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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr., Circuit Court Judge

Case No. 2020-CP-19-00071

Maurice Anthony Odom, #199677, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Maurice Anthony Odom, appeals the order of the Honorable R George M. McFaddin, Jr. filed on or about March 18, 2024.

April 2, 2024

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STATE OF SOUTH CAROLINA COUNTY OF EDGEFIELD	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Maurice Anthony Odom, SCDC #199677, Applicant, v. State of South Carolina, Respondent.	Case No. 2020-CP-19-0071 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant Maurice Anthony Odom's Application for Post-Conviction Relief and Amended Application for Post-Conviction Relief filed March 3, 2020 and October 4, 2022, challenging his conviction for second-degree burglary (violent). An evidentiary hearing on this action was convened October 10, 2022, before this Court. Applicant appeared with his counsel, Ashley A. McMahan. Respondent State of South Carolina was represented by Taylor Smith of the South Carolina Attorney General's Office. At the hearing, this Court heard testimony from Applicant and the primary of his two former trial counsel, Bennett Casto ("Counsel"). Following a review of the record and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below.

I. FACTUAL & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Edgefield County Clerk of Court. Applicant was arrested on October 30, 2007, following an investigation into a burglary of the IGA grocery store in Johnson,

South Carolina. During its August 2013 term, the Edgefield County Grand Jury indicted Applicant for second-degree burglary (violent) (2013-GS-19-0511).[1] Applicant's case was initially called for trial in August 2013, but ended in a mistrial with a hung jury.[2] On June 8, 2015, Applicant proceeded to a second jury trial before the Honorable R. Knox McMahon. Assistant Public Defenders Bennett E. Casto and Erik J. Drylie represented Applicant. Assistant Solicitors Ervin J. Maye and H. Franklin Young prosecuted the case.

A. Pre-Trial

On August 20, 2014, the State served Applicant with its notice of intent to seek life without parole (LWOP) under Section 17-25-45 of the South Carolina Code. (See Record on Appeal, pp. 448–449.) Applicant's prior convictions of second-degree criminal sexual conduct with a minor (1997-GS-06-365) and second-degree burglary (violent) (2012-GS-53-0311) were cited by the State as predicate offenses.

B. Summary of Trial Evidence

On October 17, 2007, Applicant and his half-brother, dressed in dark clothes, gloves, and masks, threw cinder blocks through the glass door of the Johnston IGA and stuffed ninety cartons of cigarettes in lawn bags before fleeing. This was captured on motion-activated video.

Investigator Lamaz Robinson described what the video depicted as follows:

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[1] Applicant was first indicted for malicious injury to property (2008-GS-19-0105) and grand larceny (2008-GS-19-0106) in May 2008. (Tr. p. 67, l. 23 – p. 67, l. 14.) When Applicant failed to appear in February 2009, the solicitor removed the indictments from the docket until Applicant was apprehended. (Tr. p. 67.) Applicant was then indicted for second-degree burglary (violent) in August 2010 (2010-GS-19-0475). It is unclear from the record why Applicant was subsequently re-indicted in 2013. In the time leading up to the 2015 trial, however, Applicant picked up multiple charges in other counties at an alarming rate, and was ultimately convicted of the following: second-degree burglary (violent) (2012-GS-30-0311), criminal conspiracy (2012-GS-30-0314), and grand larceny (2012-GS-30-0317) in Laurens County; second-degree burglary (non-violent) (2012-GS-28-0206) and grand larceny (2012-GS-28-0207) in Kershaw County; second-degree burglary (violent) (2012-GS-36-0156) in Newberry County; and third-degree burglary (2015-GS-31-0054) in Lee County.

[2] Jerry Screen, Esquire, represented Applicant at his 2013 trial.

> [T]wo individuals . . . entered the store by throwing a brick-like block towards the window. On the first attempt, it was not successful and the second attempt it was successful where the brick went through the window and then two individuals entered the store. At that point in time, one of the individuals had a blue in color shirt with like some blue in color pants and the other individual had on some black in color shirt like with a black in color pants.
>
> Both individuals had what appeared to be ski masks over their face and gloves over their hands. The one in the black shirt entered the store first with the one in the blue shirt in pursuit behind him. They went into the store and then the next caption that comes out on the video is when they're exiting the store. During the time while they was in the store, they, when they was entering into the store you could see what appeared to be empty . . . black lawn trash bags . . . . When they [exited] the store, it appeared that those bags had been filled.

(Tr. p. 281, l. 8 – p. 282, l. 2.)

Tayla Barton, the store manager, received a phone call from the store's alarm company shortly before 2:00 a.m. on October 17, 2007. Law enforcement was already present when she arrived at the store. The glass in the double-door entrance was shattered and cinder blocks lay on the store floor. The shelves for cigarettes were empty – ninety cartons of cigarettes were missing. Barton showed law enforcement the surveillance footage from the action-activated surveillance camera. (Tr. pp. 156-160; p. 164.)

Deputy Chris Miller from the Saluda County Sheriff's Office was called into Edgefield County to help set up a perimeter in the vicinity of the Johnstown IGA. He located a white Cadillac backed into the woods off Highway 191. When Deputy Miller shined the spotlight on the car, he saw two people changing out of clothes. Upon being detected, they fled into the woods. Deputy Miller stayed by the Cadillac to wait for more law enforcement to arrive. (Tr. pp. 190-192.) Upon arrival, officers collected clothing left outside the Cadillac. (Tr. p. 284.) During a standard inventory search of the abandoned Cadillac prior to its removal, law enforcement found two cell

phones and a wallet. The wallet contained Applicant's South Carolina Driver's license, his North Carolina Sheriff's identification card, an employer's identification card, Applicant's birth certificate, and his social security card. (Tr. p. 213-217; see also Tr. p. 283.)

The Cadillac bore only paper dealer tags, so officers could not run a license plate check. However, the search yielded a bill of sale to Demetrius (sic) Odom on September 22, 2007, by Duke Boys Auto Sales. (Tr. pp. 224-226.) Jesse James Dukes, owner of Duke Boys Auto Sales, testified he sold the Cadillac to Temetrious Odom. Applicant was with her when he sold her the Cadillac. Dukes knew Temetrious because she was from his hometown. He also knew and identified Applicant. (Tr. pp. 313-314.)

Lamaz Robinson, the Chief of the Johnston Police Department at the time of Applicant's trial, was an investigator at the time of the burglary. (Tr. p. 278.) Chief (then Investigator) Robinson arrived at the scene of the crime and viewed the video with the store manager. (Tr. p. 279.) He then investigated the abandoned Cadillac. Chief Robinson noted clothes outside the car by the door. He also examined one of the cell phones. Chief Robinson discovered the phone was on because it lit up when he held it. The cell phone advised that it was owned by Maurice Odom. The other cell phone contained a contact list with a number for "Momma." The officers called the number, and co-conspirator Brandon Donaldson's mother answered, which is how Donaldson was initially identified as a co-conspirator and participant in the burglary. (Tr. p. 281; pp. 283-288.) The clothes found outside the Cadillac included a blue shirt, a black shirt, dark jeans, and one or two pairs of gloves. (Tr. p. 299.) DNA found on some other clothes discovered inside the Cadillac were a 1 in 140 quadrillion match to Applicant's DNA. (Tr. pp. 361-370.)

Donaldson is Applicant's half-brother. He testified that on the night of the robbery Applicant picked him up in Blackville (South Carolina) in a white Cadillac. (Tr. pp. 241-242.) At

the time he got in the car, (cinder) blocks were already in the trunk. (Tr. p. 245.) Donaldson did not know where they were going and rode with Applicant until they parked "in some bushes and some trees." (Tr. p. 243.) Donaldson testified the pair was wearing dark clothes, and identified as the blue shirt that was State's Exhibit 17 at trial. Donaldson further identified himself as the blue-shirted burglar in the store video. He testified that he and Applicant smashed the glass door to the grocery store with the blocks and then stuffed the garbage bags Applicant had full of cigarettes. They ran to the Cadillac and were taking off their burglary clothes when a light shined on them. Donaldson testified at that moment; they both ran away. Although not expressly stated, it seems they split up. Donaldson called a friend to pick him up. (Tr. pp. 244-255.)

C. Verdict & Subsequent non-PCR Proceedings

On June 10, 2015, the jury convicted Applicant as indicted. Judge McMahon sentenced Applicant to life without parole (LWOP) as required under § 17-25-45.

Applicant filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issues:

> I. Whether the trial judge erred in sentencing [Applicant] to life without parole, pursuant to S.C. Code §17-25-45, and for a burglary second degree conviction when a prior conviction for criminal sexual conduct with a minor second degree should not have been considered a most serious offense pursuant to the statute because there is evidence in the record that the conduct was consensual?
>
> II. Did the trial judge err in refusing to dismiss the indictment for burglary second degree when the State failed to call the case for trial until August 6, 2013, almost six years after the arrest in October of 2007, and then when the first trial ended in a mistrial, the State failed to call the case again for trial until June 8, 2015, almost eight years after arrest in violation of [Applicant]'s state and federal constitutional right to a speedy trial?

(Final brief of Appellant, case 2015-001294, December 6, 2016 at pg. 1.)

Following briefing and oral argument, the Court of Appeals affirmed Applicant's conviction and sentence. State v. Odom, 2018-UP-273 (S.C. Ct. App. filed June 27, 2018). Applicant's petition for rehearing was denied by Order dated August 16, 2018. Applicant then sought certiorari to the Supreme Court. Certiorari was denied as to Issue I and granted as to Issue II. On January 22, 2020, the Court dismissed the writ of certiorari as improvidently granted, settling the above issues, as a matter of law. State v. Odom, 2020-MO-001 (S.C. Sup. Ct. filed January 22, 2020). The case was remitted back to the circuit court that same day.

D. PCR Filings and Proceedings

Applicant commenced this PCR action on March 3, 2020 by filing an Application for Post-Conviction Relief. In the Application, he alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. Ineffective assistance [of counsel]
    a. Juror 16
    b. Newspaper article
    c. Did not know he could receive LWOP
2. Prosecutorial misconduct
3. Denied of [*sic*] due process

Applicant requests relief as follows: "vacate sentence or resentence." (Application for Post-Conviction Relief, March 3, 2020 at pp. 3, 6.)

Respondent State of South Carolina filed a return November 17, 2020, seeking summary dismissal of Applicant's allegations of trial court error, denial of due process, juror misconduct, and actual innocence for failure to state a cognizable claim under the Uniform Post-Conviction Relief Act (the Act). On the remaining claims, Respondent's return sought to require an amended application specifically setting forth the grounds upon which the Application was based.

An Amended Application for Post-Conviction Relief was filed on October 4, 2022. In his

Amended Application for Post-conviction Relief, Applicant added no additional grounds for the relief sought. The Amended Application did add the request that Applicant be permitted to amend the Application should any unaddressed or new issues arise during the course of the evidentiary hearing. (Amended Application, October 4, 2022.)

Materials before this Court and incorporated by reference are the Edgefield County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal; the trial transcript of Applicant's June 8-10, 2015 trial; and the records of the current PCR action.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standard of Review

The ground for relief upon which Applicant proceeded at the evidentiary hearing pertains to alleged ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). It is common that post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient

to warrant relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Strickland "does not guarantee perfect representation [—]only a 'reasonably competent attorney.' " Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the trial attorney observed the relevant proceedings; knew of materials outside the record;

and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 668. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court need not determine whether counsel's performance was deficient before examining the prejudice suffered

by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

B. ALLEGATIONS BEFORE THE COURT

At the evidentiary hearing, Applicant proceeded on the following claims, which are individually addressed below:

1. Juror misconduct concerning Juror 16;
2. Juror misconduct regarding attention to media (newspaper);
3. A violation of Applicant's right to a speedy trial;
4. It was prosecutorial misconduct for the Solicitor to seek LWOP;
5. LWOP violates the sentencing range based on the nature of Applicant's prior crimes;
6. The Solicitor should have dropped the charges against Applicant;
7. If Applicant had known he could get LWOP, he would have pled guilty;
8. Counsel didn't object to statements by the Court regarding giving Applicant LWOP;
9. Because his charges were initially dismissed at the preliminary hearing, Applicant could not be indicted for the crime;
10. Applicant was told if he pled to charges in Newberry, this charge would be dropped;
11. The judge gave a no-contact order and that equates to harassment;
12. "They" should have DNA tested more people;
13. Counsel didn't make an appropriate argument regarding fingerprints on a car;
14. Counsel didn't object to DNA on clothing;
15. Counsel should have objected when the Solicitor noted he "wasn't from this town;"
16. Counsel should have objected when the Solicitor said Applicant thought he was smarter than the jury;
17. Applicant's brother should not have been allowed to testify against him at trial; and
18. Applicant thought his record would be admitted if he took the stand so he didn't and he now believes it would not have been admitted.

C. FINDINGS AS TO CLAIMS RAISED

In its return, the State moved that Applicant's allegations of trial court error, denial of due process, juror misconduct, and actual innocence should be summarily dismissed for failure to state a cognizable claim under the Uniform Post-Conviction Procedure Act[3] (the Act). To the extent there is any question following the analysis below, the State's motion is granted and these claims

[3] S.C. Code Ann. § 17-27-10 to -160.

are dismissed. An applicant may commence a post-conviction relief action on the following grounds:

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

S.C. Code Ann. § 17-27-20(A). However, an application for post-conviction relief is not a substitute for any remedy incident to the proceedings of the trial court, or for direct review of the sentence or conviction. S.C. Code Ann. § 17-27-20(b).

Because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the *overwhelming* majority of cognizable claims fall under the broad umbrella of "ineffective assistance of counsel," a contention under the Sixth Amendment to the Constitution of the United States. Though the majority of claims fall under ineffective assistance of counsel, not all claims do. See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not cognizable on PCR); Stepney v. State, 278 S.C. 47, 292 S.E.2d 41 (1982) (explaining that issues that could have been raised on direct appeal cannot be considered on PCR application absent claims of ineffective assistance of appellate counsel); State

v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494 499 (2005) ("Circuit courts obviously have subject matter jurisdiction to try criminal matters.").

A. Juror Misconduct, "the Verdict", Claim 1

Applicant first alleges he spoke to a friend or family member of Juror 16 and that "he told me his family is straight and he don't know why he convicted me, 'when I spoke to him on the phone and he said he wouldn't.'" (PCR Application, March 3, 2020, handwritten page 1) (internal parentheses added.) To the extent Applicant is alleging juror misconduct, post-conviction relief is not the proper forum to pursue this claim. See McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013) ("Juror misconduct discovered post-trial is not properly considered "newly discovered evidence, [for purposes of obtaining post-conviction relief]; rather, it is a separate basis for a new trial."). Further, this claim was abandoned by not being argued at the PCR hearing. Accordingly, it is denied and dismissed with prejudice.

B. Juror Misconduct, "the Paper", Claim 2

At the PCR hearing, Applicant testified that a juror allegedly reading a paper either was in the jury pool and excused or on the jury and excused. He could not recall which. (PCR, p. 39, l. 15-25; p. 40, l. 20-22.) Counsel remembered a juror being dismissed but could not recall if the dismissal occurred during jury selection or trial. (PCR, p. 49, l. 3- p. 50, l. 14). The trial transcript settles the debate. This transcript shows that immediately after the jury pool was selected, but before the pool left the courtroom, the trial court instructed the jury (among other things) not to discuss the case with anyone nor to read about it. Thereafter, a juror immediately raised her hand, a bench conference convened outside the hearing of the court reporter and the juror was excused. No reason for the excusal was put on the record. (Tr. p. 48, l. 3- p. 52, l. 13.) Because Applicant did not present evidence supporting his claims that "a juror was reading the paper after being told

not to" and that "the juror discussed his priors in the jury room," and also did not raise an issue recognizable under the Act, this allegation is denied and dismissed with prejudice.

C. Due Process/Prosecutorial Misconduct regarding Speedy Trial, Claim 3

In Applicant's PCR Application he alleges his due process rights were violated due to pre-trial delay. At the hearing, the due process claim was abandoned, and Applicant instead argued his speedy trial right was violated which "constitutes malicious prosecution." (PCR, p. 32, l. 18- p. 33, l. 13.) The speedy trial claim was initially raised by Counsel, prior to Applicant's trial, when Counsel moved for dismissal due to alleged excessive pretrial delay. (Tr. p. 56, l. 15-22 see also PCR, p. 80, l. 21 – p. 81, l. 7.) The speedy trial issue was raised again on appeal and decided by the Court on appeal. (See Petition for Writ of Certiorari to the Court of Appeals filed by Maurice Odom Petitioner, September 17, 2018 at p. 2; see also State v. Odom, 2020-MO-001 (S.C. Sup. Ct. filed January 22, 2020). I find this is not an appropriate topic for a PCR proceeding. Applicant's attorney expressly raised the issue to the trial court and, following the Court's decision, the issue was again raised on appeal. Thereafter, an appellate court decided the issue in the correct forum. Issues that were raised or could have been raised on direct appeal cannot be asserted or re-asserted in a post-conviction relief proceeding as a free-standing claim. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975); S.C. Code Ann. § 17-27-20(b).Accordingly, this allegation is denied and dismissed with prejudice.

D. Prosecutorial Misconduct for seeking LWOP, Claim 4

Applicant raises the claim of prosecutorial misconduct, alleging it was misconduct for the State to seek LWOP when his priors were (allegedly) nonviolent. (PCR, p. 30, l. 24- p. 32, l. 2.) The trial transcript is clear that Applicant was served Notice the State was seeking LWOP, what the prior crimes were, and that the State considered the prior crimes to be violent crimes entitling

it to seek LWOP. (Tr. pp. 118-121.) Then the issue (of whether the prior crimes were both violent crimes) was raised on appeal and decided by the Court on appeal. (See Petition for Writ of Certiorari to the Court of Appeals filed by Maurice Odom Petitioner, September 17, 2018 at p. 2; see also State v. Odom, 2020-MO-001 (S.C. Sup. Ct. filed January 22, 2020)). I find this is not an appropriate topic for a PCR proceeding. Applicant's Counsel expressly reviewed the convictions involved and considered the issue at trial, and an appellate court has decided the issue in the correct forum. Simmons v. State, supra. This allegation is denied and dismissed with prejudice.

E. LWOP violates the Sentencing Range because Applicant's underlying crimes were nonviolent, Claim 5

Applicant objected to getting a life sentence, claiming at least one charge that he had been previously convicted of was a nonviolent offense and couldn't be used to enhance the current charge to life without parole. (PCR, p. 21, l. 8-25.) The appropriate forum to raise this issue is on Appeal. The issue was raised on appeal and decided by the Court on appeal. (See Petition for Writ of Certiorari to the Court of Appeals filed by Maurice Odom Petitioner, September 17, 2018 at p. 2; see also State v. Odom, 2020-MO-001 (S.C. Sup. Ct. filed January 22, 2020)). It cannot be reasserted in these proceedings. Simmons. I find this is not an appropriate topic for a PCR proceeding. This allegation is denied and dismissed with prejudice.

F. The Solicitor wouldn't drop the charges against Applicant, Claim 6

Applicant claimed that the Solicitor wouldn't drop his charges because he had filed a grievance against the Solicitor. As support, Applicant claims that a prior Solicitor told Applicant's prior attorney that the Solicitor would drop all charges, but then, after Applicant filed a disciplinary proceeding against the Solicitor, the Solicitor declined to do so. (Tr. p. 17, l. 14 – p. 18, l. 21.) In his testimony, Applicant indicates this happened "before [Counsel], right, before [Counsel,

when]... I had Jerry Screen. ... he (Screen) stated he had a whole 45 minutes to an hour conversation with Mr. Frank Young... and he had agreed to drop all charges" (Tr. p. 17, l. 16-23.) This is not an appropriate topic for this proceeding. If such an offer to drop charges ever was made, it appears it was made prior to the first trial Applicant faced on the charge at issue in this case. That trial ended in a mistrial. There is no evidence any such offer was made in connection with the present case or conveyed to Counsel. The trial court had jurisdiction for the trial, conviction, and sentence. Since this is not an appropriate topic for this PCR proceeding, this allegation is denied and dismissed with prejudice.

G. If Applicant had known he could get LWOP, he would have pled guilty, Claim 7

Applicant claims that if he had known he could get a life sentence, he would have taken the plea offered. (PCR, p. 20; see also PCR, p. 23, l. 4-6.) I find no credible factual support for this allegation in the record. Applicant admits he had been served notice and knew prior to trial that he could face life without parole if convicted. (PCR, p. 45, l. 23 – p. 49, l. 2.) Having this knowledge, he turned down the State's offer of a plea deal twice on the day of trial. (PCR, p. 45, l. 23 – p. 49, l. 2; see also PCR, p. 54, l. 14-20.) Applicant's Counsel testified he covered the topic with Applicant "multiple times" and made it clear to him that if he rejected the plea offer and went forward to trial and lost at trial, the judge could sentence Applicant to prison for life. (PCR, p. 68, l. 15 – p. 69, l. 3; see also PCR, p. 66, l. 21 – p. 67, l. 9.) Applicant himself admitted "for the record, they served me with life sentence papers. They served me like two or three different life sentence papers." (PCR, p. 20, l. 5-10; see also PCR, p. 21, l. 8-15.) At trial, Applicant put on the record that he would not accept the State's offer. (Tr. p. 25, l. 6 – p. 26, l. 3.) To the extent this raises a claim of ineffective assistance of counsel, Counsel's testimony on this point is credible and his actions reasonable. To satisfy the two prongs of Strickland, the Applicant must show that

counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not shown deficiency on the part of Counsel and, further, has not shown prejudice. Applicant was fully aware of the possibility of LWOP when he knowingly made his decision to reject the plea offer. This allegation is denied and dismissed with prejudice.

H. Applicant's attorney failed to object when the Court (allegedly) said he didn't think he could give Applicant a life sentence, Claim 8

Applicant claims ineffective assistance of counsel because his attorney did not object when the judge stated that "he don't think he can do this (give Applicant life without parole)." (PCR, p. 41, l. 13-24.) Applicant gives no support for this alleged statement by the trial judge. Further, Applicant's attorney objected strenuously and a number of times regarding whether the sentence could or should be imposed. (See Tr. p. 451, l. 19-24; p. 456, l. 7-15, p. 466, l. 16-19; ROA, pp. 471-474 ("Counsel's Memorandum in Support of Defense Counsel's Challenge to Sentence Under 17-25-45 (LWOP)" provided to trial judge and marked as Exhibit C-12); see also Tr. pp. 451-466 (Defense objections to LWOP sentencing generally.)) Despite Counsel's arguments, the trial judge imposed a LWOP sentence on Applicant. Finally, whether it was error to sentence Applicant to LWOP was addressed on appeal.

This claim is dismissed for failure of Applicant to provide credible proof of the allegation. Further, there was no proved ineffective assistance of counsel regarding this allegation and, given Counsel did both raise the LWOP issue orally and in writing, no prejudice to Applicant. The issue was raised on appeal and decided on the merits by the Court on appeal. (See Petition for Writ of Certiorari to the Court of Appeals filed by Maurice Odom Petitioner, September 17, 2018 at p. 2; see also State v. Odom, 2020-MO-001 (S.C. Sup. Ct. filed January

22, 2020)). The Applicant failed to show deficient performance or prejudice under Strickland. This allegation is denied and dismissed with prejudice.

I. Applicant claims that because his charges were dismissed at the preliminary hearing, he could not be indicted for the crime, Claim 9

Applicant claims that because the first charges for robbing the IGA were initially dismissed against him at the preliminary hearing, he shouldn't have been able to be indicted "again." (PCR, pp. 11-12.) At trial, Applicant (himself) raised this issue directly with the trial court, protesting "my charges—they got dropped at preliminary hearing and then picked back up. The charges were picked up on account of them saying there's some new evidence." (Tr. p. 9, l. 7-9; see also p. 16, l. 11-16.) This court does not know if Applicant's version of why he was indicted is accurate. The reason for the direct indictment is not material to this Court's decision.

Applicant admits that prior to trial he was aware of and had seen the charging indictment and admits Counsel discussed the direct indictment with him and covered that the State could directly indict and try Applicant for the crime. (PCR, p. 50, l. 15 -22; PCR, p. 47, l. 7-12.) Further, Applicant himself raised the issue with the court pre-trial. (Tr. pp. 9-10 (Applicant explains to the court his feelings regarding whether he should be able to be indicted (and tried) after his charges were originally dismissed at preliminary hearing.)) On this point, Applicant's allegation is not ineffective assistance of counsel, but rather, that the process should not be allowed. As a procedural issue, if Applicant desired to bring this claim, the appropriate forum to raise the issue is on Appeal. This Court concludes the trial court had jurisdiction based upon the true billed indictments. State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494 499 (2005) ("Circuit courts obviously have subject matter jurisdiction to try criminal matters."). This allegation is denied and dismissed with prejudice.

J. Applicant claims a different solicitor told him that if he pled guilty to a crime in Newberry the charge in this case would be dropped, Claim 10

Applicant alleges prosecutorial misconduct, claiming that he was told by a prosecutor and his trial counsel in another proceeding (in Newberry) that if he pled to 15 years in Newberry County (on other charges) that the charge on which he was convicted in this proceeding would be dismissed, and that it was not. (PCR, pp. 17-19.) This Court does not find credible factual support for this assertion.

Counsel did not represent Applicant in Newberry and could not corroborate Applicant's version of the Newberry offer. To help resolve the issue, the PCR hearing transcript of Applicant's PCR hearing on the Newberry charge was made an exhibit to this court's proceeding, to the extent any prior offer or promises are referenced in the transcript. (PCR, p. 81, l. 15-19.) Reviewing the Newberry PCR proceeding, there is testimony regarding Applicant's plea in Newberry County in case 2016-CP-36-0057. The Newberry record shows that Applicant did have a grand larceny case dismissed in connection with his plea to the Newberry charges. (Newberry PCR, p. 4, l. 21- p. 5, l. 7.) However, the charge that was to be dropped, and which was dropped in connection with the Newberry plea, was a charge from Laurens County, not an Edgefield County charge. (Newberry PCR, p. 13, l. 1-14.) Neither the Solicitor in the present case nor Counsel were involved in the alleged discussions and the discussions did not relate to the charges in the present case. (PCR, p. 55, l. 20 – p. 56, l. 5 (Applicant testifies the attorneys involved were "the assistant solicitor, Mr. Scott, and Charles Verner".))

I find this is not an appropriate topic for this Edgefield County PCR proceeding. The evidence does not support Applicant's allegations regarding the Edgefield charges. This allegation is denied and dismissed with prejudice.

K. The judge issued a "no contact" order, which constituted harassment, Claim 11

Applicant alleges that the trial judge issued a "no contact" order because Applicant's brother was a co-defendant and the judge's not allowing Applicant to have contact equates to harassment by the solicitor and judge. (PCR, p. 36, l. 15- p. 37, l. 12.) This assertion is wholly frivolous as a ground for post-conviction relief. Applicant's testimony at the PCR hearing was that a no contact order was signed by the Court before the first trial of Applicant's case. (PCR, p. 58, l. 10-18.) Applicant was represented by a different attorney, Jerry Screen, at his first trial on the Edgefield charges. (Tr. p. 21, l. 21-25.) Trial counsel Casto and Drylie did not represent Applicant at that trial and could not be expected to object to such an order if an objection was appropriate. [4] Further, the issue of such an order is within the discretion of the court. This is not an appropriate ground for a PCR proceeding since it had no impact on the trial under §17-27-20. Further, to satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met the burden of either prong. This allegation is denied and dismissed with prejudice.

L. "They" should have DNA tested more people, Claim 12

Applicant alleges "they" should have done more DNA tests and compared the DNA to more people. (PCR, p. 38, l. 9-20.) His claim is none of the DNA presented at trial matched him. (PCR, p. 38, l. 3-20 ("Out of all the ten items none of it matched to me".)) Counsel testified he did not argue more people should be tested because "...big deal that they found DNA on items that were in—you know, inside his car. That doesn't link him to a crime. These things were found,

[4] There is evidence in the record the Order may have been issued while Applicant was out on bond, as a condition of bond. (Tr. p. 64, l. 23 – p. 64, l. 3).

like I say, in his car." (PCR, p. 72, l. 12-18.) Counsel saw no need to test more people. Instead, the argument was that Applicant was not in the car that night. (PCR, p. 73, l. 16-21.)

Testimony at trial was that there was a 1 in 140 quadrillion chance that the DNA was left on the items in the car by a random person instead of Applicant. (Tr. p. 367, l. 17-24; p. 370, l. 7-8.) Further, there was testimony about other items found in the car that identified Applicant, including his cell phone, identification card, work id and more. (Tr. p. 215, l. 12 – p. 217, l. 11.) Clothes found outside the car, which the State argued were the clothes shown on the video, as well as a pair of gloves and ski mask that may have been the gloves and mask on the store's video were tested with the result no conclusive statement could be made regarding Applicant's DNA and the items. (Tr. p. 364, l. 16 – p. 365, l. 20.) Counsel made a reasonable strategic decision to argue that Applicant wasn't in the car at the time of the robbery and that the lack of his DNA on the clothing outside the car was proof Applicant wasn't one of the robbers. (Tr. p. 372, l. 2- p. 373, l. 1.) This was a reasonable trial strategy, under prevailing professional norms.

To satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met the burden of either prong. This allegation is denied and dismissed with prejudice.

M. Counsel didn't object regarding fingerprints (allegedly) found on the car, Claim 13

Applicant argued ineffective assistance of counsel indicating "they stated I had fingerprints that were on my car and I felt the attorney should object to that because the fingerprints are supposed to be on my car because it is my car." (PCR, p. 6, l. 21- 25.) On this point, Counsel Casto indicated he could not remember if Applicant's fingerprints had been found

in the car.[5] When asked "if [I] was to say … fingerprint evidence was found, would that surprise you…," Counsel responded "No." (PCR, p. 72, l. 24- p. 73, l. 2.) Counsel continued "It's his car. That's where his fingerprints would naturally be found." (PCR, p. 72, l. 21- p. 73, l. 4.) Counsel testified his strategy regarding fingerprints in the car would have been the same as it was regarding the DNA claim directly above. Counsel's argument was that Applicant was not present at the crime. The claim was someone borrowed or stole his car and, without telling him where they were going, went to rob the IGA. Counsel even went so far as to suggest a specific name for who might be the second person with Applicant's brother. (PCR, p. 424, l. 16-18; p. 425, l. 24 – p. 426, l.4 ("Bradley Cribb… there's your second person".))

This was a reasonable trial strategy, under prevailing professional norms. The testimony at trial was that when the car found in the woods was processed, law enforcement tried to obtain fingerprints but were unsuccessful. All they could get were smudges, like if someone was wearing gloves. (Tr. p. 149, l. 1-3; 283, l. 6-18; see also Tr. p. 289, l. 17-19.) Counsel pointed out the lack of fingerprint evidence, and used it to argue Applicant was not at the scene of the crime. (Tr. p. 297, l. 3-25; Tr. p. 295, l. 16-18; Tr. p. 406, l. 11-13.) Counsel's strategic decision to argue Applicant wasn't present for the crime was within the guidelines of acceptable representation. To satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met the burden of either prong. This allegation is denied and dismissed with prejudice.

N. Counsel didn't object to Applicant's DNA on clothing found in the car, Claim 14

[5] Counsel's failure to recall is likely because, as will be discussed in the next paragraph, the testimony at trial was that no identifiable fingerprints were found inside or outside the car.

Applicant argued ineffective assistance of counsel because he felt Counsel "should have addressed further" the lack of finding conclusive DNA evidence implicating Applicant on the clothes found outside the car, and why DNA evidence identifying Applicant found on clothes inside the car was not significant since it was Applicant's car and the clothing found in the car was not a match to the clothing worn on the video of the crime. (PCR, Tr. pp. 7-9.)

Counsel's decision not to object to the introduction of the DNA evidence tying items in the car to Applicant was a reasonable trial strategy. As mentioned above, testimony at trial was that there was a 1 in 140 quadrillion chance that the DNA was left on the items in the car by a random person instead of Applicant. (Tr. p. 367, l. 17-24; p. 370, l. 7-8.) Further, there was testimony about other items found in the car that identified Applicant, including his cell phone, identification card, work ID and more. (Tr. p. 215, l. 12 – p. 217, l. 11.) Clothes found outside the car, which the State argued were the clothes on the store video, as well as a pair of gloves and ski mask that may have been the gloves and mask on the store video, were tested with the result no conclusive statement could be made regarding Applicant's DNA and the items. (Tr. p. 364, l. 16 – p. 365, l. 20.)

Counsel made a strategic decision to argue that Applicant wasn't in the car at the time of the robbery and that the lack of DNA on the clothing outside the car was proof. (Tr. p. 372, l. 2-p. 373, l. 1.) Counsel's strategy is within the guidelines of reasonable representation, under prevailing professional norms. To satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met the burden of either prong. This allegation is denied and dismissed with prejudice.

O. Counsel should have objected in closing when the Solicitor noted Applicant wasn't local

to Greenwood, Claim 15

Applicant argued ineffective assistance of counsel because Counsel did not object when, during the Solicitor's closing argument, he noted Applicant wasn't from the area. (PCR, p. 26, l. 20-24.) Applicant argued the Solicitor referring to his being from Barnwell County and coming to Edgefield to commit the crime was an objectionable emotional appeal to the jury to convict him and something Counsel should have objected to. (PCR, p. 28, l. 1-8; see also Tr. p. 390, l. 21-22.)

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Improper comments do not automatically require reversal if they are not prejudicial to the defendant. On direct appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). (a solicitor's improper comments may be cured by the judge's instructions to the jury). The Applicant in a direct appeal has the burden of proving he did not receive a fair trial because of the alleged improper argument. Johnson v. State, supra. 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. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997).

At the PCR hearing, Counsel testified the brief comment is not something he would have objected to during closing argument. In his opinion, the comment was within the boundary of argument, which is permitted during closing. (PCR, p. 75, l. 21 – p. 76, l. 20; see also PCR, p. 79, l. 9-23.) Counsel's decision not to object to this portion of the Solicitor's close is within the guidelines of acceptable representation. To satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in 6th Amendment prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Clearly, the brief comment cannot be viewed to a reasonable probability to have undermined confidence in the verdict. The Applicant has not met the burden of either prong. This allegation is denied and dismissed with prejudice.

P. Counsel should have objected to "smarter than" comment in Solicitor's close, Claim 16

Applicant argued ineffective assistance of counsel because Counsel did not object when the Solicitor, in his closing statement, said Applicant thought he was smarter than the jury.[6] (PCR, p. 43, l. 5-22.) At the PCR hearing, Counsel testified the comment is not something he would have objected to during close. In his opinion, the comment was within the boundary of argument, which is permitted during closing. (PCR, p. 76, l. 1-20.) Counsel's decision not to object to this portion of the Solicitor's closing is within the guidelines of acceptable representation of a lawyer

[6] A search of the trial transcript doesn't support Applicant's statement that the Solicitor said Applicant thought he was smarter than the jury. The comment to which Applicant refers in the PCR proceeding is at page 404 of the trial transcript. (See PCR, p. 43, l. 5-13; Tr. p. 404, l. 8-20.) In context, in the closing argument the solicitor stated after a description of the steps the State claimed he took to avoid detection as the perpetrator: " I'm smarter than everybody else involved in this process and I'm going to scheme and wiggle my way out of this even if I get caught because I'm going to beat the security cameras, I'm going to beat any detectives, any attempt to detect that we committed this crime, because I'm smart and I know what I am doing. That's the kind of arrogance that we're talking about. But it ended up, he wasn't smarter that Investigator Robinson in this case and he's certainly not smarter than the twelve of you because you bring into this courtroom all of your wisdom."

practicing criminal law.

Even if this was deficient, the brief comment does not satisfy the burden to show a reasonable probability that absent the failure to object the result of the proceeding would have been different. To satisfy the two prongs of Strickland, the Applicant must show both that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met the burden of either prong. This allegation is denied and dismissed with prejudice.

Q. Counsel should have objected to his brother being allowed to testify, Claim 17

Applicant alleges ineffective assistance of counsel because of his belief that Counsel did not object sufficiently to his brother's being allowed to testify against him. (PCR, p. 29, l. 25- p. 30, l. 10.) Applicant claims Counsel should have objected sufficiently to keep the brother, who Applicant claims has mental issues and was found incompetent to stand trial in another case, off the stand in his trial. (PCR, 28, l. 18-21.) Applicant claims "the only evidence against him" was his brother's testimony and Counsel did not adequately address his brother's mental state. (PCR, p. 35, l. 6-14.)

Under Rule 601(a), SCRE, "[e]very person is competent to be a witness except as otherwise provided by statute or these rules." Accordingly, a witness is presumed competent and the party opposing the witness's competency has the burden of proving the witness is incompetent. State v. Needs, 333 S.C. 134, 142-43, 508 S.E.2d 857, 861 (1998), holding modified on other grounds by State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004); see State v. Pitts, 256 S.C. at 429, 182 S.E.2d at 743 ("In case of timely objection to the competency of a person offered as a witness, it is the duty of the court to make such examination as will satisfy it as to the competency or incompetency of the person to testify, and thereupon to rule on the

objection accordingly."). Here, the Applicant has failed to present credible evidence that his brother lacked the threshold competency to testify under Rule 601.

On this point, Counsel Casto testified that he did not object to the brother's testifying because he saw no reason to challenge the brother's state of mental health. (PCR, p. 71, l. 3 – p. 72, l. 9.) He saw no issue with how the brother answered questions. (PCR, p. 77, l. 3-14.) Counsel noted "[i]t's a high bar, he intelligently answered questions and his answers were rational and linked to the questions. (PCR, p. 71, l. 3-25.) Counsel noted that if he had not thought the brother was competent, he would have objected. (PCR, p. 72, l. 1-9.) Counsel chose to address the brother's testimony, motivation, and mental health in his closing. In his closing, Counsel argued about the brother and the lack of credibility the jury should assign to his testimony when he talked about the brother saving himself and also when he brought out the brother's mental health issues and noted he's "infinitely better [now] than he was then… who knows what was going on in his mind." (Tr. p. 426, l. 17- p. 427, l. 10; Tr. p. 409, l. 22- p. 410, l. 10; Tr. p. 411, l. 19-22.)

At the time of the trial, Counsel was an experienced criminal defense attorney. Either at the time of trial or shortly thereafter, Counsel was at the level where he served as head public defender over multiple counties. (PCR, p. 61, l. 25 – p. 62, l. 17.) The reasons given by Counsel, a full-time, experienced public defender with years of experience at the time of Applicant's trial, relate to trial strategy. Counsel here acted within the guidelines of acceptable representation. To satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met the burden of proving either prong. This allegation is denied and dismissed with prejudice.

R. **Applicant thought his record would come in if he took the stand so he didn't, Claim 18**

Applicant alleges that, though he said he didn't want to take the stand at trial, it was because of his prior convictions, and he now believes the prior convictions would have been excluded if he took the stand. (PCR, pp. 20, 25.) Prior to his waiver of his right to testify, the solicitor indicated that he had prior convictions that would qualify as crimes of dishonesty and admissible to impeach the Applicant under Rule 609(a)(2). The initial was a 2015 conviction of burglary in the 2nd degree – violent, a 2014 conviction for burglary in the 2nd degree, and two prior convictions of burglary 3rd from 1992 and 1993. In addition. Counsel indicated that he had a criminal sexual conduct conviction that he was not going to seek to introduce. Tr.p. 377. The trial court held that the 2014 and 2015 burglary 2nd convictions would be introduced under State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). Tr.p. 378, l. 10 – p. 379, l. 5. The trial court advised the Applicant at that time the court would allow the State to question the Applicant if he testified whether he had two (2) prior felony convictions and then instruct the jury that its use would be limited to whether the Applicant's testimony was believable and not for any other purpose. Id. The Applicant then waived his right to testify and did not testify. (Tr.p. 375-383).

This Court notes that when this case was tried on June 8-10, 2015, the applicable decision was State v. Al–Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct.App.2003), which had held that armed robbery was a crime of dishonesty and admissible as impeachment under Rule 609(a)(2) and dicta in State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155–56 (2006). However, on July 29, 2015 **after the trial in this case**, the Supreme Court overruled Al-Amin in State v. Broadnax, 414 S.C. 468, 473–76, 779 S.E.2d 789, 791–93 (2015). In Broadnax, the Court noted:

> Rule 609(a), SCRE, provides:
> 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 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.

In State v. Al–Amin, the court of appeals considered the question of whether the appellant was entitled to a new trial after the trial court admitted his prior armed robbery conviction without first weighing the probative value and prejudicial effects of the admission. 353 S.C. at 408–09, 414, 578 S.E.2d at 34, 37. Noting that "[t]here is disagreement among federal circuit courts and state courts construing Rule 609(a)(2) as to which crimes are included," the court of appeals explained that "[t]he disagreement revolves around whether convictions for theft crimes, such as larceny, robbery, and shoplifting, should be admitted under the rule as involving dishonesty or false statement." *Id.* at 415, 578 S.E.2d at 37. The court of appeals acknowledged that a majority of federal courts has adopted a narrow approach to the question, but declined to follow federal precedent, instead adopting an expansive approach to determining what constitutes a "crime of dishonesty or false statement." *Id.* at 416, 578 S.E.2d at 38. The court of appeals reasoned:

> "An essential element of robbery is that the perpetrator of the offense steals the goods and chattels of another or, in the case of an attempt to commit robbery, intends to steal the goods or chattels of the person assaulted. If this element is not present, the crime is not robbery or an attempted robbery. Stealing is defined in law as larceny. Larceny involves dishonesty. The fact that the perpetrator of the crime manifests or declares his dishonesty by brazenly committing the crime does not make him an honest person."

Id. at 421, 578 S.E.2d at 40–41 (quoting State v. Goad, 692 S.W.2d 32, 37 (Tenn.Crim.App.1985)). Thus, the court of appeals concluded, "It is the larcenous element of taking property of another which makes the action dishonest. Larceny is a lesser-included offense of armed robbery." *Id.* at 425, 578 S.E.2d at 43 (citations omitted). The court of appeals, citing several dictionary definitions, found further,

> To restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or

misrepresentation of fact would be to ignore the plain meaning of the word "dishonesty." "Dishonesty" is, by definition, a " 'disposition to lie, cheat, or **steal.**' " "To be dishonest means to deceive, defraud or **steal.**" " 'In common human experience[,] acts of deceit, fraud, cheating, or **stealing** ... are universally regarded as conduct which reflects adversely on a man's honesty and integrity.' "

Id. (internal citations omitted).

More recently, however, we decided State v. Bryant, in which we held that the trial court erroneously admitted the petitioner's prior firearms convictions under Rule 609 without weighing the probative value and prejudicial effects of their admission because the firearms offenses were not crimes involving dishonesty. 369 S.C. 511, 517, 633 S.E.2d 152, 155–56 (2006). In so holding, we stated:

> Violations of narcotics laws are generally not probative of truthfulness. *See* State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) (citing State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)). ***Furthermore, a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness.*** United States v. Smith, 181 F.Supp.2d 904 (N.D.Ill.2002).[5] Likewise, firearms violations also are not generally probative of truthfulness. Accordingly, Petitioner's prior firearms convictions do not involve dishonesty and their probative value should have been weighed against their prejudicial effect prior to their admission pursuant to Rule 609(a)(1).

Id. (emphasis added).

Here, the State argues that because Bryant involved convictions for firearms offenses, and not explicitly a prior armed robbery conviction, the above language is merely dicta. Therefore, the State relies on earlier precedents from our courts—namely Al–Amin—and points to other states' precedents to support its argument that armed robbery is a crime of dishonesty, such that no balancing test is required.

> We take this opportunity to overrule *Al–Amin,* and reaffirm the rule as formulated in Bryant that armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a)(2).

State v. Broadnax, 414 S.C. 468, 473–76, 779 S.E.2d 789, 791–93 (2015).

However, even if the burglary convictions after the trial may no longer be crime of dishonesty under Rule 609(2), they may have still been admissible under Rule 609(a)(1), they

may still have impeachment value if Odom's conduct involved deceit, fraud, a false statement, or anything reflecting on his credibility. See State v. Robinson, 426 S.C. 579, 599–600, 828 S.E.2d 203, 213–14 (2019). However, in the trial setting prior to Bryant, this specific showing was not made.

To the extent Applicant's argument focuses on what he now believes he knows about the admissibility of his prior record if he were to take the stand as a free-standing claim of trial error, that is not an appropriate ground on post-conviction relief and is not before properly this court. An application for post-conviction relief is not a substitute for an appeal. Errors which could have been reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. Miller v. State, 269 S.C. 113, 236 S.E.2d 422 (1977); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975); Peeler v. State, 277 S.C. 70, 71, 283 S.E.2d 826, 826 (1981). The ground as a free-standing or due process ground must be dismissed.

As an ineffective assistance of counsel claim, importantly, in this PCR setting, the Applicant had the burden of proof in showing deficient performance and prejudice. For an ineffective assistance claim, the PCR court must "determine whether counsel was ineffective at the time of the alleged error." Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019), reh'g denied, (September 27, 2019). Thus, the court must consider the law as it existed at the time of trial and "not as it has evolved today ...." Id. at 564, 832 S.E.2d at 601. Accordingly, trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes 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). Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501–02 (Ct. App. 2019). In this setting, prior to Broadnax, this Court cannot find that counsel was deficient.

To the extent the claim is a claim his counsel failed in advising him or objecting to the court's admissibility conclusion on the burglary convictions, counsel's testimony on the topic at the PCR hearing is relevant as well as the trial record set out above at Tr.p. 377-384. At the time of the potential testimony, the trial court had resolved to admit the evidence of the burglaries as a felony that could only be used to impeach with a limiting instruction. Counsel testified that he recommended that, given Applicant's priors, he should not take the stand at trial. (PCR, p. 75, l. 5-8.) Counsel indicated he couldn't specifically remember his conversation with Applicant, but his general belief is "though the judge instructs the jury not to hold it against you, sometimes it is hard for jurors not to." (PCR, p. 74, l. 16-23.) The reasons given by Counsel, a full-time, experienced public defender with years of experience *at the time of Applicant's trial* are not outside the range of professional decision. (PCR, p. 61, l. 25 – p. 62, l. 17.)

Alternately, this Court must find that the Applicant failed to show prejudice. First, he failed to show that the two charges would not have been admitted under Rule 609(a)(1). ("that the probative value of admitting this evidence outweighs its prejudicial effect to the accused."). Second, he failed to show that the result would have been different to a reasonable probability if he had testified and the priors not been admitted.

To satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met the burden of either prong. This allegation is denied and dismissed with prejudice.

CONCLUSION

After careful consideration of Applicant's Amended Application for Post-Conviction Relief, the Record of the case, the arguments of Attorneys McMahan and Smith, and the testimony

of witnesses, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. To satisfy the two prongs of Strickland, the Applicant must show that counsel was deficient and also show the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Applicant has not met this burden on any of the allegations made. Therefore, the Court denies Applicant's requested relief in this matter.

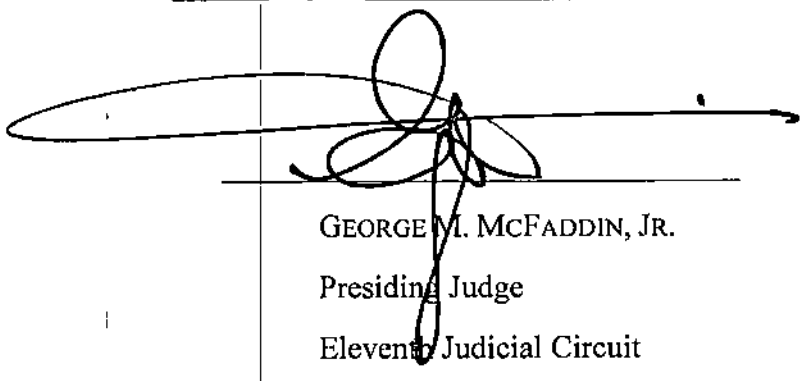
This Court notes if Applicant desires to appeal this Order, he must file and serve a notice of appeal within thirty days from the receipt of this Order through his counsel of record. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 6th day of March, 2024.



GEORGE M. MCFADDIN, JR.
Presiding Judge
Eleventh Judicial Circuit

Sumter, South Carolina