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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF LAURENS<br><br>Maurice Anthony Odom,<br>SCDC # 199677<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | IN THE COURT OF COMMON PLEAS<br>FOR THE EIGHTH JUDICIAL CIRCUIT<br><br>2016-CP-30-251<br><br>**ORDER OF DISMISSAL** |



This matter comes before this Court by way of a post-conviction relief application, filed by Maurice Odom (Applicant) on March 17, 2016. Respondent made its Return on March 30, 2017, requesting an evidentiary hearing be convened. The evidentiary hearing was held on January 26, 2021, via the Webex Virtual Courtroom platform. Applicant was present at the hearing and represented by Carson Henderson, Esquire. Assistant Attorney General Brianna L. Schill of the South Carolina Office of the Attorney General represented Respondent.

Applicant testified on his own behalf at the hearing. Eli Wiygul, Esquire (Counsel) and Deputy Solicitor C. Dale Scott also testified. After a thorough review of all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof in establishing he is entitled to post-conviction relief and hereby denies and dismisses this application with prejudice. Specific findings of fact and conclusions of law are set forth below.

## PROCEDURAL HISTORY

Applicant was indicted at the February 2012 term of the Laurens County Grand Jury for burglary (2012-GS-30-311), criminal conspiracy (2012-GS-30-314), and grand larceny (2012-GS-30-317). Counsel represented him. Deputy Solicitors Warren Mowery and C. Dale Scott

prosecuted the case. On June 9-11, 2014, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, after which he was found guilty as indicted. Applicant was sentenced to imprisonment for fifteen years for burglary (second degree, violent), five years for criminal conspiracy, and five years for grand larceny. All sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by briefing by Appellate Defender Lara M. Caudy. The South Carolina Court of Appeals affirmed Applicant's conviction by an unpublished opinion. *State v. Odom*, Op. No 2015-UP-561 (Ct. App. Filed Dec. 23, 2015). The remittitur was sent January 8, 2016.

**CURRENT ACTION BEFORE THIS COURT**

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

(1) Ineffective assistance of counsel
(2) Malicious prosecution/Prosecutorial misconduct
(3) Violation of 8th Amendment
(4) Denied Directed Verdict
(5) "Insufficiency of the evidence"
(6) "Unlawful conduct of judge..."
(7) Speedy Trial Violation
(8) "I wasn't there for the qualification of the jurors..."
(9) "The juror was also involved in premature deliberations..."
(10) "the dogman stated the dog didn't take him to a car on the side of the road."
(11) "They told the judge that they didn't know anything about phone records that judge Griffith order-ed to see if I was in the area at the time but the fact remains Judge Griffith did order[] that record."
(12) Juror misconduct/conflict of interest

On January 8, 2021, Applicant filed an amended Application alleging the following claims:

(1) Failure to Object to Judge's Reference to God
(2) Failure to Object to the Indictment
(3) Failure to Object to the Solicitor's Statement: "You Determine what the Truth Is."
(4) Failure to object, ask for a curative instruction, and request a mistrial for the solicitor's opening statement: "But I submit to you that he [co-defendant and witness Christopher Mixon] is before you with no promises, no rewards, no hope of anything like that. He is simply here to tell you the truth and I believe you will find him in spite of his criminal record to be a credible witness."

(5) Ineffective assistance of counsel based on "the way [counsel] objected to the following testimony from witness Ramesh Patel": "It looked all too familiar because it had just happened two weeks ago the same way."
(6) Failure to object to the following statement: "Well, if he knows that the DVD is what he – he made a DVD according to his testimony and I would have to assume that Solicitor would not show him a DVD that was not made by him[.]"
(7) Failure to introduce document indicating Christopher Mixon had a driver's license.
(8) Ineffective for asking a witness if Christopher Mixon was "a member of the gang called Boss."
(9) Failure to object to NCIC document indicating Applicant was the owner of the vehicle.
(10)Failure to object to Applicant's South Carolina DMV Record
(11) Failure to properly preserve the record regarding which of the Petitioner's convictions could be used against him if he testified during the trial.
(12) Failure to object to portions of the solicitor's closing argument.
(13) Failure to object to solicitor's closing statement in which he told the jurors: "they do their best. And I submit to you that Tyrone Goggins is a good, experienced, capable police officer and investigator as his sixteen years would document."

At the commencement of the hearing, Applicant indicated he would be going forward on the allegations contained in his amended application for post-conviction relief, and the following allegations from his initial application: (1) speedy trial violation allegation (2) allegation regarding phone records ("They told the judge that they didn't know anything about phone records that judge Griffith order-ed to see if I was in the area at the time but the fact remains Judge Griffith did order[] that record"); and the allegation that "Applicant wanted to present a defense but wasn't allowed to." The remaining allegations contained in Applicant's original application are hereby deemed waived an abandoned, and accordingly, will not be addressed in this order.

## FACTUAL BACKGROUND

Just after 2:43 a.m. on November 11, 2011, Deputy Nick Moye of the Laurens County Sheriff's Office heard a security alarm going off as he drove by a BP gas station and convenience store located on Highway 72 in Clinton, South Carolina, a short distance away from an exit off of Interstate 26.[1] (Tr. p. 75; pp. 78-79; p. 93; p. 263). Upon hearing the alarm, Deputy Moye notified

[1] The store's hours of operation were 8:00 a.m. to 10:00 p.m. (Tr. p. 92).

dispatch of what he had heard, learned the store's security company had just reported the alarm to law enforcement, and drove towards the store to investigate. (Tr. pp. 76-77). As he approached the store, he observed one of the store's side windows had been shattered, and, when he drove closer, he saw a man climb out of the broken window and flee towards the back of the store. (Tr. pp. 81-84; p. 90). In response, Deputy Moye pursued the fleeing man but was unable to apprehend him before the man escaped into a wooded area directly behind the store. (Tr. pp. 83-84). The deputy then returned to the store, secured the scene, and waited for other officers to arrive. (Tr. p. 83).

Shortly thereafter, numerous law enforcement officers arrived at the scene along with Hardik Patel, the owner of the store, and his brother, Ramesh Patel ("Ramesh"). (Tr. p. 84; pp. 91-94). Once the store was secured, the Patels looked inside, discovered substantial damage to the store, and found merchandise scattered all over the store's floor. (Tr. p. 83). They then reviewed the surveillance footage captured by the store's security system and observed two masked burglars smash one of the store's windows with a rock, enter the store, and fill black trash bags with cartons of cigarettes along with money from a cash register drawer. (Tr. pp. 102-104; pp. 111-113). Additionally, they observed one of the burglars smash the store's office's mirrored window, enter the office, and steal more cigarettes and money from inside. (Tr. p. 104; p. 107). The brothers then took an inventory of the money and goods gathered by the burglars during the break-in and determined those items had a cumulative value of over $5,000. (Tr. pp. 98-98; pp. 122-123; p. 273).

Meanwhile, the investigating officers attempted to locate the suspects involved in the burglary and found a black Chrysler 300 parked nearby along the eastbound side of Interstate 26 a short distance away from an exit ramp. (Tr. p. 264; p. 268). Officer Tyrone Goggins of the

Clinton Department of Public Safety then responded to the vehicle's location, verified the vehicle had not been there long due to the fact its engine was still warm, and learned the vehicle was registered to Applicant Maurice Anthony Odom at an address in Wilmington, North Carolina. (Tr. p. 261; pp. 264-265; p. 267). In response, Officer Goggins asked another officer to remain in position to watch the vehicle while he confirmed there were no other vehicles parked along Interstate 26 in that area. (Tr. pp. 268-270; p. 272). After verifying Applicant's vehicle was the only vehicle in the area, Officer Goggins returned to the store, requested assistance from a State Law Enforcement Division ("SLED") tracking team, met with the victims, reviewed the surveillance footage of the incident, and inspected the scene. (Tr. pp. 272-280). During his inspection, the officer located the burglars' abandoned trash bags, which were filled with cartons of cigarettes from the store, along with a rock on the floor of the store's office. (Tr. p. 171; pp. 278-280). Officer Goggins then collected the rock as evidence and returned the stolen property to the Patels after it was inventoried. (Tr. p. 114; p. 278; pp. 281-282).

Shortly thereafter, at approximately 5:00 a.m., members of the SLED tracking unit, including Senior Agent Reid Creswell, arrived at the scene of the incident. (Tr. pp. 188-190; p. 193; p. 202; p. 215; p. 237; p. 251). Upon arriving, Senior Agent Creswell was advised of the specific location where the suspect entered the wooded area behind the store after the break-in and verified the suspect's trail had not been contaminated by anyone else entering the woods. (Tr. pp. 208-209; p. 216; p. 237). He then deployed Judy, a bloodhound-bluetick hound mixed-breed dog trained in tracking human scents, at a neutral location near where the suspect entered the wooded area and followed her into the woods. (Tr. pp. 191-192; pp. 207-208; p. 239). Shortly after Judy entered the wooded area, she indicated she had picked up a scent and began tracking the scent through the woods. (Tr. pp. 218-219; pp. 240-241). As Senior Agent Creswell followed Judy

through the woods, he personally observed signs of environmental disturbances confirming a person had recently fled along the path Judy was tracking and eventually began observing footprints. (Tr. p. 219; p. 242; pp. 246-247). As they continued along the trail, Judy led Senior Agent Creswell to a location near Interstate 26 where the footprints the agent had observed converged with another set of footprints. (Tr. p. 222; pp. 243-246). Judy then led Senior Agent Creswell to a location along Interstate 26 directly across from where Applicant's car had been parked a short time earlier before she lost the suspect's scent.[2] (Tr. p. 212; p. 214; p. 222; pp. 248-249). However, by that time, Applicant's car was no longer present because someone had removed it from its position along the side of Interstate 26 when the officer who had been asked to maintain surveillance of the car failed to do so during the time period the tracking team was following the suspect's trial. (Tr. pp. 286-287).

Subsequently, on November 18, 2011, Officer Goggins drove to an address he found for Applicant in Barnwell, South Carolina, in an attempt to speak with him about the incident and see if his vehicle was at that address. (Tr. pp. 290-291). After arriving at Applicant's address, Officer Goggins was unable to locate Applicant. (Tr. p. 292). However, he found Applicant's vehicle parked there and verified it was the same vehicle that had been parked along Interstate 26 at the time of the incident. (Tr. pp. 297-298). Furthermore, the officer located Christopher Mixon at that location, and Mixon was taken into custody based on outstanding warrants for his arrest.[3] (Tr. p. 292). Thereafter, Officer Goggins spoke with Mixon, Mixon inculpated himself and Applicant in the burglary of the BP gas station and convenience store on the date of the incident, and

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[2] During trial, Senior Agent Creswell explained vehicles rapidly travelling along Interstate 26 would have dissipated the scent that had been left there by the suspect, which explained why Judy lost the trail at that location. (Tr. pp. 211-212; pp. 223-224; p. 247).

[3] At the time of Mixon's arrest, an officer from the Barnwell Police Department was assisting Officer Goggins. (Tr. p. 292).

Applicant was arrested for his crimes. (Tr. p. 181; p. 296). Applicant was then indicted for second-degree burglary, grand larceny, and conspiracy, and he proceeded to trial. (Tr. p. 13; Indictments).

Mixon testified for the prosecution and recounted the details of his and Applicant's roles in the incident. (Tr. pp. 153-154). Specifically, Mixon stated Applicant drove the two of them to the BP gas station and convenience store located on Highway 72 on November 11, 2011, they dropped off a rock Applicant had brought with them at the store, and Applicant then drove them away from the store and parked his vehicle along the side of Interstate 26. (Tr. pp. 155-159). After that, Mixon indicated the two of them walked back to the store, Applicant smashed one of the store's windows with the rock, an alarm went off, and they climbed through the window and began loading the store's tobacco products into some trash bags they had brought along with them. (Tr. pp. 160-163; p. 165). Shortly after that, Mixon testified he saw a police officer arrive at the store, Applicant also saw the officer, and Applicant quickly fled back out of the broken window and away from the scene. (Tr. pp. 166-167). After Applicant fled, Mixon stated he ran across the street from the store, went into the woods, and began making his way back to Applicant's vehicle. (Tr. pp. 167-168). Roughly two hours later, Mixon testified he met back up with Applicant and the two of them fled from the area in Applicant's car. (Tr. pp. 169-170). Mixon stated he then received some money from Applicant for his participation in the break-in, returned home, and was arrested some time later. (Tr. pp. 170-171).

Officer Goggins testified about his investigation into the burglary, which led to Applicant's arrest. (Tr. pp. 261-298). During his testimony, Officer Goggins confirmed to the jury Applicant's car was parked along Interstate 26 at the time of the incident and its engine was still warm at that time. (Tr. pp. 264-268). Additionally, the officer stated someone removed the car from the area during the search for the burglars at a time when no officers were watching the vehicle, and he

noted the SLED tracking team tracked the suspect who fled through the woods to a location in close proximity to where Applicant's car had been parked. (Tr. pp. 268-269; pp. 286-288). Furthermore, Officer Goggins noted Applicant's vehicle was later found at Applicant's home in Barnwell just a few days after the incident in the same area where he located Applicant's accomplice in the crimes. (Tr. pp. 288-293; pp. 297-298).

**Findings of Fact and Conclusions of Law**

This Court has reviewed the pleadings, records submitted by the parties, exhibits presented at the PCR hearing, and applicable law. Before this Court are Applicant's Laurens County Clerk of Court records, Applicant's South Carolina Department of Correction records, the trial transcript, Applicant's direct appeal records, and the PCR action records. Additionally, this Court heard the testimony presented at the evidentiary hearing, and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. Pursuant to South Carolina Code Annotated, Sections 17-27-70 and -80, this Court dismisses the application based upon the following findings:

***Ineffective Assistance of Counsel***

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense

counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on

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

*Failure to Object Trial Judge 's Reference to God*

Applicant alleges Counsel was ineffective for failing to object to a reference to God made by the trial judge during *voir dire*. More specifically, Applicant argues Counsel was ineffective for failing to object to the following statement made by the trial judge: "Just ask God for some guidance, some wisdom, and understanding, and he'll take care of you." (Trial Tr. 11, l. 10-11). This Court disagrees and denies and dismisses this allegation with prejudice.

In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge.

Recently, the South Carolina Supreme Court again considered the use of "truth seeking" language by the trial court in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018). The *Beaty* Court concluded:

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the

> verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that Applicant has not shown prejudice from this error sufficient to warrant reversal.

*Id.* The *Beaty* opinion signified the first time the Court issued a general and blanket admonishment to the bench and bar that such "truth-seeking" language should be avoided at any point during the trial, but nonetheless found a harmless error analysis applied if such charges or commentary was given by the trial court.

In both *Aleksey* and *Beaty*, the South Carolina Supreme Court determined that while the trial court's use of "truth seeking" language was improper, the error was not significant enough to warrant reversal of the convictions.

This Court finds Applicant has not and cannot show he was prejudiced by this alleged deficiency in this case, and therefore, addresses only the prejudice prong for this allegation. *Strickland*, 466 U.S. 668 (1984) (If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.). Even considering only *Aleksey*[4], this Court finds Applicant has not and cannot prove that the result of his trial would have been different with reasonable probability had Counsel objected to the statement. *Aleksey* and its progeny have held that truth finding statements are not reversible error, even when such statements were given during actual jury charges, which is not the case here. Although this statement concerns a reference to God, as opposed to a "truth" statement, this Court finds the statement at issue here akin to a truth statement or other superfluous statements. Applicant's argument is even weaker

[4] Applicant's trial occurred before the *Beaty* decision in 2018.

than that in *Aleksey*, because the trial judge's reference to God here was not made during formal jury instructions or a charge on the law, but rather during *voir dire*, prior to the jury even being selected and sworn in. The trial judge went on to make the proper reasonable doubt and burden of proof charge during the jury charge. (Trial Tr. 353-356; 360). Therefore, this Court finds Applicant has not and cannot prove he was prejudiced by this comment or Counsel's failure to object to it. Accordingly, this allegation is denied and dismissed with prejudice.

*Failure to Challenge Indictment*

Applicant alleges Counsel was ineffective for failing to challenge the indictment because the indictment did not name his co-defendant, Christopher Mixon. This Court disagrees and denies and dismisses this allegation with prejudice.

An indictment is valid under South Carolina law if it "contains the necessary elements of the offense intended to be charged and sufficiently apprised the defendant of what he must be prepared to meet." *State v. Guthrie*, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). "South Carolina courts have held the sufficiency of an indictment must be viewed with a practical eye. All the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached." *State v. Guthrie*, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). Thus, an indictment passes legal muster if it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. *State v. Reddick*, 348 S.C. 631, 560 S.E.2d 441 (Ct.App.2002). Importantly, it is not necessary that the co-conspirator be named in the indictment. *State v. Hightower*, 221 S.C. 91, 69 S.E.2d 363 (1952) ("While two or more persons must combine to constitute a conspiracy, the weight of authority is against the contention of appellant that it is essential that one or more coconspirators must be named in the indictment").

This Court finds the indictment contained the proper language from the statute such that it sufficiently apprised the Applicant of the charge against him, and that the indictment need not include the name of the co-conspirator. Accordingly, this Court finds Counsel was not ineffective for failing to challenge the indictment on that basis, and denies and dismisses the allegation with prejudice.

*Failure to Object to Solicitor's "Truth" Statement*

Applicant alleges Counsel was ineffective for failing to object to the following statement made by the solicitor: "You Determine what the Truth Is." This Court finds Applicant has failed to meet the burden imposed upon him, and accordingly denies and dismisses the allegation with prejudice.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of the victim is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence).

To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Brown v. State*, 383 S.C. 506, 680 S.E.2d (2009) (citing *Humphries v. State*, 351 S.C. 362, 373, 570 S.E. 2d 160, 166 (2002)).

To the extent, Applicant argues this is a *Beaty*[5] violation, this Court finds this argument not persuasive. As an initial matter, Applicant's trial began occurred prior to the South Carolina's decision in *Beaty* and Counsel is not expected to be clairvoyant in the law. *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). Even if *Beaty* was established legal authority at the time of Applicant's trial, *Beaty* would still not apply here as *Beaty* concerned jury charges given from trial court judges, not arguments from prosecutors. This statement in question was made by the solicitor during his closing argument, which is not considered evidence and not a charge of law to the jury.

To the extent Applicant contends this comment constitutes a Golden Rule violation or other improper statement, and that Counsel was ineffective for failing to object on that basis, this Court similarly finds the statement does not constitute a Golden Rule violation or other improper statement, and therefore, Counsel cannot be deemed deficient for not objecting. This statement does not ask the jury to put themselves in the victim's shoes, or the shoes of any party involved. The statement does not ask the jury to take into account any information not contained in the record. In fact, the solicitor goes on to say, "Now I can submit all day to you what the truth is, but y'all have to make that determination based on the facts and the evidence that comes before you, okay?" (Trial Tr. 71). Accordingly, this Court finds Counsel was not deficient for failing to object to the solicitor's statement.

This Court also finds Applicant has failed to establish how he was prejudiced by this alleged deficiency, as he has failed to show solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Brown v. State*, 383 S.C. 506, 680 S.E.2d (2009). As noted above, immediately after making the statement, the solicitor

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[5] See pages 10-11, *supra*.

informed the jury they must make the determination based upon the facts and the evidence. Moreover, as discussed above, the appellate courts of this state have held that even when such truth statements are made by judges during jury instructions and charges of law, they are harmless error, and therefore, this statement made by the solicitor on one occasion during his closing argument cannot plausibly be prejudicial error. The trial court informed the jury that the evidence only consisted of testimony from witnesses, any exhibits, and any stipulations or agreements of counsel. (Trial Tr. 356). The trial judge went on to tell the jurors that the judge was the sole judge of the law. (Trial Tr. 356). This Court finds Applicant has failed to meet the burden imposed upon him, and accordingly denies and dismisses the allegation with prejudice.

*Failure to Object to Solicitor's Alleged Witness Credibility Statements*[6]

It appears Applicant contends the solicitor made several witness credibility vouching statements during his closing arguments, and that Counsel was ineffective for failing to object, request a curative instruction, and move for a mistrial on that basis. More specifically, Applicant takes issues with the following statements:

(1) "But I submit to you that he [co-defendant and witness Christopher Mixon] is before you with no promises, no rewards, no hope for anything like that. He is simply here to tell you the truth and I believe you will find him in spite of his criminal record to be a credible witness." (Trial Tr. 73, l. 10-14);

(2) "They do their best. And I submit to you that Tyrone Goggins is a good, experienced, capable police officer and investigator as his sixteen years would document." (page 338, l. 25 – page 339, line 3); and

(3) "Okay. Now while we can prove, ladies and gentlemen, that crimes were committed, a lot of the who done it part is gonna come down – is gonna rise and fall on the believability in your minds of Christopher Mixon.

Should you believe him? That's the question you're gonna have to ask. I'm not asking you whether you should like him, I'm not asking you to take him home to Sunday dinner. All

[6] This section discusses allegations four, twelve, and thirteen of Applicant's amended PCR application.

I'm asking you to do is consider whether or not his testimony is worthy of your belief. Yes, he was convicted of several burglaries. Yes, he has charges arising from the same time frame, the same time frame as the burglary on Highway 72 that we're dealing with today, but he's pled guilty to a lot of charges, he's been sentenced, he's paid his debt, and he's still appearing before you, as he told you, to testify honestly.

Now you heard from Tyrone Goggins that Mr. Mixon made a statement to law enforcement on November 18th of 2011. Mixon apparently said on – well, he said on the witness stand he didn't remember making the statement. The defense has access to it. Don't you think if there had been some gross inconsistency with what he said back then and what he testified to in court we would have heard about it?"

(Trial Tr. 333, l. 2 – 334, l. 1).

This Court finds Applicant failed to meet the burden imposed upon him, and accordingly denies and dismisses the allegations with prejudice.

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994); *see also State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). A prosecutor should "prosecute with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." *New*, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." *Id.* "[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

"Generally, the assessment of witness credibility is within the exclusive province of the jury." *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Solicitors may not make explicit personal assurances or indicate there is information not presented which supports the testimony, i.e. vouch, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. *Id.*, 416 S.C. at 250, 785 S.E.2d at 477 (*citing Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004))

To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Brown v. State*, 383 S.C. 506, 680 S.E.2d (2009). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Id., citing Humprhies*, 351 S.C. at 373, 570 S.E.2d at 873. A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the Applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Id.*

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999), *abrogated on other grounds by State v. Wright*, 391 S.C. 436, 706 S.E.2d 324 (2011). A

mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris,* 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." *State v. Patterson,* 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.' " *State v. Rowlands,* 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct.App.2000) (quoting *Gilliam v. Foster,* 75 F.3d 881, 895 (4th Cir.1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. *State v. Council,* 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

This Court finds Counsel was not deficient as the comments were not improper witness credibility vouching statements. Counsel cannot be deemed deficient for failing to object to statements that are not improper. The solicitor made no personal assurances regarding the credibility of the witnesses, nor did he directly or indirectly assert he had personal knowledge of any information outside of the record that would support the witness's credibility. With respect to the solicitor's first statement regarding Christopher Mixon, the solicitor merely referred to Mixon's testimony in which Mixon indicated his pending charges were not affecting his decision to testify in Applicant's case. (Trial Tr. 152, l. 18-24). Moreover, with respect to the statement regarding Officer Goggins, the solicitor was attempting to counteract an argument presented by the defense, during which the defense questioned Goggins regarding alleged misconduct of other officers, as well as alleged traffic violations of Goggins, by addressing testimony given at trial. (Trial Tr. 303-305). More specifically, the solicitor merely used other information from the record, Goggins's sixteen years of law enforcement service, to counteract the defenses argument. (*See* Trial Tr. 261).

With respect to the third statement, the solicitor once again used the record to highlight why he believes the jury should find Christopher Mixon credible. In fact, the solicitor pointed to weaknesses of Christopher Mixon's history, namely his prior charges and pending charges, which were discussed during Mixon's testimony. The solicitor made no assurances or references to personal knowledge, and in fact, stressed that it was up to the jury to determine whether he was credible by stating, "should you believe him? That's the question you are going to have to ask...All I'm asking you to do is consider whether or no his testimony is worthy of your belief" (Trial Tr. 333, l. 6-10). Because these statements are not improper, Counsel is likewise not deficient for failing to ask for a mistrial. Even if these statements were improper, they do not rise to the level of manifest necessity warranting a mistrial. Accordingly, these comments are not improper, and therefore, Counsel cannot be deemed deficient for failing to object to the statements or move for a mistrial.

This Court finds that Applicant has failed to prove that he was prejudiced by Counsel's failure to object to the solicitor's statements, as Applicant has failed to show that the comments infected the trial with unfairness as to make his conviction a denial of due process. *See e.g. State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975); *Brown v. State*, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009). Moreover, Applicant has failed to show that a mistrial would have been granted if Counsel had moved for a mistrial. As discussed above, none of the statements rise to the level of manifest necessity required to warrant a mistrial. Accordingly, Applicant has failed to meet the burden imposed upon him, and therefore, this allegation is denied and dismissed with prejudice.

*Failure to Object to: "It looked all too familiar because it had just happened two weeks ago the same way."*

It appears Applicant argues Counsel was ineffective for failing to properly object to a statement in which the store owner insinuated his store had been broken into two weeks prior to the incident at issue in this PCR. This Court finds Applicant has failed to meet the burden imposed upon him, and accordingly denies and dismisses the allegation with prejudice.

Applicant takes issue with the following exchange:

Solicitor: "When you got to the store, what did you observe?"

Witness: "Well, I observed that there were lots of police cars and a broken window on the side of the building and it looked all too familiar because it had just happened two weeks ago the very same way."

Counsel: "Objection, Your Honor."

[....]

Counsel: "He's discussing a break-in that occurred at this store and at some point in the past."

Court: "Okay. Any relevancy of a prior –"

Solicitor: "No, sir. I would ask that that be stricken. That's fine."

**Court: "This is stricken from the record and consequently the objection is sustained."**

(Trial Tr. 95).

Applicant argues Counsel improperly objected to this statement because she did not request a sidebar, but instead objected on the record. This Court finds Applicant has not and cannot show he was prejudiced by this alleged deficiency, and therefore, addresses only the prejudice prong for this allegation. *Strickland*, 466 U.S. 668 (1984) (If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.).

As an initial matter, this Court notes that the statement did not implicate Applicant in the earlier burglary, and therefore, any argument that Applicant was prejudiced is highly speculative. This Court is not aware of any requirement that attorneys request a sidebar each and every time

they make an objection. The solicitor acknowledged Counsel's objection and even conceded to striking the testimony, and the trial court subsequently ordered the testimony be stricken. During the jury charge, the Court advised the jury: "If there was any testimony ordered **stricken** from the record in this case during the trial, **you must be disregard that testimony.**" (Trial Tr. 356) (emphasis added). The jury was properly advised to disregard the testimony, and accordingly, Applicant has not shown the proceeding would have been different had Counsel asked for a sidebar. *Cherry*, 300 S.C. at 117-18. Accordingly, this Court finds Applicant has failed to meet his requisite burden of proof, and denies and dismisses this allegation with prejudice.

*Failure to Object to Trial Judge's Statement Regarding the DVD*

Applicant alleges Counsel was ineffective for failing to object to the following statement from the trial judge: "Well, if he knows that the DVD is what he – he made a DVD according to his testimony and I would have to assume that Solicitor would not show him a DVD that was not made by him . . ." (Trial Tr. 100). This Court disagrees and denies and dismisses the allegation with prejudice.

This Court finds Applicant has not and cannot show he was prejudiced by this alleged deficiency, and therefore, addresses only the prejudice prong for this allegation. *Strickland*, 466 U.S. 668 (1984) (If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.). The record shows the defense had no valid objection to the DVD's authenticity in general, but the defense only objected to the extent they believed the DVD should be admitted as an exhibit by way of Officer Goggins, not the store owner, Mr. Patel. (Trial Tr. 99-100). The DVD was ultimately admitted as an exhibit by way of Officer Goggins. (Trial Tr. 274). To the extent Applicant alleges this statement created a blanket credibility statement regarding the solicitor, this Court is equally unpersuaded. Any such argument

that Applicant's trial was prejudiced by this statement would be highly speculative. This statement and Counsel's failure to object to it is substantially outweighed by the evidence Against Applicant. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Applicant has not shown the proceeding would have been different had Counsel objected to the statement. *Cherry*, 300 S.C. at 117-18. Accordingly, this Court finds Applicant has failed to meet the burden imposed upon him, and denies and dismisses the allegation with prejudice.

*Speedy Trial Allegation*

Applicant alleges he was denied his right to a speedy trial. This Court disagrees and denies and dismisses the allegation with prejudice.

Pursuant to both the United States Constitution and the South Carolina Constitution, an accused in a criminal prosecution has a constitutionally-guaranteed right to a speedy trial. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"); S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right to a speedy and public trial[.]"). That right is designed to protect against anxiety stemming from public accusation of a crime and to limit the possibility of a lengthy pre-trial delay impairing an accused's defense. *State v. Langford*, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012). However, the right to a speedy trial is chiefly designed to prevent undue pre-trial impairment of liberty. *United States v. Loud Hawk*, 474 U.S. 302, 312 (1986). Critically though, the criminal trial process is designed to move deliberately due to the many procedural safeguards involved, and, thus, the essential guarantee provided by the right to a speedy trial is the orderly expedition of a charge as opposed to mere speedy expedition. *United States v. Ewell*, 383 U.S. 116, 120 (1966); *see Beavers v. Haubert*, 198 U.S. 77, 87 (1905) ("The right of a speedy trial is necessarily relative. It is

consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.").

In order to trigger a speedy trial analysis, a criminal defendant's trial must have been delayed for a period of time that is presumptively prejudicial, which is necessarily dependent on the particular circumstances of each case. *Langford*, 400 S.C. at 442, 735 S.E.2d at 482. Notably, "a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case." *Id.* In South Carolina, a delay of over two years has previously been found to be sufficient to trigger a speedy trial analysis. *State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978). Likewise, the United States Supreme Court has suggested a delay of roughly one year could—in certain circumstances—be presumptively prejudicial. *See Doggett v. United States*, 505 U.S. 647, 652, n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."). However, even where a delay that is presumptively prejudicial exists, a speedy trial determination "is *not based on the passage of a specific period of time*" and delay alone is not singularly dispositive. *State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) (emphasis added).

Ultimately, once a speedy trial analysis has been triggered, the question of whether a defendant's speedy trial rights have been violated is necessarily dependent on the specific circumstances of the case. *State v. Robinson*, 335 S.C. 620, 625, 518 S.E.2d 269, 272 (Ct. App. 1999). When attempting to answer that question, several factors should be considered. *State v. Kennedy*, 339 S.C. 243, 249, 528 S.E.2d 700, 703-704 (Ct. App. 2000). Specifically, a court analyzing a speedy trial claim should consider: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) whether any prejudice was suffered by the

defendant as a result of the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Notably though, none of the four factors is alone necessary or sufficient for a finding of a speedy trial violation. *Id.* at 533. Instead, "they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.*

Even assuming *arguendo*, the speedy trial analysis was triggered in this case, Applicant has not established a speedy trial violation under the facts of this case. Applicant was arrested on or about November 22, 2011, and was indicted by the Laurens County Grand jury in February 2012. Applicant's trial commenced on June 9, 2014. Applicant had a related case pending in Newberry County, and Applicant received a few plea offers that would have disposed of both of these pending cases at once. These investigations coincided with each other and were intertwined. The record also indicates Applicant filed many motions to relieve counsel and had several different attorneys representing him throughout his case. (Trial Tr. 37). Accordingly, this Court finds Applicant has failed to establish a violation of his right to a speedy trial, and therefore, denies and dismisses this allegation with prejudice.

*Allegations Regarding Cell Phone Records*

In his application, Applicant alleges Counsel was ineffective for failing to investigate cell phone records and telephone tower records allegedly obtained by the prosecution. This Court disagrees and denies and dismisses this allegation with prejudice.

*Strickland* makes clear that defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness

[under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* Applicant is required to present evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

Applicant testified Charles Verner gave him a copy of an order authorizing cell phone tower records. Applicant could not recall whether or not he discussed this Order with Counsel. Counsel testified he was not aware of an Order authorizing access to telephone records and phone locations during her representation, and similarly was not aware of any records that might have been produced pursuant to that Order. Counsel testified Applicant did not give her the name of any witnesses or leads to investigate that she did not investigate. Scott testified he believed the prosecution did not obtain any cell phone or telephone tower records pursuant to the Order.

This Court finds Counsel's and Scott's testimony credible, while also finding Applicant's testimony on this issue credible only to the extent he testified she was aware an Order authorizing phone records and telephone tower records existed. Although an Order authorizing cell phone records and telephone tower appears to have been issued, this Court finds the evidence does not show records were ever obtained by the prosecution pursuant to this Order. *See Glover*, 318 S.C. at 498-99. It appears the prosecution did not obtain phone records or cell phone tower records pursuant to the Order, and therefore, neither the prosecution nor Counsel were in possession of any such records. Counsel investigated all of the disclosed discovery materials and performed an independent investigation. Applicant has not proven any such records would have placed him outside of the vicinity of the crime or otherwise helped his case. *See Glover*, 318 S.C. at 498-99. Applicant did not give Counsel any leads or witnesses to investigate that Counsel did not investigate. Accordingly, Applicant has failed to show Counsel was deficient.

Moreover, Applicant has failed to show how he was prejudiced by this alleged deficiency. Applicant has failed to show 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. Moreover, the alleged deficiency is substantially outweighed by the evidence against Applicant. In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018), *citing Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). As stated above, Applicant failed to produce any telephone records and show how they would have changed the outcome of his case. Accordingly, Applicant has failed to meet his burden as to both deficiency and prejudice, and therefore, this Court denies and dismisses this allegation with prejudice.

*Allegation of Ineffectiveness for Asking Witness if He Belonged to a Gang called "Boss"*

In his application, Applicant alleges Counsel was ineffective because she asked Christopher Mixon, a witness for the prosecution, whether Mixon belonged to a gang called "Boss."

On the defense's cross-examination of Christopher Mixon, the following exchange took place between Counsel and Mixon:

Counsel: "Okay. And were you a member of a gang back then?"

Mixon: "No, ma'am."

Counsel: "You weren't a member of the gang called Boss?"

Mixon: "No. Ma'am."

(Trial Tr. 180-181).

Later, the following exchange between Detective Tyrone Goggins and the solicitor took place:

Solicitor: "You were in the courtroom yesterday when [Counsel] was asking Christopher Mixon if he had belonged to a gang named Boss; is that right?"

Goggins: "Yes."

Solicitor: "Are you aware of any reference to anything referring to Boss as far as this case is concerned?"

[...]

Goggins: "That's what several individuals called [Applicant]."

(Trial Tr. 296).

It appears Applicant takes issue with Counsel's line of questioning because Mixon denied belonging to the "Boss" gang and because, according to Applicant, Counsel's question to Mixon resulted in Tyrone Goggins' testifying that Applicant was nicknamed "Boss." This Court finds Applicant has failed to meet the burden imposed upon him, and therefore, denies and dismisses this allegation with prejudice.

"Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (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. *Whitehead v. State*, 308 S.C. 119,

417 S.E.2d 529 (1992).

Counsel testified at the PCR hearing she asked Mixon this question with the intention of showing the jury that Mixon was not a credible witness due to his affiliation with a gang. Counsel acknowledged that this attempt was not successful per se because Mixon denied being a member of the gang.

This Court finds Counsel's testimony on this issue very credible. This Court also finds Applicant has failed to show how Counsel was ineffective for asking Mixon about his gang affiliation. First, Counsel was not deficient. Counsel articulated a reasonable and valid trial strategy for asking the question: to attempt to show that Mixon was not a credible witness for the State. Applicant cannot argue Counsel was ineffective merely because a strategy was unsuccessful. Accordingly, this Court finds Applicant has failed to show how Counsel was deficient.

Moreover, Applicant has failed to show how he was prejudiced by this alleged deficiency. Applicant has failed to show 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. Moreover, the alleged deficiency is heavily outweighed by the evidence against Applicant. In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018), *citing Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). Applicant was convicted based upon the compelling evidence against him, such as the testimony from his co-defendant, presence of his car, and video evidence, not based upon the testimony that Applicant was nicknamed "Boss." Applicant has

failed to meet the burden imposed upon him and therefore, this Court denies and dismisses this allegation with prejudice.

*Failure to Introduce Document Indicating Christopher Mixon Had a Driver's License, Failure to Object to NCIC document indicating Applicant Was the Owner of the Vehicle, and Failure to Object to Applicant's DMV Records*[7]

Applicant alleges Counsel was ineffective for failing to introduce a document indicating Christopher Mixon had a drivers' license, and Counsel was also ineffective for failing to object to Applicant's DMV records. Applicant also alleges Counsel was ineffective for failing to object to the NCIC document indicating Applicant was the owner of the Chrysler 300. It appears Applicant contends that Counsel should have used these actions to argue that Christopher Mixon must have been driving the car, and Applicant could not have been driving the car. Applicant also argues that because Counsel did not object to the DMV record and "demand[]" the State call a witness from the South Carolina DMV, she waived her right to confront a DMV witness about the information contained in the document. This Court finds Applicant has failed to show how Counsel was ineffective, and therefore, denies and dismisses this allegation with prejudice.

Counsel testified Odom never denied owning the Chrysler 300. This Court finds Counsel's testimony credible. This Court finds Applicant has not and cannot show he was prejudiced by this alleged deficiency, and therefore, addresses only the prejudice prong for this allegation. *Strickland*, 466 U.S. 668 (1984) (If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.). This alleged deficiency would not with reasonable probability change the outcome of the case as driving a vehicle to commit a burglary is not a requirement or element of burglary. Even if Mixon could have driven himself and Applicant to the BP station to commit the crime, Applicant would still be equally as culpable.

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[7] This section analyzes allegations seven, nine, and ten of the Amended Application.

To the extent Applicant alleges should have challenged the DMV/NCIC information indicating he was the owner of the vehicle, and therefore, his address was associated with the vehicle, this Court also finds Applicant cannot prove prejudice as Counsel testified Applicant never denied owning the vehicle found near the scene. This Court finds cross-examining a South Carolina DMB representative would not have changed the outcome of Applicant's case. Accordingly, Applicant has failed to establish prejudice, and accordingly, denies and dismisses this allegation with prejudice.

*Allegations Regarding Applicant's Decision Not To Testify*[8]

Applicant argues Counsel was ineffective because Counsel prohibited him from testifying at trial and because counsel "failed to properly preserve the record regarding which of the Petitioner's convictions could be used against him if he testified during the trial." Applicant alleges he wanted to testify at trial but did not do so because Counsel would not allow him, or alternatively, because he was not aware of what convictions could be used against him. This Court disagrees and denies and dismisses this allegation with prejudice.

It is ultimately solely Petitioner's decision whether to testify on his own behalf. *See* U.S. Const. Amend. V ("[n]o person ... shall be compelled in any criminal case to be a witness against himself"); *See generally Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000).

Rule 609 of the South Carolina Rules of Evidence states:

**(a) General Rule.** For the purpose of attacking the credibility of a witness,

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was

[8] This section analyzes the following allegations: (1) Amended Application: "Failure to properly preserve the record regarding which of the Petitioner's convictions could be used against him if he testified during the trial"; and (2) Original Application: "Applicant wanted to present a defense but wasn't allowed to."

convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

**(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

SCRE 609.

This Court finds Applicant has failed to meet his burden as to prejudice, and therefore, disposes of this allegation on that basis. *Strickland*, 466 U.S. 668 (1984) (If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.). As an initial matter, to the extent Applicant contends Counsel explicitly prohibited him from testifying, this Court finds this argument meritless, as Applicant was given a thorough colloquy regarding his Fifth Amendment rights. (Trial Tr. 319-322). As part of that lengthy colloquy, the Court informed Applicant: "You have the right to testify in your own behalf; however, no one can make you testify." (Trial Tr. 319).

Moreover, with respect to his amended allegation that Counsel was ineffective for failing to determine what convictions would have been used against Applicant had he testified, Applicant has failed to show that this alleged deficiency would have changed the outcome of the case with reasonable probability. Applicant failed to provide information regarding what his testimony would have been at trial, and how this testimony would have changed the outcome of his case with

reasonable probability. Any allegation that Applicant was prejudiced by this alleged deficiency is highly speculative. Accordingly, this Court denies and dismisses the allegation with prejudice.

**Conclusion**

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

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

**IT IS THEREFORE ORDERED:**

1. That the PCR application must be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of South Carolina Department of Corrections.

**AND IT IS SO ORDERED** this 2nd day of August, 2021.

J. MARK HAYES, II
Presiding Judge
Eighth Judicial Circuit

Laurens, South Carolina.