THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-10-494

King Conyers, #317737, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

King Conyers, Petitioner, appeals the attached Order of Dismissal issued by the Honorable Jennifer McCoy on April 24, 2023. Petitioner, through counsel, received notice of the entry of the Order on April 29, 2023.

Date: May 1, 2023

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
King Conyers, SCDC #317737, Applicant,	)	Case No.: 2018-CP-10-494
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

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S.C. SUPREME COURT

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JULIE J. ARMSTRONG
CLERK OF COURT
FILED

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by King Conyers (Applicant) on February 1, 2018. Respondent filed a return requesting an evidentiary hearing. On December 8, 2021, and September 16, 2022, an evidentiary hearing convened before the Honorable Jennifer B. McCoy. Applicant was present and represented by Christopher R. Geel, Esquire. Assistant Attorney General Lauren T. Mims represented Respondent. Following a thorough review of the records before this Court and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In November 2014, the Charleston County Grand Jury indicted Applicant for the murder of Melvin Simmons, Jr. (2014-GS-10-6484), first-degree burglary (2014-GS-10-6485), and possession of a firearm during the commission of a violent crime (2014-GS-10-6486).

On November 2, 2015, Applicant proceeded to a jury trial before the Honorable Kristi L. Harrington. Christopher L. Murphy, Esquire, represented Applicant, and Assistant Solicitors Jennifer K. Shealy and Daniel Cooper prosecuted the case. The jury found Applicant guilty as indicted. Judge Harrington sentenced Applicant to concurrent terms of life imprisonment for

murder and first-degree burglary, and five years' imprisonment for the weapon charge.

Applicant filed a timely notice of appeal. Appellate Defender David Alexander submitted a brief and motion to be relieved pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal pursuant to Anders. State v. Conyers, Op. No. 2018-UP-019 (S.C. Ct. App. filed January 10, 2018).[1] The remittitur was sent January 26, 2018.

SUMMARY OF PERTINENT TRIAL TESTIMONY

During trial, the State presented testimony from co-defendants Troy Mason and Mario Caldwell. According to Mason, he and Caldwell drove from Charleston to Charlotte the evening prior to the murder to pick up "Finger," whom he identified as Applicant's co-defendant Jeremiah Belton. (R. 246, 249-50). Thereafter, they picked up Curtis Delaney ("Crime"), then drove to Columbia and picked up "Bez."[2] (R. 250, 252). They returned to Charleston and went to a house "off Dorchester Road." (R. 254). While there, Bez discussed robbing someone he had "dealt with" before. (R. 255-56). Mason testified he, Caldwell, Belton, Delaney, and Bez drove to a house in McClellanville. (R. 258). They entered the victim's home with guns; once inside, Mason heard shooting in the back of the house. (R. 259-60). Mason was shot; he later had his mother drive him to the hospital. (R. 262, 266). Mason admitted he initially told investigators he was shot in Red Bank—a story he and Caldwell came up with before Mason went to the hospital. (R. 266-67). Mason later turned himself in; thereafter, he implicated Caldwell, Belton, and Bez. (R. 268-69).

Caldwell testified he drove to Charlotte to pick up Belton, and Mason rode with him. (Tr. 483). After picking up Belton, they picked up Delaney. (R. 484). Caldwell stated Belton

[1] While his direct appeal was pending, Applicant filed a pro se motion for a new trial pursuant to Rule 29(b), SCRCrimP. The State moved to dismiss, citing his pending appeal.
[2] During his testimony, Mason identified "Bez" as Applicant.

then drove to Columbia, where they picked up Bez. (R. 476, 487-89). He testified he had never met Delaney or Bez prior to this night. (R. 476, 485). Caldwell stated they returned to Charleston and stopped at a community called "The Hub"; at that time, Belton met up with two other guys that Caldwell did not know. (R. 492-93). He stated Bez discussed robbing someone. (R. 498). Thereafter, Caldwell, Mason, Bez, and Delany drove to a house in McClellanville, and Belton rode with the two other guys in a different car. (R. 499-502). The seven men met outside the house with guns. (R. 507-08). Caldwell testified Delaney, Mason, Belton, and Applicant went inside the home; Caldwell heard gunshots but never made it inside. (R. 508). He stated Delaney was shot, and Bez left him at the scene. (R. 512-13). Mason was also shot; Caldwell drove Mason to his mother's house. (R. 509, 515-16).

Constance Manigault testified she was dating Delaney in March of 2010. (R. 426-27). While dating Delaney, she met Delaney's friend "Bez"; during trial she pointed out Applicant and identified him as Bez. (R. 428-29). Manigault stated that after she met Bez, she entered his phone number—which ended in 9516—into her phone contact list. (R. 429). She stated she called Bez's phone on July 9, 2010, looking for Delaney. (R. 431). According to Manigault, Delaney called her from Bez's phone at 2:09 a.m. on July 10, 2010. (R. 432). Manigault testified she called Bez's phone later that morning looking for Delaney. (R. 433-44). After learning Delaney was dead, she called Bez's number again. (R. 434-35). She continued,

> And Bez returned my phone call at 11:29 that morning and I told him, you know, ...Crime is dead, and he said yes. He said he was crying all day Saturday. And I asked him who Curtis was with. He said he can't tell me because o the people was mixed up in some other stuff. And he also said that he doesn't want to be involved. I said, you're already involved because you know who he was with. I said you're going to tell me who he was with. But he continued saying no. He was saying . . . telling you who these people are won't bring Curtis back. I ask him . . . what was the number Crime called him from, but he said he had erased all his . . . call log because his girlfriend likes to go through this phone.

(R. 435-36). On cross-examination, trial counsel questioned Manigault about how many times she had seen Applicant before; she acknowledged it was only once. (R. 438). When pressed, Manigault acknowledged she did not know when she programmed Bez's number into her phone but maintained the number was entered in her phone as Bez's number. (R. 439-40).

In addition to the foregoing, the State presented testimony from Willis Walker, who was qualified over objection as an expert in call-detail analysis. (R. 892-913). According to Walker, the number ending in 9516 was registered as "prepaid customer" without a subscriber name. (R. 921). He stated the phone used cell phone towers in the West Columbia area on July 8-9. (R. 947-49). On July 10, the phone used cell phone towers near Orangeburg between 12:21 a.m. and 21:58 a.m. (R. 949-50). Between 2:48 and 2:59 a.m., the phone used towers in the Charleston area. (R. 951). Between 3:17 and 3:29 a.m., the phone used towers near the Mount Pleasant area. (R. 953).[3] At 5:20 a.m., the phone used a tower near Trident Hospital. (R. 958). At 5:26-5:27 a.m., the phone used a tower in the Goose Creek area. (R. 958-59). At 5:52 a.m., the phone used a tower in the North Charleston area. (R. 959). At 7:34 a.m., the phone used a tower in the Orangeburg area. (R. 960). Finally, at 8:21 a.m., the phone began using a tower in West Columbia, and continued using that tower throughout the day on July 10. (R. 960-61).

In addition to testifying to cell-tower mapping, Walker testified the 9516 number had several calls with Manigault's number, including calls at 2:09 a.m. and 12:29 p.m. on July 10. (R. 937-40). Likewise, the 9516 number had twenty-two calls with the phone associated with Belton between July 8-10, including calls at 11:16 and 11:41 p.m. on July 9; a call at 2:43 a.m. on July 10; and five calls between 5:31 and 5:36 a.m. on July 10. (R. 942-44).

ALLEGATIONS RAISED AND RELIEF SOUGHT

In his PCR application, Applicant alleges he is being held in custody unlawfully for the

[3] Over objection, the State admitted a map of the various cell towers utilized by the phone. From the testimony alone, it's not entirely clear where all of the towers were located.

following reasons:

a. Ineffective assistance of counsel: "Counsel abandon[ed] applicant at critical stages of trial and failed to present an alibi defense."

b. Violation of 4th Amendment: "Counsel failed to appear of Frank's hearing/separate trial hearing."

c. Counsel errors rendered trial and appeal fundamentally unfair: "Counsel failed to object and presence as well as lack of investigation."

Prior to the evidentiary hearing, Applicant filed an amended application raising the following allegations:

1. Failure to prepare, investigate, communicate, and present a defense:

   a. Trial counsel was constitutionally ineffective when he failed to investigate, prepare, and present an alibi defense; failed to interview Applicant's alibi witness; failed to move for a continuance when Applicant's alibi witness did not appear for trial; and failed to ask Applicant about his alibi when he testified.

   b. Trial counsel was constitutionally ineffective when he failed to investigate and prepare for trial regarding the telephone evidence presented at trial. (Tr. 429, 436, 886-992, 920, 1016). Trial counsel failed to investigate Applicant's claim that the cell phone evidence that was used against him at trial was not his cell phone. Trial counsel failed to present testimony that Applicant was not the owner/user of the phone number as alleged at trial.

   c. Trial counsel was constitutionally ineffective when he failed to investigate and prepare for trial by failing to communicate with Applicant, failing to provide Applicant his Rule 5 discovery materials and/or review the materials with Applicant, failing to meet with Applicant at the jail, and not allowing Applicant reasonable access to information that was needed in order to make informed, knowing, and voluntary decisions regarding his case.

   d. Trial counsel was constitutionally ineffective when he failed to fully prepare the Applicant to testify at trial. (Tr. 1058-61).

2. Failure to appear at critical states of trial and ensure Applicant's presence during critical stages of trial:

   a. Trial counsel was constitutionally ineffective when he failed to appear at critical stages of the case. (October 27, 2015 motions hearing).

   b. Trial counsel was constitutionally ineffective when he failed to ensure that Applicant was present for critical stages of the case. (Tr. 606, October 27, 2015 motions hearing).

3. Failure to object to trial evidence and argument

a. Trial counsel was constitutionally ineffective when he failed to challenge and/or move to exclude the in-court identification of King Conyers by Constance Manigault. (Tr. 428-29).

b. Trial counsel was constitutionally ineffective when he failed to object to improper inflammatory remarks by the State during closing argument. (Tr. 1125).

4. Failure to join co-defendant's motion: Trial counsel was constitutionally ineffective when he failed to join the co-defendant's pre-trial severance motion.

5. Appellate counsel's failure to raise meritorious appellate issues: Appellate counsel was constitutionally ineffective when he failed to challenge the qualification of the State's expert witness on appeal. (Tr. 892-913).

6. Newly-Discovered and Newly-Available Evidence: Applicant is entitled to PCR based on newly-available and newly-discovered evidence and testimony from co-defendants Jeremiah Belton and Troy Mason. This evidence exonerates Applicant and was not available to Applicant at the time of trial, either because the co-defendant was not available at trial (Belton) or because the co-defendant has since recanted his trial testimony (Mason).

At the PCR hearing, Applicant proceeded on the allegations in his amended application.

<u>TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING</u>

At the PCR hearing, Applicant testified he met with counsel "at least three or four times," for "ten, fifteen minutes, maximum." (PCR 67). Applicant stated he told counsel about his alibi witness, Vondayna Brown, from the beginning and provided counsel her contact information. (PCR 68).

Trial counsel testified he was appointed to Applicant's case and had "plenty of time" to prepare. (PCR 32). He recalled the State's evidence indicated "five guys went to this house in Georgetown and there was a shootout over some drugs." (PCR 32). Counsel testified "[t]he evidence showed that [Applicant], Belton, and another fellow were partying in North Charleston, drove up to Columbia and then to Charlotte and back to Charleston." (PCR 33). He stated Applicant denied being there or having anything to do with the crime, which "didn't make any

sense with the evidence against him." (PCR 33). Trial counsel testified his biggest problem was that Applicant denied knowledge of anything that happened, which was not helpful. (PCR 33). He stated Mason and Caldwell were going to testify and place Applicant at the scene. (PCR 34). Additionally, the State had GPS data from a phone Applicant was using that "pinged" cell phone towers "from North Charleston all the way up to Charlotte and back down and then back up to Georgetown." (PCR 34). Trial counsel recalled challenging the qualifications of the cell phone expert, but the trial court overruled his objection. (PCR 35).

Trial counsel stated the State's evidence indicated Applicant did not go inside the home with a gun, and counsel's strategy was to shorten the timeline as much as he could. (PCR 36). He stated,

> When you looked at the whole scope of things, having [Applicant] testify or his wanting to testify that he had nothing to do with anything, he wasn't in North Charleston, he didn't drive up to Columbia, didn't make any sense. And what I was trying to explain to [Applicant] is, what makes sense is you were involved in the beginning. You drove to Georgetown, but you didn't go in the house and didn't fire any shots and didn't have anything to do with the actual murders.
>
> But he refused. He said he just wasn't there. So we had this inconsistency at trial and what his position was.

(PCR 36). Counsel explained he struggled with a strategy because he had to "go with what the client wants, even though it didn't make any sense." (PCR 55). He stated their theory was Applicant was not there, which "was kind of a silly proposition because all the evidence, a lot of it indicated he was there." [4] (PCR 55).

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the records before it, including the records of the Charleston County Clerk of Court regarding the underlying convictions, Applicant's

[4] This Court will reference additional PCR testimony where relevant below.

records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the records from this PCR action. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that 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.

Alibi

At the PCR hearing, Applicant testified he told counsel about his alibi witness from the beginning and provided counsel her contact information. (PCR 68). According to Applicant, Brown would have testified Applicant was with her at her niece's birthday party the night of the murder. (PCR 75-76). Applicant recalled learning at trial that Brown's sister was available to testify and dispute his alibi defense. (PCR 68). Applicant stated he "continually" asked counsel what happened to Brown, but counsel did not provide an answer. (PCR 75).

Brown testified she was in a relationship with Applicant in 2010 and they lived together. She recalled his normal schedule involved leaving for work around 7:00 to 7:30 a.m. and returning home by 5:00 p.m. Brown further testified Applicant would typically walk to a convenience store after getting home to purchase beer. She recalled July 9, 2010, because that was her niece's birthday party. Brown stated Applicant was with her at the birthday party that evening; they left their house around 5:00 p.m. to go to the party.

Brown stated she learned Applicant had been arrested when he called her from prison. She stated she asked him how he did "something on July the 10th when [he was] at a birthday party." Brown stated she indicated she could testify for him because she knew he "didn't do it because [they] were together." She testified trial counsel called her the day before Applicant's trial and asked her to testify; however, her car broke down on the way to court.

Trial counsel testified Brown was the only person Applicant asked him to interview. (PCR 54). He stated he notified the State that he was going to present an alibi defense. (PCR 36). Trial counsel stated he contacted Applicant's employee and learned Applicant was off of work the two or three days around the incident; therefore, he "couldn't call those folks as a witness because they weren't going to say [Applicant] was working the day of this incident." (PCR 37).

Trial counsel also explored presenting an alibi that Applicant was at a birthday party on the night of the murder. (PCR 37). He testified he spoke to Brown and was prepared to call her as a witness; however, he did not subpoena her because he expected her to voluntarily appear. (PCR 37, 44). Counsel recalled Brown had car trouble on the day of trial and could not attend. (PCR 44). Counsel testified he did not move for a continuance because he believed Brown's testimony would have opened the door for the State to call Brown's sister as a rebuttal witness. (PCR 44). Counsel explained he spoke to Brown's sister, who "was adamant [Applicant] was not at that birthday party." (PCR 44). Trial counsel testified, "[K]nowing that the sister was gonna come in and say that Ms. Brown and [Applicant] are lying about this, there was no need [to request a continuance]. I didn't have any heartburn about her not coming up and testifying about this." (PCR 45). Counsel stated he planned to call Brown as a witness prior to talking to Brown's sister, but after speaking with the sister and "eyeball[ing] her and hear[ing] her story, there was no way [he] was calling anybody else to claim . . . these folks were at the birthday party." (PCR 45).

Assistant Solicitor Jennifer Shealy, who prosecuted this case, testified she spoke to Brown's sister prior to trial and was prepared to call her as a rebuttal witness if Applicant or Brown testified Applicant was at the party the night of the murder. (Sept. 2022 Tr. 25, 27-29).

This Court finds Applicant has failed to prove counsel was ineffective in his preparation and investigation of an alibi defense. Counsel **credibly** testified Brown was the only person Applicant asked him to interview, and he interviewed Brown and was prepared to call her as an alibi witness. Consistent with counsel's testimony in this regard, Applicant did not testify to any other person he wanted counsel to call to establish an alibi (other than himself and Brown). This Court finds counsel's investigation and preparation of this alibi defense was reasonable under prevailing professional norms, and Applicant has not shown counsel was deficient.

Further, this Court finds Applicant did not show counsel was deficient for failing to move for a continuance when Brown did not appear for trial. This Court finds **credible** counsel's testimony that the State was prepared to call Brown's sister as a rebuttal witness if Brown or Applicant testified Applicant was at the party. This Court further finds **credible** counsel's testimony that Brown's sister was adamant Applicant was not at the party, which would have been damaging to Applicant's alibi defense and his overall case. Based on the foregoing, counsel articulated a valid reason for not requesting a continuance to procure Brown's testimony. Likewise, trial counsel articulated a valid reason for not questioning Applicant about his alibi defense when Applicant testified—specifically, counsel **credibly** testified he was concerned that the State would use Brown's sister to undermine Applicant's testimony. Applicant has not overcome the presumption that counsel's decisions related to the alibi defense were within prevailing professional norms; thus, Applicant has not shown counsel was deficient.

Finally, this Court finds Applicant has not shown prejudice from counsel's failure to call Brown as a witness. This Court had the opportunity to assess Brown's and Applicant's demeanor and finds their testimony that Applicant was at the birthday party that evening to be **not credible**. This Court notes Brown was in a relationship with Applicant and lived with him at the time this murder occurred. This Court also notes Brown's testimony that Applicant worked

the day of the murder contradicted what trial counsel **credibly** testified he discovered when talking to Applicant's employer. Further, based on State's evidence against Applicant, as well as counsel's and the solicitor's **credible** testimony that the State had a rebuttal witness that would undermine this alibi defense, this Court finds Applicant has not shown a reasonable likelihood exists that the outcome would have been different had Brown and Applicant testified to this alibi defense. Thus, this claim is denied.

Phone evidence

At the PCR hearing, Applicant recalled that trial counsel told him the State had "some cellphone numbers, none linking to [Applicant]." (PCR 70). He testified he lived in Columbia at the time and did not have an "843" number.[5] (PCR 77-78). Applicant stated he told counsel to look through that phone to see if that number had contacted any of Applicants' family members or his girlfriend. (App. 81-82). Applicant agreed Manigault testified at trial that Applicant used the phone but maintained he did not know Manigault. (PCR 84).

Brown testified she was not aware that Applicant had a phone ending in 9516. She stated she owned an Android phone that she shared with Applicant; that number did not end in 9516.

Counsel recalled the State had a phone that it alleged Applicant used the night of the murder, but Applicant denied the phone was his. (PCR 46). However, counsel explained ownership of the phone wasn't the issue because the State's evidence indicated Applicant had that phone and was using it to send texts. (PCR 46-47). He averred there was "very little evidence" that the phone belonged to Applicant. (PCR 35).

This Court finds Applicant has failed to overcome the presumption that counsel provided effective assistance in this regard. This Court agrees ownership of the phone wasn't the primary issue; rather, the issue was who was using the phone the night of the murder. The primary

[5] The number the State relied on at trial began with "843" and ended in "9516."

evidence the State relied on in establishing who used the phone that night was Manigault's testimony that she entered the 9516 number in her phone as "Bez," Delany contacted her from that number the night of the murder, and she spoke to Bez on that number the next day about Delaney's death. (Tr. 429, 431-36). This Court finds counsel did an effective job of cross-examining Manigault about her identification of Applicant as Bez. Specifically, he elicited testimony that Manigault had only met Bez once before and she could not recall when she entered Bez's number in her phone. (Tr. 438-40). Ultimately, the issue of whether Applicant was in fact "Bez" was a question of fact for the jury. Based on evidence showing Applicant was using the phone, this Court finds counsel's decision to not further explore ownership by looking at numbers the phone may have used was reasonable within prevailing professional norms. Thus, Applicant has not shown deficiency.

Further, this Court finds it is not reasonably likely the outcome of Applicant's trial would have been different had counsel further challenged ownership of the phone. The testimony presented at trial showed Bez—whom several witnesses identified as Applicant—was using the phone on the night of the murder, regardless of who owned it. Notably, one does not need to *own* a phone to *use* it. This Court finds further information about the contacts in the 9516 phone would not have reasonably changed the outcome of trial, especially in light of the fact people can own more than one phone or borrow other people's phones. Thus, Applicant has not shown prejudice.

<u>*Failed to Communicate/Review Discovery*</u>

Applicant stated he never received "a motion of discovery." (PCR 70). However, he recalled that trial counsel told him two of his co-defendants would testify against him and the State had "some cellphone numbers, none linking to [Applicant]." (PCR 70).

Trial counsel stated he typically sends multiple letters to clients explaining the State's evidence. (PCR 38-39). Although he typically does not visit clients a lot in jail, he testified he talks to them on the phone and through letters. (PCR 39). Counsel stated he generally provides clients as much discovery as he can. (PCR 39). In this case, however, there were "boxes of documents." (PCR 39). Counsel explained "[a] lot of it was just cell phone records from all those folks who didn't have anything to do with it, so [he] wouldn't have given [Applicant] those, just because they wouldn't have made any sense." (PCR 39). He stated he would not have sent all of the boxes of information, but he would have sent Applicant the most pertinent stuff. (App. 39-40).

This Court finds **credible** trial counsel's testimony that he communicated with Applicant through phone calls and mail about the State's evidence and provided Applicant the most pertinent discovery. This Court further notes Applicant himself testified to discussing his co-defendants' testimony and cellphone records with counsel, which this Court finds was the most damaging evidence presented against Applicant at his trial. Counsel's discussions with Applicant about his discovery were reasonable under prevailing professional norms; thus, Applicant has not shown counsel was deficient. Further, Applicant has failed to set forth what *additional* discovery he believes counsel should have discussed with him, and how discussing that alleged additional discovery would have changed the outcome of this trial. Thus, Applicant has not shown prejudice, and this claim is denied.

Failed to prepare Applicant to testify

Applicant stated they reviewed his potential testimony "in that ten-minute time span" at trial, but he did not know what counsel would ask him or what he would say. (PCR 75). He maintained he had an alibi and stated he was at a birthday party that evening. (PCR 75-76).

Applicant testified he expected counsel to ask him whether he was at the party and with Brown that weekend, but counsel never did. (PCR 75-76).

Counsel stated he "definitely" spoke with Applicant about his right to testify and told him his "only chance . . . of getting out of this is by testifying." (PCR 55). He stated they discussed Applicant's potential testimony and he told Applicant, "[Y]ou're gonna have to explain where you were, why you weren't there, and it's gonna have to make sense, and he wasn't able to do that." (PCR 55). Trial counsel testified he believed Applicant would testify he was not present at the crime as part of his alibi defense, and he discussed that with Applicant prior to trial. (PCR 38). Counsel stated he explained to Applicant that he could not claim he was at the birthday party "because that sister's going to bury you if you claim that." (PCR 45). He was concerned that Applicant would open the door for the sister's testimony when he testified. (PCR 45-46).

This Court finds **credible** counsel's testimony that he discussed with Applicant his right to testify. This Court further finds **credible** counsel's foregoing testimony about the advice counsel provided to Applicant about his testimony. This Court finds counsel's advice to Applicant to *not* testify he was at the party was reasonable under prevailing professional norms based on counsel's **credible** testimony about what Brown's sister was expected to testify to on rebuttal. Likewise, in light of the circumstances and Applicant's insistence he was not present when counsel testified the evidence showed otherwise, this Court finds counsel's advice overall was reasonable under prevailing professional norms. Thus, Applicant has not proven deficiency.

Additionally, Applicant has not set forth what additional advice counsel should have provided regarding his testimony. As this Court previously found, counsel articulated a valid reason for not eliciting testimony that Applicant was at the birthday party. Other than questioning him about being at the birthday party, Applicant has not set forth what he believes

counsel should have elicited from him or what advice he believes counsel should have provided. Thus, Applicant has failed to prove any prejudice in this regard, and this claim is denied.

Failed to join motion to sever;
Failed to appear/ensure Applicant's appearance

Applicant testified his co-defendant, Belton, filed a pretrial motion to sever; however, Applicant did not recall whether counsel ever discussed Belton's motion to sever with him. (PCR 71-72). Applicant stated he was transported to court for the motion hearing, and he believed it was both his and Belton's motion. (PCR 71-72). However, he testified "they told [him he] had to go back because [his] attorney wasn't present." (PCR 71). Applicant testified he never gave counsel permission to waive his presence at any point during his jury trial. (PCR 73).

Trial counsel stated he rarely sought motions to sever and would not have in this case because he believed Applicant was the least culpable of the co-defendants. (PCR 40). When asked if he joined in with Belton's motion to sever, counsel replied, "Probably not." (PCR 40). He explained that at trial, he wanted "the State to be focused on the other guy and not necessarily [Applicant]." (PCR 40). Had the trials been severed, "all the focus would be on [Applicant]." (PCR 40). Counsel did not recall a hearing on Belton's motion to sever. (PCR 40). After reviewing a transcript from Belton's pretrial hearing, trial counsel agreed he and Applicant were not there. (PCR 41). Counsel explained it was not his motion and he may not have received notice of it. (PCR 41-42). He could not recall whether he was notified of that hearing but reiterated he did not want to sever Applicant's case from Belton's. (PCR 42).

Counsel reviewed page 606 of the trial transcript and agreed he waived Applicant's appearance during that "motion." (PCR 43). He did not recall discussing that with Applicant but stated, "I probably did not ask him." (PCR 43). Counsel stated it would be common for him to waive his client's appearance at a motion hearing like that one. (PCR 43).

This Court finds counsel articulated a valid strategy for not moving to sever the trials and thus was not deficient in this regard. Specifically, counsel **credibly** explained he did not want to sever the trial because he believed Belton was more culpable, and the jury would be less focused on Applicant if Applicant was tried with Belton. This Court finds this is a valid strategy, and Applicant has failed to rebut the presumption that this strategy fell within prevailing professional norms. Further, because counsel and Applicant did not join in the motion, this Court finds counsel's failure to ensure he and Applicant were present at Belton's motion hearing did not fall below prevailing professional norms. Thus, Applicant did not prove deficiency.

Likewise, Applicant has not shown a reasonably likelihood the outcome would have been different had counsel joined in the motion to sever or ensured Applicant's attendance at the hearing. Ultimately, Applicant and Belton were tried together, meaning any motion to sever was denied.[6] Thus, this Court finds Applicant has not shown prejudice in this regard. Overall, counsel articulated a valid strategy for not seeking to sever Applicant's trial from Belton's and thus was not ineffective in this regard.

Finally, Applicant has not shown counsel was ineffective for "waiving" his appearance at trial. The "motion" referenced by Applicant on page 606 of the trial transcript occurred on the start of the third day of trial, when the solicitor informed the Court she intended to call as an additional witness a custodian of records from the clerk of court's office. The custodian of records had pulled a 2002 murder arrest warrant for Applicant, and the State sought to call her to establish that Applicant once lived in McClellanville—where this murder occurred. (R. 603). Trial counsel objected, arguing it was highly prejudicial and hearsay. (R. 603-04). The Court indicated it would allow limited testimony that, according to the document, Applicant had lived in McClellanville, but it would not allow testimony about *what* the document was. (R. 604-05).

[6] Applicant did not present evidence of what actually happened at that hearing.

At the conclusion of the hearing, the Court noted Applicant was not present and asked if counsel waived Applicant's presence. (R. 606). Counsel responded, "Yes, I have."

This Court finds the foregoing portion of trial was not a critical stage of trial. Further, under these circumstances, this Court finds Applicant has not shown counsel's conduct fell below prevailing professional norms. Counsel argued against the admissibility of the testimony, but the trial court allowed limited testimony about where the document indicated Applicant had lived. If counsel had indicated to the court he was *not* waiving Applicant's appearance for that limited hearing, it is not reasonably likely the court would have changed its ruling on this issue. This Court notes nothing indicates Applicant was not present when the clerk of court testified or at any other stage of trial. At the PCR hearing, Applicant pointed only to this objection—heard outside the presence of the jury—to support his assertion that counsel waived his appearance. Given the limited scope of this objection and the circumstances under which it was raised, this Court finds Applicant did not prove counsel was ineffective for waiving Applicant's appearance. Thus, this claim is denied.

Failed to challenge in-court identification of Constance Manigault

At the PCR hearing, Applicant testified he did not know who Manigault was, and it surprised him that she identified him in court. (PCR 78). He stated counsel "mentioned a name, and I told them that I didn't know who that was." (PCR 79). Applicant agreed he and counsel discussed the fact that Manigault may identify him in court. (PCR 79).

Trial counsel testified he did not specifically recall Manigault's testimony. (PCR 47). When asked whether he considered challenging her in-court identification of Applicant, he replied, "I don't recall doing it and probably not. I wouldn't have known what to challenge because she said that's him." (PCR 48). He acknowledged he did not request a pretrial Neil v. Biggers hearing; when asked why, counsel explained, "I didn't think it was going to be fruitful at

all." (PCR 49). He stated he does not typically "just throw out motions because I can, just the same way I don't make objections because I can. I want to make sure that if I'm gonna do something, it has merit and it has a strong probability of success." (PCR 49). Trial counsel also explained that in jury trials, he does not want to make objections that will be overruled because the jury may think he's trying to hide something. (PCR 51). He averred objections can "bring more attention and more focus to whatever issue it is." (PCR 52).

This Court finds Applicant failed to prove counsel was ineffective for not further challenging Manigault's in-court identification. Nothing in Manigault's testimony and nothing presented by Applicant at the PCR hearing suggested Manigault's identification was based on an unduly suggestive police procedure. See State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) ("In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification."); id. ("Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed."). Rather, the crux of Manigault's testimony was she had previously met Bez and entered Bez's number into her phone, and Delaney called her from Bez's phone on the night of the murder.

Further, this Court finds counsel articulated a valid reason for not further challenging Manigault's identification in that he did not want to raise a frivolous objection that may get overruled and cause the jury to think he was hiding something. Notably, trial counsel *did* challenge Manigault's identification of Applicant on cross-examination by eliciting an admission that she only met Applicant once prior to this occasion and she could not recall when she entered Bez's number into her phone. This Court finds counsel's challenge of Manigault's identification

through cross-examination was reasonable within prevailing professional norms, and Applicant failed to prove counsel was deficient.

Likewise, this Court finds it is not reasonably likely the outcome of trial would have been different had counsel further challenged Manigault's in-court identification. Even if her in-court identification had been suppressed (which Applicant has not proven was reasonably likely), Manigault would have still been able to testify that she entered the number of someone named Bez into her phone, and Delaney called her from Bez's number the night of the murder. The State had other witnesses identify Bez in court and/or testify that Applicant's nickname was Bez. (R. 244-45, 318, 447-48, 476-77, 577). Thus, even if Manigault's identification had been challenged and suppressed, it is not reasonably likely the outcome of this trial would have been different, and Applicant did not prove prejudice.

Failed to object to State's closing argument

In his application, Applicant avers counsel was ineffective for not objecting to the State's closing argument. In support, Applicant pointed to one page (1125) of the State's nearly twenty-page closing argument. When questioned about this at the PCR hearing, trial counsel explained that especially in jury trials, he does not want to make objections that will be overruled because the jury will look at him like he's trying to hide something. (PCR 51). He also averred objections can "bring more attention and more focus to whatever issue it is." (PCR 52). Counsel explained,

> This was a week-long trial. And as with every trial, . . . the jurors are tired, they want to get out. They're not listening as closely as they were at the beginning, and I don't want, unless something is incredibly damaging and just completely off the walls wrong, I'm not going to object at closing.

(PCR 52).

This Court finds Applicant has failed to prove counsel was ineffective in this regard. First, this Court finds the solicitor's comments on page 1125 related to the "snitching code" was not improper. See Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) ("A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom."). Likewise, this Court finds the solicitor's comments did not appeal to the personal biases of the jury; were not calculated to arouse the jurors'' passions or prejudices; and were based on reasonable inferences from the trial testimony. See id. This Court further finds counsel articulated a valid reason for not objecting to this argument in that he did not believe an objection here would be successful and he did not want the jury to think he was trying to hide something. (PCR 50-51). This Court agrees that an objection here would have made the jury think he was hiding something, and this Court further agrees the argument here did not rise to the level of warranting an objection. Thus, Applicant did not prove counsel was deficient.

Further—and critically—nothing on page 1125 of the transcript "so infected the trial with unfairness as to make the resulting conviction a denial of due process." See Brown, 383 S.C. at 515-16, 680 S.E.2d at 914-15 ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. 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."). Any statement on page 1125 must be considered in the context of the State's nearly twenty-page closing argument. Overall, this Court finds this argument did not amount to a due process violation, it is not reasonably likely the outcome would have been

different—either at trial or on appeal—if counsel *had* objected to this argument, and Applicant has failed to prove prejudice.

Ineffective Assistance of Appellate Counsel

In his amended application, Applicant contends appellate counsel was ineffective for not raising as an issue a challenge to Willis Walker's qualification as an expert in call-detail analysis. This Court finds Applicant has not proven appellate counsel was ineffective in this regard.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). "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 . . ." Jones v. Barnes, 463 U.S. 745, 754 (1983).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Southerland v. State, 337 S.C. at 616, 524 S.E.2d at 836. Thus, an applicant must prove 1) appellate counsel's performance was deficient, and 2) the applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show 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).

At the PCR hearing, appellate counsel recalled reviewing Walker's testimony. He agreed trial counsel preserved an issue related to Walker's qualification as an expert. However, appellate counsel did not believe that issue had much merit.

This Court finds Applicant has failed to prove appellate counsel was ineffective for not raising this issue on appeal. Appellate counsel testified he did not believe this issue had merit. This Court agrees and finds Applicant failed to overcome the presumption that appellate counsel's decision here fell within prevailing professional norms. Specifically, Applicant did not set forth any additional argument or law to support his mere contention that appellate counsel should have raised this issue. Thus, Applicant has failed to prove deficiency.

For the same reason, Applicant has not proven prejudice. Applicant did not set forth any case, statute, or other relevant law to support his contention that this issue should have been raised. Additionally, this Court finds Walker's testimony at trial that he had been an intelligence analyst since 2009; he used call-detail logs as part of his job; he received training on using call logs at Quantico, in Charlotte (one week), in Atlanta (three days), and in Columbia (several days); he received over sixty hours of training in mapping software; he had taught seminars on using cell-phone data; and he had analyzed more than 100 call-detail logs was sufficient for the trial court to qualify him as an expert in call-detail analysis. (Tr. 885-88, 895-900). See Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). In the absence of additional law, Applicant has not met his burden of proving the outcome would have been different if appellate counsel had raised this issue on appeal. Thus, this claim is denied.

Newly-Discovered Evidence

In his application, Applicant alleges he is entitled to relief based on newly-discovered evidence. Specifically, Applicant alleges:

> Applicant is entitled to PCR based on newly-available and newly-discovered evidence and testimony from co-defendants Jeremiah Belton and Troy Mason. This evidence exonerates Applicant and was not available to Applicant at the time of trial, either because the co-defendant was not available at trial (Belton) or because the co-defendant has since recanted his trial testimony (Mason).

The Uniform PCR Act provides a person may institute a PCR action if "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice". S.C. Code Ann. § 17-27-20(A)(4). To warrant a new trial, an applicant must show the newly-discovered evidence

(1) Is such as would probably change the result if a new trial was had;
(2) Has been discovered since the trial;
(3) Could not by the exercise of due diligence have been discovered before the trial;
(4) Is material to the issue of guilt or innocence; and,
(5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983).

Belton

At the PCR hearing, Belton—Applicant's co-defendant—testified he was also convicted of these charges. (PCR 27). He stated he had an alibi witness that his lawyer did not call. (PCR 28). Belton stated that during his PCR hearing, he testified he was not present at the crime scene. (PCR 28). When asked if he had any evidence regarding whether Applicant was at the crime scene, Belton initially stated, "Not at no crime scene." (PCR 29). He then testified he was not with Applicant. (App. 29). Belton testified he traveled from Charlotte to Columbia to Charleston the night of the murder and was with "the individuals who were at the crime scene

prior to their going to the crime scene." (App. 30). Belton testified Applicant was not with his group. (App. 30).

This Court finds Belton's testimony does not meet the threshold for newly-discovered evidence. Notably, Belton testified he was *not* at the crime scene; he also testified he was *not* with Applicant. Thus, Belton could not offer any testimony as to whether *Applicant* was at the crime scene. Based on Belton's testimony that he was not with Applicant, any alibi witness Belton may have had is not germane to the issue of whether *Applicant* was at the crime scene. Overall, this Court finds Belton's testimony would not have changed the outcome of Applicant's trial. Likewise, this Court finds Belton's testimony was not material to Applicant's guilt or innocence. Thus, Applicant has not met his burden of proving he is entitled to a new trial based on Belton's testimony.

Mason

Applicant called Mason as a witness, and Mason asserted his Fifth Amendment right against incrimination and refused to testify. (Sept. 2022 Tr. 12). In response, Applicant moved to enter into evidence a statement[7] from Mason, Mason's testimony from Belton's PCR hearing, and the circuit court order granting Belton's PCR application. The State objected to the admission of Mason's affidavit and testimony from Belton's PCR hearing, asserting it was hearsay and not admissible under Rule 804, SCRE. The State further contended that at the time of Belton's PCR hearing, it did not have notice that it would need to cross-examine Mason about anything related to Applicant's case. The PCR court accepted the documents as court exhibits for appellate review purposes but deferred ruling on their admissibility at the hearing.[8][9]

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[7] Although this statement purports to be an affidavit, it is not notarized.
[8] Both parties submitted briefs regarding the admissibility of the documents.
[9] Based on this Court's prior finding that any alibi Belton may have had would not be germane to the issue of whether Applicant was at the crime scene, this Court finds the order granting Belton post-conviction relief is not relevant to Applicant's PCR proceeding.

This Court finds Mason's statement and testimony from Belton's PCR hearing are not admissible. Specifically, they do not meet the Rule 804(b)(1), SCRE, exception to hearsay. First, under the plain language of Rule 804(b)(1), the written statement is not admissible because it is not "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law." Rule 804(b)(1), SCRE.

Further, Mason's testimony from Belton's PCR proceeding is not admissible under Rule 804(b)(1) because the State did not have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Id. At the time of Belton's PCR hearing, there was no indication that Applicant would seek to introduce or use Mason as an alibi witness. Applicant filed his PCR application on February 1, 2018; in that application, Applicant did not raise any allegations involving Mason. The State dis not have notice that Applicant would proceed on any allegations of newly discovered evidence from Mason's testimony until Applicant filed an amended application on November 29, 2021—approximately one week before Applicant's evidentiary hearing. The testimony Applicant seeks to admit was obtained during Belton's evidentiary hearing on January 20, 2020. At that time, Applicant had not amended his PCR application to alert the State to elicit testimony from Mason regarding Applicant. Any cross-examination of Mason regarding Applicant thus would have required clairvoyance from the State. The State did not have a reason to cross-examine Mason regarding Applicant during Belton's PCR hearing. Thus, this Court finds Mason's testimony from Belton's PCR hearing is inadmissible under Rule 804(b)(1).[10] In the absence of any testimony from Mason, Applicant has not met his burden of proving newly-discovered evidence.

[10] Further, nothing about Mason's testimony at Belton's PCR hearing is material to Applicant's guilt or innocence. At Belton's PCR hearing, Mason merely testified that since the trial, he (1) provided an affidavit stating they dropped Belton off prior to the incident; (2) Belton was not with the co-defendants at the time of the crime, (3) Belton was not present with the co-defendants on July 10, 2010, and (4) he implicated Belton at trial because he "had a beef with

CONCLUSION

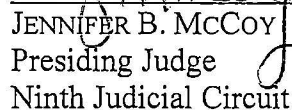
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Pursuant to Rule 71.1(g), SCRCP, if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 17 day of April, 2023.



JENNIFER B. MCCOY
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

him." (Belton PCR 13-18). Mason offered absolutely no testimony about whether Applicant was with the co-defendants the night of the murder. Although he recanted his testimony that Belton was involved, he never testified he was recanting his testimony that Applicant was involved. Thus, even if Mason's testimony from Belton's PCR hearing was considered, Applicant has still not met his burden of establishing newly-discovered evidence.