2. Ineffective assistance of appellate counsel
3. Lack of subject matter and person jurisdiction
4. Insufficient evidence
 - a. "Victim's Death Certificate doesn't state the correct location of death"

Pursuant to Rule 71.1, SCRCP, Applicant, through PCR counsel, amended his application to include the following allegations:

1. Trial Counsel David Mauldin failed to object to leading question regarding the location of passengers in the car (page 139 line 25 to page 140 line 5).
2. Trial Counsel David Mauldin failed to object to leading question regarding the driver having long hair (p. 145 lines 15 and 16 and 17).
3. Trial Counsel David Mauldin failed to object to a leading question regarding police vehicle getting up to 128 mph (page 153 lines 1-2).
4. Trial Counsel David Mauldin failed [ob]ject to leading question to EMS worker regarding identity of the individual in the backseat as Alexander Clemens (page 176 lines 24, 25).
5. Trial Counsel David Mauldin failed to object to hearsay and testimony regarding items not in evidence from EMS witness Amanda Sucher reading blood pressure and respiration readings from their record (page 178 line 25 to 179 line 1 1 and Page 179 line 5 to 8, line 20 to 22).
6. Trial Counsel David Mauldin failed to [o]bject to leading question to Michael Phi[pps] regarding "photograph you're

- able to retrieve off of a media card on one of those phones” (page 218 lines 10 to 12).
7. Appellate counsel Donald McCune Jr. and Robert M. Dudek, failed to appeal judge’s decision to overrule trial counsel’s objection to admission of a pistol, States Exhibit 48, into evidence based on a lack of foundation and hearsay testimony (p.226 Lines 24-25 to p. 227 Lines 1-8).
 8. Trial Counsel David Mauldin failed to object to leading question regarding “these were the pants removed from Mr. Pontoo in the hospital” (page 24 1 lines 6-7).
 9. Trial Counsel David Mauldin failed to object to leading question regarding is that the clothing you obtained from the hospital belonging to Mr. Clemmons p. 241, line 24 and 25.
 10. Appellate counsel Donald McCune Jr and Robert M. Dudek failed to appeal judge’s decision to overrule trial counsel objection to hearsay regarding statement by somebody at the hospital that clothing belonged to Mr. Clemens page 242 lines 1 7 to 2 1.
 11. Trial Counsel David Mauldin failed to properly investigate an interview witnesses including Carlisle Jones, Patrick Johnson and Iquawn Jones and others.
 12. Trial Counsel David Mauldin failed to object to solicitor misstating evidence by stating to the court that the defendant had identified himself in states Exhibit No. 63 (photograph), (page 418 line 5 to 8).
 13. Trial counsel David Mauldin failed to [o]bject to the jury instruction that failed to include instructions regarding expert testimony due to the testimony of Dr. Janice Ross.
 14. Trial counsel David Mauldin failed to [o]bject to the jury instruction for the charge of Failure to Stop for Blue Light Resulting in Death in S.C. Code Ann. Sec. 56-5-750 that failed to include the element of “in the absence of mitigating circumstances” and as a result this issue was not preserved for appellate review.
 15. Trial counsel David Mauldin failed to raise the issue of the location of the victim’s death and the recording of the victim’s death in another county on the death certificate to challenge the validity of the indictment for Failure to Stop for Blue Lights Resulting in Death (2014-GS-32-01408) or to challenge the jurisdiction of the court.
 16. Applicant’s trial counsel, David Mauldin, failed to properly review the evidence with applicant to prepare for trial.
 17. Trial Counsel David Mauldin failed to discuss applicants sentence with him following sentencing to discuss and explain a possible motion to reconsider sentence that applicant wanted to pursue.

18. Trial Counsel David Mauldin failed to cross examine witnesses regarding inconsistencies in the evidence including the defendant's height and a black shirt that had a portion removed.

IV. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985);

Rule 71.1(e), SCRPC. The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.'" *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410

(2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, “even if there is reason to think that counsel’s conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that *no competent lawyer would have chosen.*” *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 (“Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”). “Defense lawyers have ‘limited’ time and resources, and so must choose from among

'countless' strategic options." *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id.* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires 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. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance 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; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An error by counsel, even if professionally

unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

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. 466 U.S. at 689–90. 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, 417 S.E.2d 529 (1992). The applicant’s burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Id.* at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the “benchmark” of the right to counsel is the “fairness of the adversary proceeding”); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) (“[T]he threshold issue is not whether [the applicant’s] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.”).

V. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in

this action incorporated by way of the State's return, this Court proceeds to the claims raised in the amended applications and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

A. Failure to Challenge Indictments and Jurisdiction of the Court¹¹

Applicant contends Counsel Mauldin was ineffective for failing to challenge the validity of the indictment for FTSFBL and jurisdiction of the trial court because the victim's death certificate¹² shows he died in Richland County. Specifically, Applicant testified Counsel Mauldin "failed to object on a multi-crime significance" and that he was "never given the chance to be presented with a statewide grand jury." (PCR Tr. 11–12). He stated that his case could have gone differently had it been presented to a state grand jury. (PCR Tr. 12).

Counsel Mauldin testified that, based on his understanding of the law, where there is a continuing course of conduct from one county to the other, the defendant could be prosecuted in either county. (PCR Tr. 39–40). Counsel Mauldin further testified that most of the conduct giving rise to Applicant's charges occurred in Lexington County. (PCR Tr. 40).

This Court agrees with Counsel Mauldin's assessment regarding the jurisdiction of the Lexington County Court of General Sessions.¹³ While "an accused has a right to be tried in the county in which the offense allegedly was committed," our Supreme Court has held that, "[w]here some acts material to the offense, and requisite to its consummation, occur in one county, and some in another, venue is proper in either county." *State v. Perez*, 311 S.C. 542, 545, 430 S.E.2d 503,

¹¹ Claim 15

¹² The death certificate was admitted into evidence as Applicant's Exhibit #1.

¹³ This Court would note that the subject matter jurisdiction of the state grand jury extends only to certain crimes enumerated in S.C. Code Ann. § 14-7-1630(A).

504 (1993). Accordingly, Applicant's claims pertaining to Trial Counsel's failure to challenge the indictment or jurisdiction of the trial court based on the victim's place of death are **DENIED**.

B. Failure to Investigate, Interview Witnesses, and Review Evidence¹⁴

Applicant makes a series of claims alleging Trial Counsel was ineffective for failing to sufficiently investigate the circumstances of the case, interview certain witnesses, and review evidence with him. Specifically, Applicant alleges Trial Counsel was ineffective for failing to interview certain witnesses, including Carlisle Jones (Carlisle), Patrick Johnson (Patrick), and Iquawn Jones (Iquawn). This Court disagrees, and finds Applicant failed to present any evidence or testimony indicating how a more thorough investigation, further preparation, or alternate strategy Counsel should have explored which would have helped Applicant's case. This Court finds credible and persuasive the testimony of Trial Counsel, who presented well-recalled testimony of the events leading up to Applicant's trial.

At the PCR hearing, Applicant testified Counsel Mauldin only came to see him at the jail two or three times before trial. (PCR Tr. 6-7, 12-13). According to Applicant, approximately six or seven months before trial, Counsel Mauldin told Applicant he did not want to see him anymore because they "did not see eye-to-eye." (PCR Tr. 6-7, 13). After that, Applicant testified that Counsel Mauldin's paralegal was the only one who came to see him. (PCR Tr. 6). Applicant also testified on cross-examination that Counsel Mauldin told him that his paralegal left Applicant's trial because she felt Counsel Mauldin was not representing Applicant to his best ability. (PCR Tr. 14-15).

Applicant stated he does not think Counsel Mauldin ever hired or used a private investigator in his case. (PCR Tr. 7). Although Iquawn (Iquawn) Jones was subpoenaed, he did not

¹⁴ Claims 11 and 16

testify. (PCR Tr. 10). Applicant testified he asked Counsel Mauldin to call Iquawn to the stand, but Counsel Mauldin refused. (PCR Tr. 10–11). He further testified that Counsel Mauldin never reviewed the evidence with him and that Counsel Mauldin refused to get the video surveillance footage from the bar and plaza on the night of the incident. (PCR Tr. 17). Applicant stated that the video would have shown that Mr. Ruple was the aggressor in the armed robbery. (PCR Tr. 17).

Counsel Mauldin testified he is currently an Assistant Public Defender for the Eleventh Judicial Circuit. (PCR Tr. 20). He was appointed to represent Applicant approximately a year before his trial. (PCR Tr. 20). Counsel Mauldin testified Applicant was originally charged with murder, kidnapping, and grand larceny in addition to FTSFBL and armed robbery. (PCR Tr. 21). According to his notes, Counsel Mauldin met with Applicant on February 21, 2014 to discuss the charges and his rights; on March 12, 2014, for a bond hearing; on April 11, 2014, for a preliminary hearing; and on May 30, 2014, to review the evidence and discuss plea offers. (PCR Tr. 22). Counsel Mauldin testified the plea offer was a negotiated range of twenty to thirty years, which Applicant was not interested in. (PCR Tr. 22).

Counsel Mauldin's notes further indicate he met with Applicant on July 9, 2014, and July 25, 2014. (PCR Tr. 22). He had a phone call with Applicant on September 30, 2014. (PCR Tr. 22). He then met with Applicant on either August 2 or August 3, 2014. (PCR Tr. 22). On October 6, 2014, they had a second bond hearing. (PCR Tr. 23). On January 8, 2014, Counsel Mauldin went to visit Applicant to advise that his trial would likely be held by the end of the month. (PCR Tr. 23). He met with Applicant again on January 16, 2015, January 22, 2015, and January 23, 2015, to review evidence and other trial matters. (PCR Tr. 23). The two also met every day of the trial. Counsel Mauldin testified he felt he had enough time to meet with Applicant, review the discovery with him, and prepare for trial. (PCR Tr. 23, 25–26).

Regarding the investigation, Counsel Mauldin testified he hired a private investigator named Kyle Taylor with Southern Investigative Services. (PCR Tr. 24). Taylor spoke with various witnesses and visited the scene of the crime. (PCR Tr. 24). He also inquired about surveillance footage from the Mile High Club and from the ATM across the street from the club on the night in question. (PCR Tr. 24). He was told that it was unclear whether the surveillance footage still existed. (PCR Tr. 24).

Regarding the witnesses Applicant apparently wanted to call, Counsel Mauldin testified Taylor interviewed Iquawn, Carlisle, and Patrick. (PCR Tr. 26, 46). Carlisle and Patrick both testified for the prosecution. (PCR Tr. 26). Counsel Mauldin testified that, based on their interviews, none of these witnesses were helpful to Applicant's case or trial strategy. (PCR Tr. 26). In fact, Carlisle testified Applicant robbed the victim. (PCR Tr. 26). The other two stated they did not know an armed robbery occurred, that they had no idea how the victim's bag got in the car, and that they were tired from being up all night. (PCR Tr. 26, 55-57).

Regarding trial strategy, Counsel Mauldin testified that Applicant told him someone else must have committed the armed robbery because he was sitting in the car with Carlisle watching a movie when the other two men jumped into the car with the stolen bag. (PCR Tr. 27). Applicant further told Counsel Mauldin that he did not stop for law enforcement because Andrew Clemmons, the deceased victim, pulled a gun on Applicant during the intimal stop and told him to drive. (PCR Tr. 27). Counsel Mauldin therefore pursued a trial strategy based on the affirmative defense of duress. (PCR Tr. 27). Counsel Mauldin explained that an affirmative defense requires the defense to offer proof at trial supporting the defense. (PCR Tr. 27). Absent Applicant's testimony, Counsel Mauldin explained, he would not have been able to present the defense to the jury at all and likely would not have received a jury charge on duress. (PCR Tr. 27). However, Counsel Maudlin advised

Applicant that he would be cross-examined and possible impeached based on previous convictions. (PCR Tr. 28). Counsel Mauldin confirmed that Applicant was impeached with an assault and battery of a high and aggravated nature conviction from 2007. (PCR Tr. 28).

This Court finds Applicant failed to overcome the “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. 668). “A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). “[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses “when it is reasonable to do so.” *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). “In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691.

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel’s duty to investigate. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 597 (“Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.”). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional

judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690–91; *see id.* (“In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”). Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel’s decision not to undertake a particular investigation must be evaluated with heavy deference to counsel’s judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). The applicant must further present evidence demonstrating how the discoverable matters or defenses would have resulted in a different outcome. *Id.* Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.* (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Regarding Trial Counsel’s alleged failure to investigate and interview witnesses, our Supreme Court has held that a PCR applicant must “produce the witnesses at the PCR hearing or otherwise introduce the witnesses’ testimony in a manner consistent with the rules of evidence” to prevail on this type of claim. *Glover*, 318 S.C. at 498–99, 458 S.E.2d at 540 (citing *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992)); *see also Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (pure conjecture as to what a witness’s testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different). Applicant did not introduce

such testimony at the PCR hearing. Trial Counsel nonetheless testified the private investigator interviewed Iquawn, Carlisle, and Patrick, and that their testimony was not helpful to Applicant's case. Moreover, Trial Counsel was able to question Carlisle and Patrick on cross-examination.

As to Applicant's claim Trial Counsel was ineffective for failing to call Iquawn as a defense witness, Applicant cannot meet his burden where he failed to present testimony from Iquawn at the PCR hearing. Mere speculation as to what Iquawn's testimony might have been is insufficient to satisfy the Applicant's burden of showing prejudice. In a post-conviction relief action, the Applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective." *Simpson v. Moore*, 367 S.C. 587, 598, 627 S.E.2d 701, 707 (2006), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. Here, Applicant did not even speculate as to what Iquawn would have testified to or how it would have helped his case. *See Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir. 1977) (citations omitted) ("Absent a showing that the tactical decision of counsel was so unreasonable in light of the need for the testimony that it amounted to a deprivation of an attorney who acted within 'the range of competence demanded of attorneys in criminal cases,' " reviewing courts will not second-guess the tactics of trial lawyers). Thus, this Court finds Applicant's allegation pertaining to Trial Counsel's failure to call Iquawn as a witness is meritless.

Trial Counsel credibly testified he met with Applicant on multiple occasions prior to trial, reviewed the discovery with him, and discussed his case with him at length. This Court does not find credible Applicant's claim that Trial Counsel never reviewed the discovery with him. Applicant further failed to specify what, if anything, could have been achieved had Trial Counsel spent more time with him in consultation regarding the contents of his discovery. *See Smith v. State*, 404 S.C. 493, 500–01, 745 S.E.2d 378, 382 (Ct. App. 2012) (noting that an applicant must

present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief).

Accordingly, Applicant's claims pertaining to Trial Counsel's failure to sufficiently investigate the circumstances of the case, interview certain witnesses, and review evidence with him are **DENIED**.

C. Failure to Object¹⁵

Applicant next makes a series of claims alleging Trial Counsel was ineffective for failing to object to instances of leading questions from the solicitor, hearsay testimony, and the solicitor misstating evidence. This Court disagrees, and finds Applicant failed to show Trial Counsel's performance fell below an objective standard of reasonableness based on any of the allegedly objectionable instances identified by Applicant. Given the deference owed to real-time, tactically significant decisions about objections made by trial counsel, Applicant ultimately failed to demonstrate that, had Trial Counsel objected to these matters, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 689, 694.

At the PCR hearing, Counsel Mauldin testified he has been practicing criminal law since 1999, and has tried dozens of cases throughout his career. (PCR Tr. 28–29). When asked about how he generally handles objectionable questions or testimony, Counsel Mauldin explained that it depends on the case and strategy he is pursuing. (PCR Tr. 28–29). Sometimes he objects to everything he finds objectionable in order to catch the solicitor off guard; however, there are strategic decisions to consider. (PCR Tr. 29–30). For example, Counsel Mauldin explained that

¹⁵ Claims 1–6, 8–9, and 12–14.

making too many objections can run the risk of irritating the jury or making the jury believe he is trying to hide things from them.

The “use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation.” *United States v. Nguyen*, 379 F. App’x 177, 181 (3d Cir. 2010); see *Humphries v. Ozmint*, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) (“[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under *Strickland*.”); cf. *Bergmann v. McCaughtry*, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel’s performance, the reviewing court will “strong[ly] presume[e] that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. *Yarborough*, 540 U.S. at 8 (internal quotation marks omitted); cf. *Higgs v. United States*, 711 F. Supp. 2d 479, 515 (D. Md. 2010) (“Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.” (citing *Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir. 2003)); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Strickland* standard was not developed “to promote judicial second-guessing on questions of strategy as basic as the handling of a witness”).

Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); see *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) (“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).

i. Leading Questions

Seven of Applicant's allegations of ineffective assistance of trial counsel are based on counsel's failure to object to instances of the solicitor asking leading questions.¹⁶ Applicant first contends Counsel Mauldin failed to object to the following exchange between the solicitor and Trooper Lee on direct examination regarding the location of the passenger in the car following the collision:

- Q. Okay. Did you mention where the passenger was located in the vehicle?
- A. The passenger was in the seat directly, it would be the number 6 and 5 seat kind of slouched over.
- Q. **So that, would be, I guess, the middle towards --**
- A. **The middle.**
- Q. **-- towards the -rear driver's side?**
- A. **Towards the middle towards the rear. More towards the middle of the car.**
- Q. **In the back seat, right?**
- A. Yes. He was in the back seat.

(Trial Tr. 139-40; R. 104-05).¹⁷

The passenger Trooper Lee and the solicitor are referring to is the victim, Andrew Clemmons. At the PCR hearing, Counsel Mauldin testified he did not think the question or testimony was particularly significant. (Plea Tr. 30-31). He further noted that Trooper Lee previously described where the drivers and passengers were seated during his initial stop. (PCR Tr. 30-31, 59-60) (Trial Tr. 132-33; R. 97-98). Counsel Mauldin testified he did not attribute any significance to where everyone was sitting at that point, particularly given his defense strategy

¹⁶ A leading question is one "which suggests to the witness the desired answer." *State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979).

¹⁷ The bolded portions of the testimony were specifically cited in the application.

based on duress. (PCR Tr. 31). In other words, no one was disputing the identity of the driver. Applicant later admitted during his testimony that he was driving the vehicle, which was part of Counsel Mauldin's trial strategy. (PCR Tr. 31) (Trial Tr. 371-73; R. 334-36).

On cross-examination, Counsel Mauldin was asked whether there is value in stopping the solicitor from asking leading questions on direct. (PCR Tr. 41-42). Counsel Mauldin stated that it depends on the circumstances and context of the testimony. (PCR Tr. 42). In this particular context, Counsel Mauldin explained, the solicitor was not "feeding" the testimony to the witness because he had already elicited about the location of the passengers. (PCR Tr. 42). Counsel Mauldin further testified that in his experience, objecting to leading questions is not particularly helpful because most of the time the judge will merely instruct the solicitor to rephrase the question. (PCR Tr. 44).

Applicant next contends Counsel Mauldin failed to object to the following exchange between the solicitor and Trooper Snider on direct examination regarding the driver of the vehicle having long hair:

- Q. Could you see the profile of the individuals inside the vehicle?
- A. Yes, sir. I could tell whoever was driving the vehicle had dreadlocks, not a shaved head. There's a silhouette of that. I didn't know at the time if it was a female or a male.
- Q. **Right. But you could tell the driver had long hair?**
- A. **Long hair. Yes, sir.**

(Trial Tr. 145; R. 110). Applicant similarly contends Counsel Mauldin failed to object to the following exchange between the solicitor and EMS worker, Amanda Sucher, regarding the identity of the passenger in the back of the vehicle as Andrew Clemmons:

- Q. What do you remember about the hair style of the individual in the back seat?
- A. All I remember is that it was short, kind of fuzzy. That's about it.

Q. And the individual in the back seat from your report that's Alexander Clemmons; isn't that correct?

A. Yes sir.

(Trial Tr. 176–77; R. 141–42).

At the PCR hearing, Counsel Mauldin again testified that their trial strategy was not based on misidentification of Applicant as the driver, but rather was that the victim forced Applicant to drive by holding a gun to his head. (PCR Tr. 34). Counsel Mauldin also cross-examined both Trooper Snider and Amanda Sucher about their failure to include in their respective reports that the driver of the vehicle had long hair. (Trial Tr. 160, 184; R. 125, 149). Additionally, their testimony was cumulative to multiple other witnesses who testified that the driver had long dreadlocks and the passenger had short hair. (Trial Tr. 139, 166, 191, 194–95, 200–01, 233; R. 104, 110, 156, 159–60, 165–66, 198). Neither Carlisle, Iquawn, nor Johnson had dreadlocks at that time. (Trial Tr. 283, 304, 374–77; R. 248, 267, 337–40).

Applicant next contends Counsel Mauldin failed to object to the following exchange between the solicitor and Trooper Snider regarding his patrol car reaching up to 182 miles per hour during the police chase:

Q. So based on that video it appeared -- You at one point got up to 128 miles per hour?

A. Yes sir.

(Trial Tr. 153; R. 118).

At the PCR hearing, Counsel Mauldin agreed that this was a leading question but testified that the speed of the vehicles during the police chase was not pertinent to Applicant's defense. (PCR Tr. 35, 44). Moreover, the solicitor was referring to the speed shown in the video taken from Trooper Snider's in-car recording system, which had just been played for the jury moments prior. (Trial Tr. 149–52; R. 114–17).

Applicant next contends Counsel Mauldin was ineffective for failing object to the following exchange between the solicitor and Michael Phipps, a member of the crime scene unit, who specializes in computer and digital forensics:

Q. Is that a photograph that you were able to retrieve off of a media card on one of those phones?

A. Yes, sir.

(Trial Tr. 218, R. 183). At the PCR hearing, Counsel Mauldin testified technically this was a leading question, but that this was not a situation where the solicitor was attempting to feed a witness information. (PCR Tr. 36, 45).

Applicant next contends Counsel Mauldin was ineffective for failing object to the following exchange between the solicitor and Detective Garrick:

Q. These were the pants that were removed from Mr. Pontoo in the hospital?

A. Correct.

(Trial Tr. 141, R. 206). Applicant additionally contends Counsel Mauldin was ineffective for failing object to the following exchange between the solicitor and Detective Garrick:

Q. Is that the clothing you obtained from the hospital belonging to Mr. Clemmons?

A. It is.

(Trial Tr. 141–42, R. 206–07). At the PCR hearing, Counsel Mauldin agreed that both of these exchanges contained leading questions, but he not recall any particular significance about either that would require him to object. (PCR Tr. 36–37). Additionally, he recalled the solicitor spending a significant amount of time laying the foundation to admit the clothing into evidence. (PCR Tr. 37). The record additionally reflects that Counsel Mauldin previously objected to the admission of Applicant's pants based on lack of foundation and hearsay. (Trial Tr. 239–40, R. 204–05).

Rule 611(c) of the South Carolina Rules of Evidence provides that “[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony.” However, “[t]he law gives the trial judge wide discretion when ruling on an objection to a question on the ground that it is leading.” *State v. Hale*, 284 S.C. 348, 351, 326 S.E.2d 418, 420 (Ct. App. 1985). A “case will rarely be reversed on the ground that the trial judge permitted leading questions, and then only if there has been a clear abuse of discretion resulting in prejudice to the objecting party.” *Id.*

This Court finds Trial Counsel’s failure to object to questions characterized by Applicant as leading does not constitute behavior falling below an objective standard of reasonableness. As Counsel Mauldin pointed out, had he objected to any of the aforementioned lines of questioning, such an objection likely would not have been sustained or the State would have rephrased its questions and elicited the same testimony. Many of the leading questions Applicant alleges were improper were introductory in nature and used for the purpose of developing the subject testimony on often immaterial facts unlikely to influence the jury’s decision such that they fall within the scope of Rule 611(c), SCRE. *Cf.* 1 McCormick on Evid. § 76(b) (8th ed. Jan. 2020 update) (noting that “leading questions may be used to bring out preliminary matters such as the witness’s name and occupation, or to elicit matters that are not seriously disputed”). Even if counsel was somehow deficient, this Court finds the alleged violations of Rule 611(c), SCRE, are each so miniscule as to preclude a finding of deficiency.

Applicant further failed to show how allowing the State to ask any of the allegedly leading questions actually prejudiced his case, given that many of the instances of alleged leading involved facts testified to by that witness or other witnesses. Counsel Mauldin testified he elected not to object to the allegedly leading questions because they were not harmful. *See Strickland*, 466 U.S.

at 691 (“An error by counsel, even if professionally unreasonable, does not warrant reversal of a criminal conviction if it had no effect on the judgment.”); *cf. Reynolds v. State*, 269 Ga. App. 268, 270, 603 S.E.2d 779, 782 (2004) (holding trial counsel was not ineffective by failing to object to “excessive” leading questions, because “decisions as to whether to interpose certain objections fall within the realm of trial tactics and strategy and usually provide no basis for reversal of a conviction, nor do they amount to ineffective assistance of counsel” (citations and alterations omitted)). This Court finds Applicant failed to provide with any evidence—aside from the blanket statement that he was prejudiced—to show that there is a reasonable probability that but for Trial Counsel’s failure to object to the cited leading questions, there is a reasonable probability he would have been acquitted.

Because none of the seven instances of alleged leading identified by Applicant are of a sufficiently prejudicial nature to support a grant of relief, Applicant’s request for relief by way of these allegations is **DENIED**.

ii. Hearsay Testimony

Applicant next alleges Counsel Mauldin was ineffective for failing to object to hearsay and testimony regarding items not in evidence from Amanda Sucher. Specifically, Applicant contends Counsel Mauldin should have objected to the following testimony about the victim’s blood pressure and respiration levels contained in her report:

- Q. During that time that you were with Mr. Clemmons, can you tell the jury about his blood pressure and his respirations and recordings and what they meant to you?
- A. **Uhm, if you look at his record, we started off, we have a set of vital signs that, uhm, is what we consider normal in a patient which would be just anybody walking and talking with no medical problems, that’s what sets the normal range that we look at. His first set of vitals that we took, if you look, at them, his blood pressure was 98 over 74. That’s a little bit low and that can be indicative**

of shock or bleeding. His pulse rate was. 86 and regular which means he had a regular heart rate. His respiratory was 8 which was low so we assisted him by putting a mask on his face and giving him additional – we let him breath 8 times a minute, but we also would give him a few extra breaths in between.

If you look at my second set of vitals are pretty much the same, but if you look at my third set, uhm, got a blood pressure of 100 over 80.

(Trial Tr. 178–79; R. 143–44).

At the PCR hearing, Counsel Mauldin testified that none of this testimony was prejudicial to Applicant. (PCR Tr. 35). On cross-examination, he testified that he could not recall whether Sucher was reading from her own report or another EMT's report. (PCR Tr. 45). However, it appears from the record that Sucher was reading from her own report. (Trial Tr. 176, 179, 184; R. 141, 144, 149).

Rule 801(c) of the South Carolina Rules of Evidence defines hearsay as “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.” A statement is “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Rule 801(a), SCRE.

This Court finds Sucher's testimony regarding the victim's blood pressure and respiration levels is not hearsay because it is not a statement nor an assertion. Rather, they are measurements Sucher recorded based on her personal observation of the readings indicated by the medical equipment. See 31A C.J.S. Evidence § 365 (“[T]estimony is not hearsay where it relates to what the witness himself did in reliance on, or in response to, a statement, facts upon which action was taken, personal observations, explanation of conduct, the effect of statements on the listener, the fact that something was said, or identifying what was said.”) (cited with approval in *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 30–31, 609 S.E.2d 506, 512 (2005)).

Nor did the solicitor's question eliciting this testimony "assume facts not in evidence." An issue with the form of the question occurs "when the examiner words the question so that it assumes as true matters which no witness has yet testified to, and which are disputed between the parties." McCormick, *supra*, § 7(c). The danger here is two-fold; first, if the examiner is putting the question to a friendly witness, the recitation of the assumed fact may suggest the desired answer, and second, whether the witness is friendly or hostile, the answer is likely to be misleading. *Id.*¹⁸ However, neither dangers are present if the witness has previously testified to the truth of the fact assumed in the question. *Id.*¹⁹

Here, the solicitor's question did not contain an *assumption* about the victim's blood pressure and respiration levels. Rather, he asked Sucher a direct, open-ended question as to what the measurements were, which she testified to based on her report. This Court finds Applicant failed to establish Trial Counsel was ineffective for failing to object to Sucher's testimony because it was neither hearsay nor did the solicitor's question assume facts not in evidence. Accordingly, Applicant's request for relief by way of this claim is **DENIED**.

iii. Misstatement of Evidence

Finally, Applicant alleges Counsel Mauldin was ineffective for failing to object to the solicitor allegedly misstating the evidence during his recross-examination of Applicant. In its full context, the following exchange occurred:

- Q. I'm going to show you a picture and ask you if you recognize that as being taken while you're wearing that collar brace the day or two after this, incident? Is that you?
- A. Yes, sir.

¹⁸ The classic illustration is, "When did you stop beating your wife?"

¹⁹ For example, in *State v. Marshall*, 105 Iowa 38, 74 N.W. 763, 765 (1898), the Supreme Court of Iowa held it was not error for the prosecutor to ask the witness to a burglary to name the goods that were stolen from his store because he previously testified that goods had been stolen.

MR. GRAHAM: Your Honor, the State would offer this into evidence.
THE COURT: Any objection?
MR. MAULDIN: No objection, Your Honor.
THE COURT: All right. That will be State's exhibit 63, I believe.
MR. GRAHAM: Thank you, Your Honor.

- Q. State's number 63, that's the left side of your face, right?
A. Yes, sir.
Q. And you agree that this was taken a day or two after this incident happened, correct?
A. I can't agree. I can't tell you when that picture was taken.
Q. You've got your collar brace on, correct?
A. But understand, I can't tell you who took that 1 picture or when that picture was taken, sir.
Q. You don't know when this picture was taken?
A. No, sir. I never remember anyone taking no picture of me or anything like that, sir.

MR. GRAHAM: Your Honor, I would ask for the previous testimony. I think he admitted earlier that this was taken, that this was accurate for a day or two after this incident.

THE COURT: That's right. That was the testimony.

(Trial Tr. 417-18, R. 380-81). At the PCR hearing, Counsel Mauldin stated the solicitor was not misstating the evidence because, as seen above, Applicant testified just moments earlier that the photograph referenced by the solicitor was taken a day or two after the incident. (PCR Tr. 37). This Court agrees. *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence). Accordingly, Applicant's request for relief by way of this claim is **DENIED**.

iv. Cumulative Error

In his closing argument, PCR counsel asserted that the cumulative effect of Trial Counsel's

failure to object to the above-referenced individual instances identified by Applicant deprived him of a fair trial. (PCR Tr. 73). The State replied that our appellate courts have never recognized the cumulative error doctrine, citing our Supreme Court's opinion in *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). (PCR Tr. 74). Rather, each issue must be considered individually.

In *Green*, our Supreme Court noted that [w]hether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina. *Id.* at 197, 569 S.E.2d at 324. The Court nonetheless recognized that “the threshold to asking the cumulative prejudicial question is to first find multiple errors.” *Id.* at 197, 569 S.E.2d at 325. Here, having found that none of the allegedly objectionable issues raised by Applicant amounted to error, multiple errors do not exist in this case to form any cumulative prejudicial effect. *See Fisher v. Angelone*, 163 F.3d 835, 852–853 (1998) (holding that various claims of ineffective assistance of counsel, like claims of trial error, would not entitle petitioner to relief because a cumulative error analysis would apply only to the effect of those matters actually determined to be constitutional error and not the cumulative effect of all matters alleged or deemed deficient); *Lorenzen v. State*, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding that where none of the errors alleged by the PCR applicant were meritorious, the alleged errors did not have the cumulative effect of denying the applicant of effective legal representation to the extent that prejudice was presumed), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Accordingly, Applicant's allegation of ineffective assistance of Trial Counsel based on cumulative error is **DENIED.**

D. Failure to Adequately Cross-Examine Witnesses²⁰

Applicant next contends Counsel was ineffective for failing to cross-examine witnesses

²⁰ Claim 18

about inconsistencies in the evidence pertaining to Applicant's height and black shirt. This Court disagrees, and finds Applicant failed to overcome *Strickland's* strong presumption that Trial Counsel's cross-examination fell within the wide range of reasonable professional assistance.

At trial, photographs of Applicant's light-colored jeans (State's Exhibit #49) and black t-shirt (State's Exhibit #50) were introduced through Detective Garrick, who collected these items from a bag in Applicant's hospital room. (Trial Tr. 239–41). Clemmons, however, was in surgery at the time Detective Garrick arrived at the hospital. (Trial Tr. 242–43). Hospital staff gave Detective Garrick Clemmons' clothing, which included a white, green, and brown strip Polo shirt; a black or gray t-shirt; and dark blue jeans. (Trial Tr. 242–43).

At the PCR hearing, Applicant alleged Counsel Mauldin failed to challenge or cross-examine witnesses regarding the black t-shirt (State's Exhibit #50) that was identified as Applicant based on Garrick's testimony he collected the shirt from Applicant's hospital room. (Trial Tr. 241) (PCR Tr. 7–8). Applicant stated that Jonathan Ruple testified that the person who robbed him was wearing a black shirt with designs on it rather than an all-black shirt. (PCR Tr. 7–8). However, when he was extracted from the car following the accident, Applicant explained that EMS "cut the whole inside of the front of the shirt so as to look like a whole black shirt, so the front of the shirt was never, like, presented to the Court. So therefore, the Court actually looked at it as being an all-black shirt." (PCR Tr. 8).

Counsel Mauldin testified at the PCR hearing that he did not recall anything specifically about a black shirt versus a black shirt with designs on it. (PCR Tr. 25). However, he pointed out that he argued during closing that neither a Rastafarian hat nor a green puffy jacket were ever recovered. (PCR Tr. 25) (Trial Tri. 431–32). The only green jacket found belonged to Carlisle and the only puffy jacket found belonged to Iquawn. (PCR Tr. 25) (Trial Tri. 431–32).

This Court finds Applicant failed to establish Trial Counsel's cross-examination was ineffective regarding alleged inconsistencies in the evidence pertaining to the black t-shirt. Contrary to Applicant's assertion, Ruple testified at trial the man who robbed him was wearing a black t-shirt under a green puffy jacket and "silver grayish" jeans. (Trial Tr. 74–77; R. 39–42). He did not mention any design on the front of the shirt. Ruple testified the man accompanying Applicant—Clemmons—was wearing a green striped shirt and Rastafarian-style hat. (Trial Tr. 77–78). Rather, Applicant testified at trial that he was wearing a black shirt with a red and silver design on the night of the incident. (Trial Tr. 405). When was asked on cross-examination if he recognized the black t-shirt Garrick collected from his hospital room, Applicant stated at first that he did not recognize it. (Trial Tr. 404–05). However, he then stated he could not tell if the shirt was his because part of it was cut. (Trial Tr. 405).

This Court further finds Applicant's cross-examination of Ruple regarding the perpetrator's height fell below an objective standard of reasonableness. At trial, Ruple testified the man who robbed him had shoulder-length dreadlocks, was roughly 5'9" to 5'10" tall, and weighed approximately 180 pounds (Trial Tr. 74–77; R. 39–42). Counsel Mauldin testified he cross-examined Ruple that he told the police at one point that the robber was 5'5" and another time stated the robber was 5'8." (PCR Tr. 53) (Trial Tr. 88–89). Counsel Mauldin further cross-examined Ruple about other discrepancies in his description of the man who robbed him. (PCR Tr. 53) (Trial Tr. 88–89).

Here, Applicant failed to allege what further questions Counsel Mauldin should have asked and to whom he should have asked them on cross-examination. *See Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996) ("In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the

counsel whose performance would pass muster.”). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry upon its opportunity to examine a witness; “the proper measure of counsel’s performance is whether he has provided representation within the range of competence required by attorneys in criminal cases.” *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (addressing claim of deficient performance during cross-examination and affirming grant of PCR). Accordingly, Applicant’s request for relief by way of this allegation is **DENIED**.

E. Failure to Request Jury Instruction

Applicant next contends Trial Counsel was ineffective for (1) failure to request a jury charge on expert witnesses and (2) failing to request the judge include the element “in the absence of mitigating circumstances” in his charge on failure to stop for a blue light resulting in death. This Court disagrees, and finds the jury was properly instructed on the means of analysis appropriate for the evidence presented in this case and applicable law; thus, no deficient performance or prejudice flows from counsel’s alleged omissions.

i. Expert Witness

At the PCR hearing, Counsel Mauldin testified that technically he technically should have requested a jury instruction on expert testimony because Dr. Ross testified. (PCR Tr. 38). However, he stated there was no dispute that an individual died or the manner of death. (PCR Tr. 38). Nor was it relevant to Applicant’s defense. (PCR Tr. 38). Additionally, the solicitor raised the issue during the charge conference, and the trial judge agreed it was not necessary. (Trial Tr. 426).

The purpose of a trial judge’s jury instructions is “to enlighten the jury and to aid it in arriving at a correct verdict.” *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct

law of South Carolina. *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

This Court finds Applicant failed to establish Trial Counsel's failure to request a jury charge on expert witnesses constituted deficient performance. Even had the judge charged the jury on expert witnesses, Applicant failed to show the absence of the charge "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

ii. Failure to Stop for a Blue Light Resulting in Death

Applicant contends Counsel was ineffective for failing to request the judge include the language, "in the absence of mitigating circumstances," in his charge on failure to stop for a blue light resulting in death. S.C. Code Ann. § 56-5-750(A) provides that:

In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light.

(emphasis added). At the PCR hearing, Counsel Mauldin admitted that he certainly could have requested the judge use the language, "in the absence of mitigating circumstances." (PCR Tr. 38-39). However, he explained that the duress charge itself is an affirmative defense that would obviously constitute mitigating circumstances. (PCR Tr. 39). This Court agrees with Counsel

Mauldin's assessment, and rejects Applicant's argument that he is entitled to relief merely because this particular issue was not preserved for appellate review.

Assuming "in the absence of mitigating circumstances" constitutes an "element,"²¹ of the offense of failure to stop for a blue light resulting in death as Applicant alleges, it is immaterial in the context of a duress defense. "Duress excuses the crime but does not negate any element of the offense." *State v. New*, 371 S.C. 523, 526, 640 S.E.2d 871, 873 (2007); accord. *Dixon v. United States*, 548 U.S. 1, 6 (2006) (holding that the prosecution need not bear the burden disproving duress beyond a reasonable doubt because "the existence of duress normally does not controvert any of the elements of the offense itself); see, e.g., *State v. Rocheville*, 310 S.C. 20, 425 S.E.2d 32 (1993) (duress does not negate element of malice in murder charge); *State v. Robinson*, 294 S.C. 120, 363 S.E.2d 104 (1987) (duress envisions a third person compelling another to commit a crime). Rather, it allows the defendant to "avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Dixon*, 548 U.S. at 7 (quoting *United States v. Bailey*, 444 U.S. 394, 402 (1980)).

Viewing the jury instruction in the context of the entire case, this Court finds Applicant failed to show Trial Counsel was constitutionally ineffective for failing to request the trial judge include the "mitigating circumstances" language in his charge on failure to stop for a blue light resulting in death. See *Fitzgerald v. Thompson*, 943 F.2d 463, 469 (4th Cir. 1991) (explaining that,

²¹ This Court would note that "in the absence of mitigating circumstances" appears to be a proviso creating an exception to the offense. See *Cain v. S.C. Pub. Serv. Auth.*, 222 S.C. 200, 213, 72 S.E.2d 177, 183 (1952) (" 'The natural and appropriate office of a proviso is to modify the operation of that part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that it follows.' " (citation omitted)); see also *State v. Clarke*, 302 S.C. 423, 425-26, 396 S.E.2d 827, 827-28 (1990) ("The general rule, when dealing with statutory crimes to which there are exceptions, is that the defendant 'has the burden of excusing or justifying his act; and hence the burden may be on him to bring himself within an exception in the statute . . . '") (citation omitted)).

in evaluating whether actual prejudice flowed from an attorney's failure to object to the instruction, "[i]t is important . . . to consider the challenged instruction in light of other jury instructions" and in the context of the entire case) (citing *Boyde v. California*, 494 U.S. 370 (1990)). Even had Trial Counsel requested the language be included in the charge, this Court finds no prejudice resulted as a matter of law because the jury was properly instructed on the affirmative defense of duress as it related to the offense of failure to stop for a blue light resulting in a death consistent with the relevant and applicable South Carolina law. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

F. Failure to Discuss Sentence and Motion to Reconsider²²

Applicant asserts Trial Counsel was ineffective for failing to discuss Applicant's sentence with him and "failing to explain a possible motion to reconsider sentence that [A]pplicant wanted to pursue." At the PCR hearing, Applicant was asked whether he asked Counsel Mauldin about a motion to reconsider the sentence. Applicant testified:

Yes. I asked -- I asked. I -- me and my mother, we asked why was it ran consecutive and can I do anything that can eliminate me having to do a consecutive sentence. And he never responded to me. He just looked at me and my mother and walked out of the courtroom. He never gave us the opportunity to fill out anything or to go in front of the judge and ask for a reconsideration. We were never afforded the opportunity.

(PCR Tr. 9).

This Court finds credible Counsel Mauldin's testimony that he spoke with Applicant after trial and advised him that he would serve 85% of his thirty-year sentence. (PCR Tr. 40). Counsel Mauldin testified he did not recall Applicant asking him about any kind of motion to reconsider the sentence. (PCR Tr. 40). On cross-examination, Counsel Mauldin testified he generally does not

²² Claim 17

discuss a motion to reconsider the sentence with his clients unless he has uncovered factors or facts the judge did not hear during sentencing. (PCR Tr. 40, 58–59).

This Court does not find credible Applicant's claim Counsel Mauldin never discussed his sentence with him. This Court further finds Applicant failed to establish Counsel Mauldin's failure to discuss a motion to reconsider the sentence with him constituted ineffective assistance of counsel. Applicant failed to allege any such factors or facts upon which Counsel Mauldin could have based a motion to reconsider Applicant's sentence.

Accordingly, Applicant's claims pertaining to sentencing and Trial Counsel's post-trial performance are **DENIED**.

G. Failure to Raise Issues on Appeal²³

Finally, Applicant alleges Appellate Counsel was ineffective for failing to argue on appeal that the (1) the trial court erred in admitting the .22 caliber pistol into evidence²⁴ and (2) the trial

²³ Claim 7 and 10

²⁴ At trial, Counsel Mauldin objected to the admission of the .22 caliber pistol into evidence based on lack of foundation and hearsay. (Trial Tr. 224–27; R. 189–92). The State introduced the pistol into evidence through Xavier Perdue, the hospital security guard on duty at the time Applicant was brought in. (Trial Tr. 223–24; R. 188–89). Perdue testified that anytime a patient comes into the emergency room with a gunshot wound, he or another security guard stays in the trauma room where the patient is being treated to ensure the safety of the patient and staff. (Trial Tr. 222; R. 187). Perdue testified he was in the trauma room at Palmetto Richland where hospital staff were tending to Applicant's injuries. (Trial Tr. 222; R. 187). He testified that he observed a weapon fell on the floor while the staff were removing Applicant's clothing. (Trial Tr. 222–23; R. 187–88). He stated that the staff immediately stepped back to allow him to retrieve and secure the weapon. (Trial Tr. 223; R. 188). Perdue then took the weapon to the security office, wrote down the patient information, and placed it into the safe. (Trial Tr. 223, 229; R. 188, 194). Later that night, he turned it over to Detective Garrick. (Trial Tr. 223; R. 188). Counsel Mauldin objected based on lack of foundation because Perdue did not specifically remember Applicant. (Trial Tr. 224; R. 189). Rather, Perdue obtained Applicant's information through hospital records that included Applicant's name and assigned patient number. (Trial Tr. 226; R. 191). Counsel Mauldin therefore argued the foundation was based on hearsay. (Trial Tr. 226–27; R. 191–92). The trial judge overruled Counsel Mauldin's objection, finding the patient admission form and records were sufficiently reliable to connect Applicant to the recorded patient number. (Trial Tr. 227; R. 192).

court erred in admitting Clemmons' clothing into evidence.²⁵ This Court disagrees, and finds Applicant failed to show that either of these issues were "clearly stronger" than the three Appellate Counsel raised on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

At the PCR hearing, Counsel McCune testified he carefully reviewed the transcript several times; at first to gain familiarity with the facts of the case and then to carefully analyze all objections. (PCR Tr. 67). He then triaged what he believed were the most meritorious issues and began drafting his brief and researching applicable case law. (PCR Tr. 67). Counsel McCune recalled speaking with Counsel Mauldin; however, Counsel Mauldin did not report any issues in particular that stuck out to him at trial. (PCR Tr. 67). Based on his research and review of the record, Counsel McCune testified he ultimately argued the trial court erred by (1) giving jury instructions that shifted the burden of proof, (2) allowing the State to impeach Applicant with his post-*Miranda* silence, and (3) permitting an in-court identification process that was unduly prejudicial. (PCR Tr. 67-68). Following briefing, Counsel McCune recalled representing Applicant in an oral argument before the Court of Appeals. (PCR Tr. 68). However, Applicant's convictions were ultimately affirmed. (PCR Tr. 70).

Counsel McCune testified he considered raising both issues Applicant alleges he should have argued on appeal. (PCR Tr. 69). However, he believed both issues could be easily cured, and

On cross-examination, Perdue admitted that he did not specifically remember the identity of the patient aside from the hospital records he reviewed. (Trial Tr. 230; R. 195).

²⁵ At trial, Counsel Mauldin objected to the admission of Clemmons' clothing based on lack of foundation and hearsay. (Trial Tr. 241-42; R. 206-07). The State introduced the clothing into evidence through the testimony of Detective Garrick, who testified hospital staff gave him Clemmons' clothing. (Trial Tr. 241-43; R. 206-08). Clemmons' was in surgery at the time, and therefore did not have an assigned room like Applicant did. (Trial Tr. 242; R. 207). Rather, hospital staff collected his clothing from the floor of the trauma room he was being treated before he was rushed into surgery. (Trial Tr. 242; R. 207). The trial judge overruled Counsel Mauldin's hearsay objection. (Trial Tr. 242; R. 207).

at best would have amounted to harmless error. (PCR Tr. 69). Specifically regarding the admission of the pistol, he testified any issue could have easily been cured with the testimony of the custodian of records. (PCR Tr. 69). Moreover, multiple people were in the trauma room and observed the pistol fall out of Applicant's clothing and onto the floor. (PCR Tr. 69). Counsel McCune similarly explained that he did not raise the issue regarding Clemmons' clothing because he believed there would be adequate records to establish the clothing belonged to Clemmons. (PCR Tr. 69–70).

In applying *Strickland* to claims of ineffective assistance of appellate counsel, reviewing courts must accord appellate counsel the “presumption that he decided which issues were most likely to afford relief on appeal. A decision with respect to an appeal is entitled to the same presumption that protects sound trial strategy.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993). Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). To prove prejudice, the applicant must demonstrate that, “but for counsel’s errors, there is a reasonable probability he would have prevailed on appeal.” *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Particularly in light of the broad discretion afforded to the trial court on the admissibility of evidence,²⁶ this Court finds Applicant failed to establish a reasonable probability that his convictions would have been reversed had Appellate Counsel raised either the issue regarding the admissibility of the .22 or of the admissibility of Clemmons' clothing. *See Gilchrist v. State*, 364 S.C. 173, 179, 612 S.E.2d 702, 705 (2005) (holding appellate counsel was not ineffective for

²⁶ “The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court,” and will not be reversed absent a “manifest abuse of discretion accompanied by probable prejudice.” *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.* at 429–30, 632 S.E.2d at 848.

failing to argue an issue on appeal because the issue did not amount to reversible error); *Bennett v. State*, 383 S.C. 303, 309–10, 680 S.E.2d 273, 276 (2009) (holding the PCR court erred in finding appellate counsel ineffective for failing to brief an issue because even if appellate counsel’s performance was deficient, such performance did not prejudice the petitioner); *cf. Anderson*, 354 S.C. at 436, 581 S.E.2d at 836 (“Anderson, unable to prove the inadmissibility of the evidence, would not have prevailed on appeal to this Court. He is, therefore, unable to prove prejudice.”).

Neither item of evidence were necessary to prove Applicant’s guilt for either crime. *See Hill v. State*, 415 S.C. 421, 433, 782 S.E.2d 414, 420 (Ct. App. 2016) (finding applicant was not prejudiced appellate counsel’s failure to raise directed verdict issue on appeal where “a reasonable probability of a different outcome does not exist because Petitioner would not have been entitled to a reversal; that is, the State provided independent evidence to corroborate Petitioner’s statements about the murders.”). Thus, Applicant cannot show Appellate Counsel’s determination that the trial court’s admissibility of these items amounted to reversible error was unreasonable under prevailing professional norms.

Although Appellate Counsel testified these issues were preserved, he articulated specific reasons why he did not raise these issues. *See Thrift v. State*, 302 S.C. 535, 539–40, 397 S.E.2d 523, 526 (1990) (holding that appellate counsel’s testimony that she reviewed the issue petitioner requested that she raise on appeal and consciously decided not to brief the issue clearly supported the PCR court’s finding that appellate counsel was not ineffective); *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996) (emphasizing that where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective); *see also Thrift*, 302 S.C. at 539, 397 S.E.2d at 526 (“[A]ppellate counsel is not required to raise every

nonfrivolous issue that is presented by the record.”); *see also Jones v. Barnes*, 463 U.S. 745, 752 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy.”).

This Court finds Applicant failed to demonstrate that either of these issues “were more promising or had any more merit than the issues appellate counsel chose to raise on appeal.” *Hill v. State*, 415 S.C. 421, 432, 782 S.E.2d 414, 420 (Ct. App. 2016) (citing *Jones*, 463 U.S. at 752–53 (noting the importance of appellate counsel selecting the most promising issues for appellate review, especially when oral arguments are limited by time restrictions)); *see Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (“In a PCR proceeding, the burden is on the applicant to prove the allegations in his application.”). Accordingly, Applicant’s claims pertaining to Appellate Counsel’s allegedly ineffective performance are **DENIED**.

VI. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

VII. CONCLUSION

Based on the evidence presented at the PCR hearing and a thorough review of the record, this Court finds and concludes Applicant failed to meet his burden of proof pursuant to *Strickland* and Rule 71.1, SCRCP. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, based

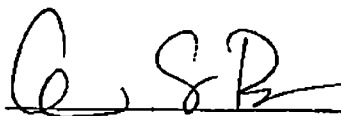
on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

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


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 the State.

AND IT IS SO ORDERED this 22 day of September, 2021.



COURTNEY CLYBURN POPE
Presiding Circuit Court Judge
Eleventh Judicial Circuit


_____, South Carolina

